**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**COREEN GONZALES, *Applicant***

**vs.**

**ADP TOTALSOURCE GROUP, INC.; SAGE MILLIMETER, INC.; AIU INSURANCE COMPANY, administered by HELMSMAN MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ18936354**
**Anaheim District Office**

# OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks removal of the Findings and Order ("F&O") issued on September 17, 2024, wherein the workers' compensation administrative law judge ("WCJ") concluded that defendant need not produce a video recording of applicant's injury prior to applicant's deposition. Applicant asserts that the WCJ erred because the video is a video of the alleged incident itself, not *sub rosa* surveillance, and is therefore properly discoverable prior to her deposition.

We did not receive an Answer. We did receive a Report and Recommendation on Petition for Removal from the WCJ, recommending that removal be denied.

We have reviewed the Petition and the Report, as well as the record. For the reasons discussed below, we will amend the F&A to include the findings stipulated to by the parties, grant the petition as a petition for reconsideration because the stipulations include a threshold issue, and find that the video should be produced prior to applicant's deposition because it is not *sub rosa* surveillance.

## FACTUAL BACKGROUND

Applicant filed an Application for Adjudication, alleging a specific injury to her shoulder, nervous system and psyche occurring on November 20, 2023 during an altercation with a co-worker while employed by defendant.

On the same day as the Application for Adjudication, applicant served defendant with a request for applicant's personnel file and other associated documents, as well as witness statements of the incident. Defendant denied this request. Subsequently, applicant also requested production of video footage of the incident, along with claim notes and witness statements. When the request was refused, applicant sought the intervention of the WCAB to compel production.

The matter went to hearing on August 5, 2024. The "sole" issue was listed as: "Whether defendant must produce the surveillance video prior to the injured workers' deposition." (Minutes of Hearing / Summary of Evidence ("MOH/SOE"), 8/5/2024, at p. 2.) According to the Minutes of Hearing, the parties stipulated to the following facts:

> 1. Coreen Gonzales[], while employed on November 30, 2023, at Torrance, California, by ADP TotalSource Group, Inc./Sage Millimeter, Inc., claims to have sustained injury arising out of and in the course of employment to shoulders, nervous system, and psyche.
> 2. At the time of injury, the employer's workers' compensation carrier was AIU Insurance Company, administered by Helmsman Management Services-ADP.

(*Ibid.*) Exhibits were admitted without objection, trial briefs were submitted, and the matter was taken under submission. (*Id.* at pp. 1–4.)

On September 17, 2024, the WCJ issued the F&O, finding that defendant need not produce the video. (F&O, at p. 2.) The appended Opinion on Decision makes clear that the WCJ relied upon a line of cases including *Downing v. City of Hayward* (1988) 16 CWCR 76, which hold that *sub rosa* surveillance videos need not be produced prior to an applicant's deposition. (Opinion on Decision, at p. 2.) The WCJ believed that although the video was of the alleged injury itself, not post-injury surveillance, the same principle applied because by withholding the video defendant was seeking to test applicant's credibility. (*Ibid.*)

This Petition for Removal followed.

**DISCUSSION**

**I.**

Initially, we note that the F&A fails to properly incorporate the stipulations of the parties. Specifically, although the parties stipulated to the two statements referenced above –

encompassing stipulations to employment and insurance coverage – the F&O instead simply states that applicant "filed an Application for Adjudication of Claim." (F&O, at p. 1.) Because these facts were stipulated to by the parties at the hearing, they are legally determined and should have been included in the F&O. As such, we will amend the F&O to include these stipulations, and we will review the F&O as if they had been included.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the parties' stipulations included threshold issues – for example, employment – and, as described above, we will treat the F&O as if it had properly incorporated these stipulations. Accordingly, the F&O is a final decision subject to reconsideration rather than removal, and we will consider the Petition as a petition for reconsideration. However, we will still apply the removal standard, because applicant seeks review only of an interlocutory issue.

**II.**

Former Labor Code 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, Labor Code 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 Labor Code 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 October 2, 2024 and 60 days from the date of transmission is Sunday, December 1, 2024. The next business day that is 60 days from the date of transmission is Monday, December 2, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, December 2, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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 petition. Labor Code 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 October 2, 2024 and the case

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[1] 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.

was transmitted to the Appeals Board on October 2, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 2, 2024.

**III.**

Removal – the legal standard governing the claims raised here, as described above in Section I – is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd. (Cortez)* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 3 155]; *Kleemann v. Workers' Comp. Appeals Bd. (Kleemann)* (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).)

Here, applicant challenges the WCJ's conclusion that defendant may take applicant's deposition before providing applicant and applicant's counsel with the video footage it has of the incident leading to applicant's alleged injury. Reconsideration will not be an adequate remedy because applicant's deposition will already have been taken, and, assuming applicant is correct that the decision is erroneous, we agree it would result in significant prejudice to applicant and applicant's case.

To that end, we disagree with the WCJ that the situation here is analogous to the situation presented when a defendant has *sub rosa* surveillance video of an applicant's activities post-injury. By definition, the entire purpose of such footage is to challenge the applicant's credibility by demonstrating that the applicant's actual activities are inconsistent with the level of injury alleged. It is for this reason that panel decisions have held that such footage need not be disclosed prior to an applicant's deposition. (See *Downing v. City of Hayward* (1988) 16 CWCR 76.)

Here, however, the "surveillance" video is not of applicant's *post-injury* activities, but of the incident leading to the alleged injury itself. Although defendant would no doubt prefer not to disclose the video to applicant until after conducing her deposition in the hopes that she testifies

to something inconsistent with what is pictured, such an argument can be equally mustered with regard to virtually any discoverable evidence. Were we to broaden the holding of *Downing* to include the instant video footage, we see no real limiting principle that would prevent a defendant from withholding virtually *any* evidence prior to conducting an applicant's deposition.

We do not believe such a result is consistent with the principles upon which the workers' compensation system is founded. The workers' compensation system is designed to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.) Allowing defendants to withhold relevant evidence solely in the hopes that an applicant will undermine their credibility in deposition testimony does not promote substantial justice, nor does it promote the expeditious and inexpensive resolution of disputes. Although it may be justified in the very specific case of *sub rosa* surveillance, we decline to broaden the category of evidence which can be withheld prior to a deposition to include video footage of the alleged injury itself.

Moreover, even if we were inclined to allow a defendant to withhold such evidence prior to a deposition in the abstract, there is a second reason why defendant should be compelled to produce the video footage at issue here. According to applicant's trial brief and the Petition, both verified under penalty of perjury and uncontradicted by defendant, the video footage was in fact already shown to applicant once previously, after the incident. (See Applicant's Trial Brief, at p. 2; Petition, at p. 2.)

This being the case, defendant is not merely seeking to withhold production of video footage never seen by applicant in the hopes that applicant will provide inconsistent testimony, it is seeking to withhold video footage it has already shown to applicant on one occasion, in the hopes that its refusal to allow applicant to see the footage again will provide it with a litigation advantage. Having shown applicant the video footage previously, defendant has already colored applicant's recollection of events and is in no position to assert that the footage can be withheld prior to taking her deposition. To the extent that defendant fears that applicant's testimony will be influenced by review of the footage, that ship has already sailed. At this point, defendant's refusal to provide the footage appears as much aimed at testing applicant's recall of the footage itself as at testing applicant's recall of the incident. This is not the way the litigation process should function – it is unfair both to applicant herself and to applicant's counsel, who would be the only

person in the deposition room not to have seen the video footage were we to endorse defendant's approach.

We will therefore amend the F&A to find that defendant should provide the video footage to applicant prior to taking her deposition.[2]

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Removal of the September 17, 2024 Findings & Order is **GRANTED** as a Petition for Reconsideration.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 17, 2024 Findings & Order is **AMENDED** as follows:

**FINDINGS OF FACT**

1. **Coreen Gonzales, while employed on November 30, 2023, at Torrance, California, by ADP TotalSource Group, Inc./Sage Millimeter, Inc., claims to have sustained injury arising out of and in the course of employment to shoulders, nervous system, and psyche.**
2. **At the time of injury, the employer's workers' compensation carrier was AIU Insurance Company, administered by Helmsman Management Services-ADP.**

[2] We note that the dispute apparently also encompassed "claim notes" and "witness statements," and that applicant's Petition requests the production of these documents in addition to the video footage. (See Petition, at p. 1.) However, according to the Minutes of Hearing the sole issue raised at the hearing was production of the video footage. (MOH/SOE, at p. 2.) Applicant does not argue that the Minutes of Hearing misstated the issues for determination, and it is clear from the Opinion on Decision that the WCJ only considered the video footage. Our decision is therefore limited to the issue of production of that evidence. However, to the extent that a dispute remains regarding the disclosure of other evidence prior to the deposition, we encourage the parties to resolve their dispute informally, based upon the views expressed in this opinion.

**ORDER**

**IT IS ORDERED THAT defendant produce the video footage in question prior to applicant's deposition.**

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISISONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**NOVEMBER 26, 2024**

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

**COREEN GONZALES**
**LAW OFFICES OF JAMES YANG**
**ALBERT AND MACKENZIE**

**AW/*pm***

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