

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

CARMEN CAVA, *Applicant*

vs.

**VOLT INFORMATION SCIENCES;
AIU INSURANCE COMPANY, administered by
GALLAGHER BASSETT SERVICES, *Defendants***

Adjudication Number: ADJ17133319; ADJ17176608

Los Angeles District Office

**OPINION AND ORDERS
DISMISSING PETITION FOR
RECONSIDERATION,
GRANTING PETITION
FOR REMOVAL AND
DECISION AFTER REMOVAL**

Applicant seeks reconsideration or in the alternative removal of the Order Compelling applicant's Attendance at Defendant's Medical-Legal Examination ("Order") issued on February 27, 2024, by the workers' compensation administrative law judge (WCJ).

The WCJ ordered applicant to attend an evaluation with a panel qualified medical evaluator (QME), when applicant's hearing representative failed to appear at trial on the issue of the QME exam, and appeared to misrepresent that he was hospitalized on the day of the trial.

Applicant contends that the WCJ violated applicant's right to due process by issuing the order without first providing notice.

We have not received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we dismiss the petition seeking reconsideration and deny it to the extent that it seeks removal.

We have considered the allegations of the Petition for Reconsideration and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below we will dismiss the petition for reconsideration as the Order is a non-final order. We will grant the petition as one seeking removal. As our Decision After Removal, we will rescind the February 27, 2024 Order and return this matter to the trial level for further proceedings.

FACTS

On January 3, 2023, Susan Garrett filed an application for adjudication alleging that applicant sustained a specific injury to the right leg, right ankle, and right foot. (Application for Adjudication, ADJ17133319, November 4, 2021). On January 6, 2023, Susan Garrett filed a second application alleging that applicant sustained a cumulative injury to her back. (Application for Adjudication, ADJ17176608, January 6, 2023.) On January 31, 2023, applicant filed a claim of 132a discrimination.

On March 27, 2023, defendant filed a Declaration of Readiness to Proceed, seeking a hearing on a qualified medical evaluator (QME) panel dispute.

The matter was set for trial on June 27, 2023; however the parties jointly requested a continuance due to lack of notice.¹ (Minutes of Hearing, June 27, 2023.) The trial was continued to July 27, 2023. (*Ibid.*) At the next trial date, the matter was continued to August 31, 2023, because the parties failed to correctly complete and file the pre-trial conference statement.² (Minutes of Hearing, July 27, 2023.)

At the next hearing, the trial was deferred as the parties were discussing proposed agreed medical evaluators. (Minutes of Hearing, August 31, 2023.)

¹ It appears that a hearing representative attempted to appear for applicant throughout these proceedings. We would remind all parties that per WCAB Rule 10401, "a non-attorney representative may act on behalf of a party in proceedings before the Workers' Compensation Appeals Board **if the party has been informed** that the non-attorney representative is not licensed to practice law by the State of California." (Cal. Code Regs., tit. 8, § 10401(a), (emphasis added).) We were unable to find compliance with WCAB Rule 10401 in the present record. Absent such compliance, only an attorney should appear for applicant.

² It is unclear why the WCJ did not require the parties to complete and file a PTCS **at the original MSC** as is required by the Labor Code and the Rules of Practice and Procedure. (Lab. Code, § 5502.) WCAB Rule 10759(b) states that: "The parties shall meet and confer prior to the mandatory settlement conference and, absent resolution of the dispute(s), the parties shall complete a joint Pre-Trial Conference Statement setting forth the issues and stipulations for trial, witnesses, and a list of exhibits **by the close of the mandatory settlement conference.**" (Cal. Code Regs., tit. 8, § 10759(b), (emphasis added).)

On November 3, 2023, defendant filed a second DOR again requesting a hearing on the panel dispute and noting that the parties were unable to resolve the issue privately. The matter was heard on January 10, 2024, wherein it was reset for trial to occur on January 30, 2024. (Minutes of Hearing, January 10, 2024.)

On January 25, 2024, applicant's counsel requested a continuance due to an office calendar conflict. It appears that the request was not acted upon.

Applicant's counsel did not appear for trial in person, but instead appeared virtually. (Minutes of Hearing, January 30, 2024.) The minutes of hearing reflect the following:

MR. GARRETT STATES THAT TRIAL CANNOT GO FORWARD BECAUSE HEARING REP. FRANCISCO BARBOSA HAD A FAMILY EMERGENCY THIS MORNING. MR. GARRETT STATES HE IS UNABLE TO GO FORWARD WITH TRIAL BECAUSE HE DOES NOT HAVE THE FILE. IT IS NOTED THAT A PRIOR REQUEST FOR CONTINUANCE BY AA WAS DENIED, AND THAT THE ISSUE TODAY IS PANELS REQUESTED BY DEFENDANT. FRANCISCO BARBOSA IS ORDERED TO FILE AN AFFIDAVIT REGARDING HIS REASONS FOR FAILING TO APPEAR, WITH ANY EVIDENCE HE DEEMS APPROPRIATE, WITHIN 10 DAYS.

(Ibid.)

The WCJ continued the trial to February 27, 2024. *(Ibid.)* It does not appear that Francisco Barbosa filed any response to his failure to appear.

On February 6, 2024, defendant filed a petition to compel applicant's attendance at the QME evaluation in dispute.

On February 21, 2024, applicant’s counsel requested another continuance of the trial due to calendar conflict. It does not appear that the court acted upon the request for continuance.

At trial, the minutes reflect the following:

COUNSEL FOR APPLICANT AND APPLICANT DID NOT APPEAR OR CALL THE ATT LINE. ORDER COMPELLING APPEARANCE AT QME ISSUED. UNVERIFIED EMAIL CLAIMING THE HEARING REP. WAS HOSPITALIZED ARRIVED AFTER THE CASE WAS OTOC’ED. ALLEGEDLY HOSPITALIZED HR APPEARED ON WCJ ASLANIAN’S ATT LINE AT 8:30 WITHOUT DIFFICULTIES.

(Minutes of Hearing, February 27, 2024, (emphasis added).)

The email referred to in the minutes of hearing was not uploaded into the Appeals Board file.

The WCJ issued the order compelling applicant’s attendance at the disputed QME appointment. From this order, applicant seeks both reconsideration and removal.

DISCUSSION

A petition for reconsideration may properly be taken only from a “final” order, decision, or award. (Lab. 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]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) 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].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Id.* at p. 1075 [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”]; *Rymer, supra*, at p. 1180 [“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here the order that issued was for applicant to attend a QME evaluation. This is an interim order affecting discovery and is not a final order for purposes of reconsideration. Accordingly, the petition for reconsideration will be dismissed.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, 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).)

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is “. . . one of ‘the rudiments of fair play’ assured to every litigant . . .” (*Id.* at 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, [The] commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law. (*Id.* at 577.)

WCAB Rule 10756 states:

Where a required party, after notice, fails to appear at a trial in the case in chief:

(a) If good cause is shown for failure to appear, the workers' compensation judge may take the case off calendar or may continue the case to a date certain.

(b) If no good cause is shown for failure to appear, the workers' compensation judge **may issue a notice of intention pursuant to rule 10832**, take the case off calendar or continue the case to a date certain.

This rule shall not apply to lien trials, which are governed by rule 10880.

(Cal. Code Regs., tit. 8, § 10756 (emphasis added).)

Rule 10832 states:

(a) The Workers' Compensation Appeals Board may issue a notice of intention for any proper purpose, including but not limited to:

- (1) Allowing, disallowing, or dismissing a lien;
- (2) Granting, denying, or dismissing a petition;
- (3) Sanctioning a party;
- (4) Submitting the matter on the record; or
- (5) Dismissing an application.

(b) A Notice of Intention may be served by designated service in accordance with rule 10629.

(c) If an objection is filed within the time provided, the Workers' Compensation Appeals Board, in its discretion may:

- (1) Sustain the objection;
- (2) Issue an order consistent with the notice of intention together with an opinion on decision; or
- (3) Set the matter for hearing.

(d) Any order issued after a notice of intention shall be served by the Workers' Compensation Appeals Board pursuant to rule 10628.

(e) An order with a clause rendering the order null and void if an objection is received is not a Notice of Intention and must be served by the Workers' Compensation Appeals Board.

(Cal. Code Regs., tit. 8, § 10832.)

Labor Code section 5313 requires a WCJ to state the “reasons or grounds upon which the determination was made.” The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision “must be based on admitted evidence in the record” (*Hamilton, supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, “the WCJ is

charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton, supra*, at p. 475.)

Here, the WCJ issued an order for applicant to appear before a disputed QME. The order issued without notice to applicant, which violated applicant’s right to due process and warrants removal. Upon return, the WCJ should provide adequate notice of intent to applicant prior to issuing any findings or orders, notwithstanding applicant’s failure to appear at trial. If applicant objects to the notice of intent, the WCJ must create a record and then decide the issue on the merits. This would include, for example, obtaining evidence of the claim denial letter, when it issued, and defendant’s panel request. The WCJ may include a notice to admit exhibits and a notice of intent to submit the matter on the record as part of a notice of intent. (Cal. Code Regs., tit. 8, § 10832.)

To the extent that applicant’s hearing representative repeatedly failed to appear and may have misrepresented his whereabouts to the court on the morning of trial, such conduct could be construed as either bad faith or frivolous actions, which could warrant the imposition of sanctions and/or reasonable expenses including costs and attorney’s fees. (§ 5813.) We do not address the issue of sanctions at this time as the alleged conduct occurred at the trial level. However, the issue of sanctions and reasonable expenses should not be confused with the issue of due process and proving adequate notice and creating a proper record in support of any order that should issue.

Accordingly, we will dismiss the petition for reconsideration as the Order is a non-final order. We will grant the petition as one seeking removal. As our Decision After Removal, we will rescind the February 27, 2024 Order and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Order issued on February 27, 2024 by the workers’ compensation administrative law judge is **DISMISSED**.

IT IS FURTHER ORDERED that Petition for Removal of the Order issued on February 27, 2024 by the workers’ compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED that as the decision after removal that the Order Compelling applicant's Attendance at Defendant's Medical-Legal Examination issued on February 27, 2024 by the workers' compensation administrative law judge is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 16, 2024

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

**CARMEN CAVA
GARRETT LAW GROUP, PC
ALBERT & MACKENZIE, LLP**

EDL/mc

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