

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

BRYANT FARNHAM, *Applicant*

vs.

CITY OF RIVERSIDE, PSI, *Defendants*

**Adjudication Number: ADJ18360589
Riverside District Office**

**OPINION AND ORDER DISMISSING
PETITION FOR RECONSIDERATION AND
DENYING PETITION FOR REMOVAL**

Applicant seeks reconsideration of the Minutes of Hearing issued on June 28, 2024 (trial setting order) by a workers' compensation administrative law judge (WCJ), with designated service by defendant on July 1, 2024, and of the Order Deferring Action on Petition for Dismissal of Claim (Order Deferring) issued on June 12, 2024. In the trial setting order, the WCJ set this case for trial on the issues of employment and whether the record requires further development of the record, i.e., further discovery, on the issue of employment; the Order Deferring found good cause to defer further action on defendant's Petition to Dismiss applicant's claim based on a lack of employment given that the issue of employment involves issues of fact and requires an evidentiary hearing.

Applicant contends that the issue of employment was not ripe for trial given that his discovery request to the City of Riverside in the form of a public records act request had yet to be fulfilled.

Defendant filed an Answer to the Applicant's Petition for Reconsideration (Answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration/Removal (Report).

We have reviewed the record in this case, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. Based on the reasons set forth in the Report which we adopt and incorporate herein (except for the paragraph starting with "nevertheless" on p. 3), and for those reasons set forth below, we dismiss the Petition for Reconsideration and treat applicant's petition as one for removal of the June 28, 2024 trial setting order.

I. TIMELINESS OF THIS DECISION

Former Labor Code¹ section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
 - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
 - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on July 16, 2024 and 60 days from the date of transmission is Saturday, September 14, 2024. The next business day that is 60 days from the date of transmission is Monday, September 16, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Monday, September 16, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a

¹ All further references are to the Labor Code unless otherwise noted.

² WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that: “Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers’ Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.”

petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 16, 2024, and the case was transmitted to the Appeals Board on September 16, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 16, 2024.

II. PETITION FOR RECONSIDERATION OF THE ORDER DEFERRING WAS NOT TIMELY FILED AND MUST BE DISMISSED

We concur with the WCJ that the Petition for Reconsideration of the Order Deferring is untimely. There are twenty-five days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a).) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed (Cal. Code Regs., tit. 8, §§ 10940, 10615(b)). Proof that the petition was mailed (posted) within that period is insufficient.

Here, applicant seeks reconsideration of the Order Deferring which was served by mail on June 12, 2024. Therefore, any petition for reconsideration needed to be filed 25 days from June 12, 2024, i.e., on or before the first business day after Sunday, July 7, 2024, or Monday, July 8, 2024. Applicant filed the Petition for Reconsideration on July 12, 2024. The Petition for Reconsideration is therefore untimely.

The time limit for filing a petition for reconsideration is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].)

Accordingly, we must therefore dismiss the Petition for Reconsideration of the Order Deferring as untimely.

III. THE TRIAL SETTING ORDER IS NOT A FINAL ORDER SUBJECT TO RECONSIDERATION

A petition for reconsideration may properly be taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) “An order, decision, or award of the WCAB or workers’ compensation judge is final for purposes of a petition for reconsideration where it determines any substantive right or liability of those involved in the case.” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180 [260 Cal.Rptr. 76] quoting *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]; see also, *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413].) An order may also be “final” when it determines a “threshold” issue fundamental to the claim for benefits. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].)

Interim procedural and discovery orders are not final orders because they do not *finally* determine questions of the parties’ substantive rights or liabilities, nor do they *finally* determine a threshold issue basic to the employee’s right to benefits. (*Maranian, supra*, 81 Cal.App.4th at p. 1075; *Rymer, supra*, 211 Cal.App.3d at 1180; *Kramer, supra*, 82 Cal.App.3d at 45; see *Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd. (“Gaona”)* (2016) 5 Cal.App.5th 658, 660.)

Here, the trial setting order is an interim procedural order setting the matter for trial and makes no final determination on the issue of employment *or* on the issue of discovery. The trial setting order sets the issues presented for hearing in order to ensure the due process rights of both parties. Accordingly, the trial setting order is not a final order subject to reconsideration and we must therefore dismiss the Petition for Reconsideration.

However, we concur with the WCJ that applicant’s petition raises issues appropriate for removal, and therefore treat the petition as one for removal.

IV. REMOVAL OF THE TRIAL SETTING ORDER IS DENIED

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers’ Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155];

Kleemann v. Workers' Comp. Appeals Bd. (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) In addition, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

We concur with the WCJ that there is no risk of irreparable harm or substantial prejudice to the applicant in having this matter set for trial given that the trial judge has been tasked by the trial setting order with hearing the issue of employment and determining whether the record requires further development on that issue pursuant to the trial judge's power and duty to do so (see eg., *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc). (Report, p. 4.) Thus, there is no reason why reconsideration would not be an adequate remedy after a final order, decision, or award issues after hearing.

Accordingly, we deny removal as no grounds for removal are established.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Minutes of Hearing issued on June 28, 2024 by a workers' compensation administrative law judge is **DISMISSED**.

IT IS FURTHER ORDERED that applicant's Petition for Removal of the Minutes of Hearing issued on June 28, 2024 by a workers' compensation administrative law judge is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 16, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**BRYANT FARNHAM
CITY ATTORNEY RIVERSIDE
CITY OF RIVERSIDE**

AJF/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*

**STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board**

CASE NO.: ADJ18360589

BRYANT FARNHAM vs. **CITY OF RIVERSIDE**
WORKERS' COMPENSATION JUDGE: **SUZANNE M. BANKS**
DATE: **JULY 16, 2024**

REPORT AND RECOMMENDATION ON PETITION

FOR RECONSIDERATION/REMOVAL

I.

INTRODUCTION

Applicant's alleged Occupation:	Mandated Volunteer (Employment at issue)
Applicant's Age:	43 at time of alleged injury
Date of Alleged Injury:	CT 7/12/2014-10/13/2023
Parts of Body Alleged Injured:	Circulatory System, Musculoskeletal, Nervous, Reproductive, Multiple
Identity of Petitioner:	Applicant, Bryant Farnham
Timeliness:	The petition was filed timely in response to June 25, 2024 Minutes of Hearing, served 6/28/2024 (designated service upon defendant, defendant served 7/1/2024); Petition was untimely as it relates to Order Deferring Action on Defendant's Petition for Dismissal dated 6/11/2024, served on all parties 6/12/2024.
Verification:	The petition was not verified
Date of Issuance Finding & Order:	Minutes of Hearing dated June 25, 2024, served 6/28/2024 (designated service upon defendant, defendant served July, 1 2024); Order Deferring Action on Defendant's Petition for Dismissal dated 6/11/2024, served on all parties 6/12/2024.
Petitioner's Contentions:	1. By the Order, Decision, or Award the Board acted without or in excess of its powers. 2. The evidence does not justify the finding of fact. 3. The findings of fact do not support the Order, Decision, or Award.

Hearing Status:

This case is set for Trial before WCALJ Yee on August 6, 2024 at 8:30 a.m.

II.

FACTS

This case involves a dispute regarding employment. Bryant Farnham, hereinafter “applicant” filed an Application for Adjudication of Claim on 10/13/2023 alleging he was a mandated volunteer/employee of the City of Riverside during the period of 7/12/2014-10/13/2023, whereby he alleged injury during the course and scope of said alleged employment to his Circulatory System, Musculoskeletal System, Nervous System, Reproductive System, and “Multiple”. City of Riverside, hereinafter “defendant” filed an Answer on 11/15/2023 denying the applicant was ever an employee of the City of Riverside and denying injury AOE/COE as a result of the alleged employment.

Applicant filed a Declaration of Readiness to Proceed on 10/30/2023, requesting a Status Conference on the issues of Employment and Discovery. A Status Conference proceeded on 1/16/2024 and was continued to another Status Conference on 4/16/2024. At the Status Conference of 4/16/2024 the case was continued to a Mandatory Settlement Conference on 6/25/2024 regarding the issue of Employment, with an indication on the Minutes of Hearing dated 4/16/2024 that the parties were to prepare a Pre-Trial Conference Statement. At the 6/25/2024 Mandatory Settlement Conference the matter was continued to Trial on 8/6/2024 before Judge Yee. Pursuant to the Minutes of Hearing dated 6/25/2024, the parties had until the end of the week to file the Pre-Trial Conference Statement. It is further noted that applicant objected to the trial setting and alleged further discovery was necessary. Judge Yalon indicated in the Minutes of Hearing dated 6/25/2024 that the trial judge would have discretion to develop the record if necessary.

On 7/12/2024 the applicant filed a Petition for Reconsideration. Pursuant to the Petition for Reconsideration, while the applicant states he is aggrieved by the Order Deferring Action on Defendant’s Petition for Dismissal of the case (Petition for Reconsideration page 3, lines 24-25, page 4, lines 1-3 and page 6, lines 8-12), it appears he may actually be disputing whether the case should be set for trial, indicating his belief the trial setting is premature (Petition for Reconsideration, page 7, lines 1-10). To that extent it appears the applicant is filing a Petition for Removal (not Reconsideration) from the Trial setting (Minutes of Hearing dated 6/25/2024), not the Order Deferring Action on Defendant’s petition for Dismissal.

III.

DISCUSSION

▪ PETITION FOR RECONSIDERATION

Applicant named its petition filed 7/12/2024 a Petition for Reconsideration. A petition for Reconsideration may only be taken from a “final” order, decision, or award (Labor Code 5900(a),

5902, 5903). A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211

Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal. Comp. Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal. Comp. Cases 661, 665]) or determines a “threshold” issue that is fundamental to the claim for benefits (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal. Comp. Cases 650, 650-651, 655-656]).

In the above case no WCALJ has issued a final order of any kind or issued an order determining a threshold issue. Therefore, it is the undersigned opinion that there is Order, Decision or Award that has issued that would be subject to a Petition for Reconsideration.

▪ **PETITION FOR REMOVAL**

In applicant’s Petition for Reconsideration, he states he is aggrieved by the Order Deferring Action on Defendant’s Petition for Dismissal of the case (Petition for Reconsideration page 3, lines 24-25, page 4, lines 1-3 and page 6, lines 8-12). As this “Order” is not a final order it is likely the applicant intended to file a Petition for Removal, not Reconsideration. As such the undersigned will address the petition as if it were filed as a Petition for Removal.

Title 8, California Code of Regulations, Section 10955 provides that any time within twenty (20) days after the service of the order or decision, or of the occurrence of the action in issue, any party may petition for removal based upon one or more of two specifically-stated grounds – that the order, decision or action will result in significant prejudice and/or that the order, decision or action will result in irreparable harm. Rule 10955 also requires that “[T]he petitioner must also demonstrate that reconsideration will not be an adequate remedy after the issuance of a final order, decision or award.”

The Order Deferring Action on Defendant’s Petition for Dismissal of the case is dated 6/11/2024, and was served on all parties 6/12/2024. The Petition for Reconsideration (Removal) was filed by applicant on 7/12/2024, and thus is untimely.

...

Alternatively, it appears from review of the Petition for Reconsideration (Removal) filed 7/12/2024, that the applicant may be alleging he is aggrieved by this case being set for trial. Specifically, pursuant to the Petition for Reconsideration the applicant may be disputing whether the case should be set for trial, indicating his belief the trial setting is premature (Petition for Reconsideration, page 7, lines 1-10). To that extent the applicant may also intend this filing as a Petition for Removal from the Trial setting, specifically the Order Granting Continuance to Trial pursuant to the Minutes of Hearing dated 6/25/2024.

From review of the petition and the Minutes of Hearing dated 6/25/2024, it appears the applicant is alleging there is a need for further discovery pursuant to the issue of employment prior to the matter proceeding to trial. It is noted however, to that point Judge Yalon indicated in the Minutes of Hearing dated 6/25/2024 that the trial judge would have discretion to develop the record if necessary.

Pursuant to *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal. Comp. Cases 138 [en banc], at trial the WCALJ, after review of the evidence presented may decide to develop the record. Therefore, based upon the evidence presented to the WCALJ at time of trial, if the judge were to be of the opinion additional discovery was necessary, he, Judge Yee in this case, is empowered to develop the record. As such there is no risk of irreparable harm to the applicant in having this matter set for trial, or even proceeding to trial. Applicant has also failed to demonstrate that reconsideration would not be an adequate remedy after the issuance of a final order, decision or award.

IV.

RECOMMENDATION

It is recommended the Petition for Reconsideration be **DENIED** as premature as no final Order, Award or Decision has issued. It is further recommended that the Petition for Reconsideration, if viewed as a Petition for Removal be **DENIED** as the applicant has failed to establish there will be significant prejudice or will result in irreparable harm and/or Reconsideration would not be an adequate remedy should this case proceed to trial.

DATE: 7/16/2024

Suzanne M. Banks
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE