WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARTIN VAZQUEZ, *Applicant*

vs.

EMPLOYERS OUTSOURCING, *Defendants*

Adjudication Number: ADJ16142394
Anaheim District Office

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

Defendant Employers Outsourcing seeks reconsideration or in the alternative, removal of the Order Suspending Action on Compromise and Release (Order Suspending) issued on April 17, 2024, and the Notice Re: Sanctions; and Order to Produce Witnesses (April NIT) issued on April 18, 2024, by a workers' compensation administrative law judge (WCJ).[1] The Order Suspending suspended approval of the parties compromise and release agreement (C&R) filed on April 3, 2024 because of "a substantial issue regarding adequacy of the settlement, in light of the documentary evidence provided," and pursuant to Policy and Procedure Manual section 1.91 because the parties failed to submit medical records sufficient to determine the adequacy of the C&R, or whether there was support for maintaining denial of the claim and a "*Betran*" finding. The WCJ provided the parties a 30-day opportunity to provide written opposition to the Order Suspending prior to hearing the issues presented on May 16, 2024.

The April NIT issued after defendant's failure to respond to a request for production of documents issued by the WCJ on January 30, 2024, and a subsequent March 29, 2024 Notice of Intent to Impose Further Sanctions against Defendant Employers Outsourcing; and Order to Produce Witness for Trial (March NIT). The WCJ identified issues of fact related to the production of documents to be determined and noted that defendant had yet to comply with the order to

[1] Defendant's petition was timely filed on May 8, 2024, 20 days after April 18, 2024 and 21 days after April 17, 2024. (Lab. Code, § 5903 [petition for reconsideration may be filed within 20 days after service of a final order]; Cal. Code Regs., tit. 8, § 10605 [extends time for filing by 5 days for service to an address in California].)

disclose witnesses. In addition, the April NIT issued after defendant submitted the C&R wherein it acknowledged that it was uninsured [for workers' compensation]. The WCJ set a hearing on the issues identified in relation to the production of documents and issues related to defendant's uninsured status.[2]

Defendant contends that the WCJ improperly suspended approval of the C&R without any basis because the WCJ had enough information to approve the settlement and applicant was represented by counsel.

Defendant contends that the April NIT violates defendant's right to due process because it fails to specifically identify and provide notice of the issues that would be heard or adjusted at the May 16, 2024 hearing, or whether it was to be a hearing or a trial that would take place on May 16, 2024; that the WCJ is not acting as an impartial adjudicator but is instead advocating in violation of the Fourteenth Amendment of the United States Constitution and *Knudsen v. Department of Motor Vehicles* (2024) 101 Cal.App.5th 186; violates Labor Code Section 5275 by setting a coverage issue for adjudication with the Workers' Compensation Judge rather than through arbitration; prematurely sets a hearing or trial when certain parties have only recently been joined and either have yet to appear or have just appeared; and, should be deemed moot as the parties, who are both represented by counsel, reached a settlement by way of the C&R.

There is no answer filed to defendant's Petition for Reconsideration and/or in the alternative for Removal. The WCJ filed a Report and Recommendation on Petition for Reconsideration and Removal (Report).

Defendant filed a Petition Requesting Approval to File Supplemental Petition for Reconsideration and/or Removal (Request), which must state good cause for the filing. (Cal. Code Regs., tit. 8, § 10964). Defendant states that good cause exists because the WCJ's Report was lengthy and covered various topics. Given that defendant sought reconsideration and/or removal of two separate orders on a wide range of contentions and given that defendant's contentions on

[2] The WCJ set the following issue for hearing on May 16, 2024 as well: "whether Defendant shall be assessed a penalty pursuant to Labor Code Section 3722." The Appeals Board notes that the WCJ acknowledged, and the Appeals Board confirms that the Workers' Compensation Appeals Board (WCJs or the Appeals Board) lacks jurisdiction to make findings and order relating to assessment of penalties under Labor Code section 3722. (Report, p. 24.) Therefore, the following issue identified by defendant is moot and will not be addressed herein: "The April 18, 2024 Order violates Labor Code sections 3710 and 3722 and 8 Cal. Code Regs. § 15550 by usurping the authority and jurisdiction of the Division of Labor Standards Enforcement." (See Petition for Reconsideration, p. 1.) We note that in Labor Code section 3710 et seq., including section 3722, the "director" refers to the director of the Department of Industrial Relations, *not* the Division of Labor Standards Enforcement.

reconsideration and/or removal were generally plead without specific citation to the record, the WCJ's Report was necessarily broad in scope and cannot be seen as surprising. Therefore, the Request does not state good cause to file the proposed supplemental pleading, and the Request is therefore denied. The proposed supplemental pleading will not be considered.

We have reviewed the record in this matter, the allegations in defendant's petition, and the contents of the Report. Based on this review, we dismiss defendant's Petition for Reconsideration because both the Order Suspending and the April NIT are obviously interim orders and not final orders subject to reconsideration. Also based on this review, for the reasons set forth below and based on the Report, which we adopt and incorporate herein (except for the section under heading III. DISCUSSION titled, "TIMELINESS OF PETITION," as well as any language crossed out/struck out),[3] we deny defendant's Petition for Removal.

I.

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].)

Threshold issues include, for example, whether a workers' compensation injury arises out of and in the course of employment (Lab. Code, § 3600); the presumption of compensability (Lab. Code, § 5402); jurisdiction of the appeals board; whether there exists an employment relationship; or the statute of limitations. (*Maranian, supra,* 81 Cal.App.4th at pp. 1080-1081; *Safeway, supra,* at pp. 533, 537, fn. 4.) However, "[t]he fact that an issue is significant or important to the litigation is not sufficient to support a finding that it is a threshold issue." (*Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1256.) The Court in *Maranian* also noted that "whether an issue

[3] All typographical, citation, etc., errors in the attached Report are from the original.

may later become moot after a full determination of benefits does not determine the availability of review under the statutory scheme." (*Maranian, supra*, 81 Cal.App.4th at p. 1075, fn. 5.)

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 Order Suspending and the April NIT are both interim procedural and/or discovery orders. Neither of these orders represent a final order *finally* determining any substantive right or liability of any party, nor *finally* determining any threshold issue basic to applicant's right to benefit. The Order Suspending neither approved *nor disapproved* the C&R, and the April NIT made no findings of fact or award of sanctions. Both orders set the issues presented for further discovery and further hearing, thereby *ensuring* due process for all parties involved.

The recent en banc decision issued by the Appeals Board in *Ledezma v. Kareem Cart Commissary and Mfg.* (2024) 89 Cal.Comp.Cases 549 (Appeals Bd. en banc), reaffirmed that filing alternative petitions for reconsideration and/or removal "is not a general pleading practice," and when filed on interlocutory orders, such practice may be considered "frivolous and filed for the purposes of delay in violation of section 5813 and WCAB Rule 10421." (*Id*, at pp. 555-556.) Given that the language related to final orders and interlocutory orders as it relates to the filing of reconsideration "has been used in dozens, if not hundreds of panel decisions issued by the Appeals Board...," we can see no reason for defendant's alternative filing of a petition for reconsideration in this matter. (See *Ledezma (Alfredo) v. Kareem Cart Commissary and Mfg* (2024) 89 Cal.Comp.Cases 462, 476 (Appeals Board en banc).)

This is especially true here where defendant simultaneously sought intervention of the California Appellate Court on these orders, filing the alternative petition herein on May 8, 2024, and a Petition for Writ of Prohibition and Stay on May 10, 2024. It could appear that defendant intentionally filed in the alternative to avoid the May 16, 2024 hearing in order to await the outcome in the appellate court.[4]

[4] We note that the appellate court denied defendant's writ one day before the May 16, 2024 hearing, on May 15, 2024.

We therefore strongly admonish defendant's attorneys Joseph C. Gjonola, David R. Ginsburg, and Roxborough, Pomerance, Nye & Andreani, LLP, to abide by the Labor Code, the WCAB Regulations, and the precedent law in general and specifically as it relates to when a petition for reconsideration may properly be taken, i.e., from a final order, decision, or award, and that violators may be subject to sanctions (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421).

We dismiss the Petition for Reconsideration as neither the Order Suspending nor the April NIT are final orders and are thus not subject to reconsideration.

II.

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 agree with the reasons set forth in the Report that neither the Order Suspending or the April NIT will cause harm or prejudice to any party, and therefore deny removal as to the April NIT. In addition, the Order Suspending will do no harm and cause no prejudice to any party as it was issued in compliance with the WCJ's statutory duty to review every settlement for fairness and adequacy:

> **In addition, to safeguard injured workers from agreeing to unfair or unwise settlements, Labor Code section 5001 provides that no settlement is valid unless the Workers' Compensation Appeals Board or a workers' compensation referee approves the settlement.** (*Steller v. Sears, Roebuck & Co.* (2010) 189 Cal.App.4th 175, 180 [116 Cal. Rptr. 3d 824].) The board or referee must inquire into the fairness and adequacy of a settlement and may set the matter for hearing to take evidence when necessary to determine whether to approve the settlement. (*Id*. at p. 181; Cal. Code Regs., tit. 8, §§ 10870, 10882.) **"These safeguards against improvident releases place a workmen's compensation release upon a higher plane than a private contractual release; it is a judgment, with 'the same force and effect as an award made after a full hearing.' [Citation.]"** (*Johnson v. Workmen's Comp. App. Bd.*

(1970) 2 Cal.3d 964, 973 [88 Cal.Rptr. 202, 471 P.2d 1002]; see also *Steller*, at p. 181.)

(*Camacho v. Target Corp.* (2018) 24 Cal.App.5th 291, 301-302, bold added.)

The WCJ clearly stated in the Order Suspending that he could not approve the C&R at the time it was presented for his approval because it was not filed with medical evidence or other required evidentiary support. In the Report, which we adopt and incorporate, the WCJ identifies specific issues with the C&R based on the medical evidence that was available, and notes that there is still no information giving rise to the "substantial possibility that adverse findings would totally bar" applicant's claim to benefits. (Report, pp. 17-19.)

Accordingly, neither the Order Suspending nor the April NIT are final orders subject to reconsideration and we therefore dismiss defendant's Petition for Reconsideration and admonish defendant and its counsel for seeking a petition in the alternative for reconsideration of two clearly interim, non-final orders. Further, neither order will cause any party prejudice or harm for the reasons stated in the Report, which is adopted and incorporated, and for the reasons stated herein.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Notice Re: Sanctions; and Order to Produce Witnesses issued on April 18, 2024, and the Order Suspending Action on Compromise and Release issued on April 17, 2024, by a workers' compensation administrative law judge is **DISMISSED**.

IT IS FURTHER ORDERED that defendant's Petition for Removal of the Notice Re: Sanctions; and Order to Produce Witnesses issued on April 18, 2024, and the Order Suspending Action on Compromise and Release issued on April 17, 2024, by a workers' compensation administrative law judge is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 5, 2024

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

MARTIN VAZQUEZ
HUMPHREY AND ASSOCIATES
ROXBOROUGH, POMERANCE, NYE & ADREANI, LLP

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 NUMBER: ADJ16142394

MARTIN VASQUEZ **-vs.-** **EMPLOYERS OUTSOURCING; PRIME DMINISTRATORS**

WORKERS' COMPENSATION JUDGE: JAMES P. FINETE

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION AND REMOVAL

I. INTRODUCTION

1.	Identity of Petitioner	Defendant, Employers Outsourcing
2.	Petition for Reconsideration Filed:	05/8/2024
3.	Verification	Yes
4.	Timeliness	Yes~~, in part; No, in part~~

Defendant, Employers Outsourcing, ("Defendant" or "Petitioner") has filed a Petition for Reconsideration (Petition)[1] that has been filed in the alternative as a Petition for Removal. The Petition alleges that reconsideration is "necessary and proper" even though Petitioner does not seek review of any final order.

Rather, Petitioner frames interlocutory orders as well as notices of intent to issue orders as being the proper subject of a Petition for Reconsideration for the following reasons:

1) That it has not received proper notice of the issues to be adjudicated on May 16, 2024;

2) That adjudication of issues pursuant to Labor Code Section 3 722 is not within the scope of this WCJ's jurisdiction;

3) That issues of insurance coverage must be adjudicated via arbitration proceedings;

4) That this WCJ has improperly withheld approval of a Compromise and Release agreement; and

5) That Trial should not go forward until all necessary parties have been joined.

[1] EAMS Doc ID# 51825210

Additionally, Petitioner avers that it being substantially prejudiced and irreparably harmed by this Court acting as both an advocate and adjudicator.

It is recommended that the Petition be denied.

This Court has provided Petitioner with notice of the issues to be heard at trial; has not adjudicated any penalty under Labor Code Section 3722; has not raised insurance coverage as an issue for trial; has not improperly withheld approval of a settlement; and Petitioner's argument on appeal regarding joinder of additional parties is inapposite to its previously documented position.

This case involves Employers Outsourcing representing that it is a Professional Employer Organization ("PEO") that has paid Applicant's wages and provided workers' compensation coverage. In its initial appearance in this case, Defendant appeared as "Employers Outsourcing; Firestone Labor Union, Association of Employee Paiticipants for Affordable Benefits, and Prime Administrators Fresno". The Application for Adjudication of Claim names Employers Outsourcing as the employer. Neither Firestone Labor Union, nor Association of Employee Participants for Affordable Benefits, nor Prime Administrators Fresno are insurance carriers in this case (nor are they alleged to be employers).

When Petitioner sought to join an insurance carrier for a different employer (but did not seek to join said other employer itself), this Court took notice that Petitioner had not disclosed its insurance carrier in compliance with WCAB Regulation 103 90 and the case of *Coldiron v. Compuware Corporation,* (2002) 67 Cal. Comp. Cases 289 (Appeals Board en banc).[2]

Accordingly, this Court directed Petitioner to disclose its insurance carrier. In response[3], Petitioner took the position that so long as it identified itself as an employer that it was not required to disclose its insurance carrier. In said initial response (dated 12/12/2023), Petitioner represented that "there are no illegally uninsured employers in this case and failure to pay workers' compensation awarded to the injured employee is not at issue in this case". This response further represented that Applicant's injury was being covered by a union - employee welfare benefit plan and that, "Union coverage for workplace injuries is provided *in addition* to workers' compensation insurance" [emphasis added].

These statements are materially false, and Petitioner has since admitted it is uninsured.

[2] Petitioner would subsequently argue against joinder of additional parties.
[3] EAMS Doc ID# 49667371

Petitioner has engaged in a course of conduct that on its face has obfuscated the identify of the employer(s) and insurance carrier(s) in this matter. Such conduct includes multiple contradictory statements regarding the status of insurance coverage.[4]

Petitioner's conduct is good cause to believe that Petitioner has intentionally mislead this Court to an extent that warrants sanctions, and possibly contempt. To provide Petitioner an opportunity to be heard and present evidence this Court set the matter for Trial. The parties were apprised of the issues for Trial. This Court also issued an order for Petitioner to produce evidence and name witnesses well in advance of the Trial so that this Court and all parties would be aware of the issues and evidence for trial. Petitioner did not seek relief from said order, and continues to be materially non-compliant.

Petitioner has now filed the Petition for Reconsideration (as well as a Petition for Writ of Mandate in the Appellate Court[5]) which has stayed the trial and any further action by this Court.

II. PROCEDURAL HISTORY

An Application for Adjudication of Claim[6] was dated and filed on May 6, 2022, naming Employers Outsourcing as the employer[7]. No insurance carrier was listed on the Application.

On July 16, 2022, the law firm of Korey Richardson filed a Notice of Representation reflecting that the firm was, "Attorneys for Defendant, Firestone Labor Union, Association of Employee Participants for Affordable Benefits, and Prime Administrators Fresno".[8] No appearance was made on behalf of Employers Outsourcing itself.

Korey Richardson on behalf of Petitioner then filed an Answer to Application for Adjudication of Claim on August 15, 2022, in which it denied the injury (this was more than 90 days after the Application and claim form had been filed and served on Petitioner).[9] In said Answer, Petitioner did not specify whether it was insured for California workers' compensation purposes, was self-insured, or uninsured.

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[4] This Court takes judicial notice of the EAMS system which reflects that the number of cases involving Employers Outsourcing exceeds 200 cases. The records and files of an administrative board are properly the subject of judicial notice. (Evid. Code, § 452, subd. (d).) A reviewing court may take judicial notice of matters which could have been noticed by the trial court, even where the trial court was not requested to take such notice. *(Hogen v. Valley Hospita/(1983)* 147 Cal. App. 3d 119, 125 [195 Cal. Rptr. 5].

[5] EAMS Doc ID# 77964880

[6] EAMS ID# 41390835

[7] The Court takes judicial notice of the pleadings pursuant to Evidence Code 452(d); *Faulkner v. WCAB* (2004) 69 Cal. Comp. Cases 1161 (writ denied) (permitting judicial notice of the DWC-1).

[8] EAMS ID# 42284575

[9] EAMS ID# 42658225

On November 6, 2023, Petitioner filed a "Petition for Joinder"[10], accompanied by a proposed order for joinder[11], seeking joinder of Starr Specialty Insurance Company (Starr). Per the Petition for

Joinder, Starr was a "necessary" party based on its coverage of Horizon Personnel. However, the same Petition for Joinder represented that "Employers Outsourcing provided PEO services, processing wages, and providing workers compensation insurance coverage for Horizon Personnel". At the time of the Petition for Joinder, Horizon Personnel was not a party to the case and the Petition for Joinder did not seek to join Horizon Personnel. The Petition for Joinder represented that Employers Outsourcing was administered by Prime Administrators, but Petitioner still did not identify its own insurance carrier.

On November 8, 2023, this WCJ issued an Order Denying Petition for Joinder[12] (without prejudice) and further ordered Petitioner to comply with Regulation Section 10390 by identifying its insurance carrier. Petitioner was served with the Order on November 8, 2023, and was afforded 15 days to disclose its insurance carrier information. This WCJ then set the matter for Conference on December 12, 2023.

A Status Conference then proceeded on December 12, 2023. As of that date, over 30 days had passed since Petitioner received the Order Denying Petition for Joinder, but Petitioner had still not complied with the Order to disclose its insurance carrier pursuant to Regulation 10390. The Minutes of Hearing (MOH) from that Status Conference reflect that Petitioner *admitted that it was uninsured* for California workers' compensation coverage purposes, at which point Petitioner was placed on notice that this WCJ intended to sanction Petitioner the sum of $500.00 for failure to timely disclose its uninsured status.[13] The MOH also indicated that UEBTF should be joined based on the admission that Petition was uninsured. The matter was then continued to a status conference set for January 30, 2024.

Petitioner did file an objection to the NOI re sanctions dated December 22, 2023.[14] In the response, Petitioner did an about face and asserted that "there is insurance in place but have chosen to utilize the union benefits for this claim"; and that although Petitioner has insurance it was not obligated under Regulation 10390 to disclose the name of its insurance carrier. The objection

[10] EAMS ID# 48963807
[11] EAMS ID# 48963808
[12] EAMS ID# 77339750
[13] At that point, more than one year had passed since Petitioner filed its Answer; and Petitioner did not timely comply with the Order from November 8, 2023.
[14] EAMS ID# 4966737

included a letter from Manock Law dated December 19, 2023, which intimated ERISA preemption but also represented that benefits through a union welfare benefit plan "for workplace injuries is provided *in addition to* workers' compensation insurance and is administered in conjunction with Prime."[15] Further, Petitioner argued that joinder of UEBTF was not warranted because "there are no illegally uninsured employers in this case" and because joinder of UEBTF should not occur when the employer is paying benefits (though per the Answer to Application the claim was denied).

Counsel for Petitioner then also filed an "Amended Notice of Representation" also dated December 22, 2023, reflecting that the firm represented Employers Outsourcing, LLC - the notice did not list an insurance carrier.

Following review and consideration of Petitioner's objection to sanctions, as well as the amended notice of representation, this WCJ then issued an "Order Imposing Sanctions [in the sum of $500.00] Against Employers Outsourcing ... And Notice to Impose Further Sanctions" on December 22, 2023.[16] This WCJ determined that Petitioner had not set forth good cause as to why it should not be sanctioned. Additionally, Petitioner was placed on notice that an additional sanction was being considered due to Petitioner's continued obfuscation of its insurance coverage.

Petitioner did then file a January 10, 2024, "Response to Order Imposing Sanctions Against Employers Outsourcing ... And Notice to Impose Further Sanctions ... " ("Response") to the sanction order and notice to impose additional sanctions,[17] in which Petitioner confirmed that the $500.00 sanction was paid - there was no petition for reconsideration from the order imposing sanctions.

As to the notice of intent to impose additional sanctions for continued failure to disclose insurance coverage, Petitioner responded:

> "The insurance in place that EO referenced in the Objection dated December 22, 2023 referred to coverage for this claim by co-employer and EO affiliated company, Simplify HR, Inc., whose California workers' compensation insurance carrier for the relevant time period was State National Insurance Company, Inc. and by the jobsite, J & J Snack Foods, whose California workers' compensation insurance

[15] The letter further stated: 'Firestone Prime, and any other entity involved in providing and administering the union benefits discussed below are not workers' compensation insurers. They provide union benefits, separate and apart from state workers' compensation insurance, under ERISA."; "Union coverage for workplace injuries is provided in addition to workers' compensation insurance and is administered in conjunction with Prime. Historically, this has been accomplished by Prime submitting payment of benefits for the subject injury by cashier's check under a procedure similar to that of an "uninsured employer" because the payments are not coming from a carrier. The funds for payment of the injured worker's claim are indeed available from the union benefit."

[16] EAMS ID# 77481638

[17] EAMS ID# 49914171

carrier for the relevant time period was, on information and belief, Travelers Property Casualty;"

"EO itself does not have a California workers' compensation insurance policy covering this claim."

This Response acknowledges that Petitioner is *uninsured*; it is also the first document that mentions there is a "co-employer" named Simplify HR, or insurance coverage by State National Insurance Company. This response was not verified.

The matter then proceeded to Status Conference on January 30, 2024. *At that time, Petitioner was specifically advised that its responses must be verified.* The Minutes of Hearing[18] (MOH) which included a "Supplement" page document:

> At today's Hearing, EO is notified that their response dated 01/10/24 is unverified, at which point a verification was filed and counsel for EO orally verified contents of the response; EO confirms they do not have an insurance policy in place covering Horizon Personnel. EO is questioned about why UEBTF was not joined, and the response is that EO does not believe that UEBTF involvement is required because EO has "coverage" via an "affiliated employer" - named Simplify HR. EO is specifically asked if they are joining Simplify HR and its insurance carrier as parties to the case. EO does not want Simplify HR or its carrier joined. EO is specifically asked if they are joining J&J Snack Foods and its insurance carrier as parties to the case. EO does not want J&J Snack Foods or its carrier joined, asserting joinder is "not appropriate or necessary".
>
> "MATTER SET FOR TRIAL ON LIMITED ISSUE OF SANCTIONS AND COSTS AGAINST EMPLOYERS OUTSOURCING; WHETHER EMPLOYERS OUTSOURCING IS AN EMPLOYER; AND JOINDER OF ADDITIONAL PARTIES"

Accordingly, this Court took note that Petitioner had provided conflicting and confusing representations about the status of its insurance coverage and whether Employers Outsourcing or its "affiliated employer" was the proper Defendant in the case.[19] It was unclear to this Court based on the documents submitted and representations made whether, absent evidence of payment of wages or provision of insurance, Employers Outsourcing or its "affiliated" company (or both) was the correct employer.[20]

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[18] EAMS ID# 77596965

[19] In the Petition for Joinder of Stan Casualty Insurance from November 6, 2023, at Page 1, Lines 26-28, it was asserted that Employers Outsourcing was a PEO that processed waged and provided workers' compensation coverage. However, Petitioner later admitted it did not have insurance coverage and subsequent responses to orders to produce did not include evidence of wages paid by Petitioner.

[20] Pursuant to Labor Code Section 3701.9, a PEO cannot be self-insured.

Rather than join UEBTF on a CT claim, this Court attempted to determine whether there was other coverage available to this Applicant via the other putative employers disclosed by Petitioner.

The Order is clear as to the issues set for Trial: sanctions[21], employment (as to Employers Outsourcing), and joinder (of additional parties - the issue of whether there is good cause to join a party is not synonymous with an actual finding of employment). With the only employer of record being uninsured and denying injury, and Petitioner filing a pleading stating there were other employers and insurance carriers, this WCJ set the case for Trial. This Court also made clear what evidence it was seeking to develop the record, what evidence would be considered at trial, and what actions Petitioner needed to take in advance of trial.

In that regard, the Supplemental page to the MOH included a Minute Order ("Order") requiring Petitioner to provide responses and production of documents to seven categories of evidence ("A-G") to address the issues of employment, joinder and sanctions, specifically:

> "Within 25 days of service of these Minutes, EO is ORDERED to produce and disclose to the Court (and Applicant's counsel):
>
> A. The insurance policy and underwriting files of any policy covering any portion of the period between 04/21/21 and 04/21/22, that concern any combination of EO, Simplify HR, State National Insurance Company, Horizon Personnel and/or J&J Snack Foods (or their intermediaries, representatives or designees, et al.);
>
> B. Any letters, correspondence or other documentation exchanged between EO (or its intermediaries, representatives or designees, et al.) and the CA Insurance Commissioner and/or WCI RB, concerning the relationship between EO and Simplify HR, coverage afforded to EO via Simplify HR, and whether EO is uninsured for purposes of CA workers' compensation coverage;
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> C. Any contracts between any combination of EO, Simplify HR, Horizon Personnel and/or J&J Snack Foods regarding the provision of PEO services, wage processing and/or providing compensation coverage for Horizon Personnel and/or J&J Snack Foods for the years 2021 and 2022;
>
> D. Applicant's complete personnel file including payroll records and employment agreements in the possession or control of EO;
>
> E. Evidence that EO has complied with Labor Code Section 3602(d)(1) as it pertains to Horizon Personnel and/or J&J Snack Foods;
>
> F. Any evidence as to which employer(s) paid Applicant for his services between 04/21/21 and 04/21/22, had control over Applicant's employment and/or work activities (including but not limited to hours worked, direction and control over job functions, and right to hire discipline, or terminate)
>
> G. EO is to identify and produce for Trial the "Person Most Knowledgeable (PMK) who can testify as to the contents of each document specified in Orders A through G.

[21] "No additional documents have been filed by EO establishing its relationship with Horizon Personnel, Simplify HR, and/or J&J Snack Foods. Pursuant to Regulation 10752(d), a Judge has discretion to order people to appear at trial who are not otherwise required to appear. Pursuant to Regulation 10421, a party may be sanctioned for making 'false or substantially false statements of fact' or for '[a]sserting a position that misstates or substantially misstates the law, and where a reasonable excuse is not offered.' See also LC 5813. Pursuant to Labor Code 5309, this Court is authorized to conduct contempt proceedings to determine if a patty and/or their counsel should be held in contempt for defying orders of the court."

This Order was served on Petitioner on January 31, 2024. By its plain language, Petitioner had 25 days to "produce and disclose" the evidence and the names of witnesses/ PMKs. Petitioner did not seek removal (appeal) from this Order.

Petitioner filed a response on March 1, 2024, entitled, "Defendant Employers Outsourcing's Production of Documents Pursuant to Minutes of Hearing Order Served January 31, 2024" ("Production")[22]. This Production contained 50 pages of documents. It was not verified. It did not list, identify or otherwise describe each document that was provided, identify to which category of production each document was responsive; and it did not identify the Person Most Knowledgeable (PMK) for any of the categories above or the PMK who could testify about the contents and relevance of each document that was produced. The only Employers Outsourcing employee named in the documents produced was Michael Anthony Walstad who is listed as Petitioner's President and CEO.

Included in this Production was an "Agency Agreement" between Simplify HR and Employers Outsourcing, which named Vincent Lara Walstad as President of Simplify HR, and Michael Anthony Walstad as President of Employers Outsourcing. Also produced was a "Memorandum of Understanding" between Employers Outsourcing and Firestone Labor Union, which also contained the signature of Michael Anthony Walstad as President of Employers Outsourcing, as well as a similar document signed by Vincent Lara Walstad as President of Simplify HR.[23]

Based on the Production responses and the representations by Petitioner, on March 4, 2024, this Court issued Notices of Intent to Join Simply HR[24], State National Insurance[25], J&J Snack Foods[26], and Horizon Personnel Services[27]. Pursuant to Regulation 10629, in each instance counsel for Petitioner[28] was designated to serve the NOI rejoinder on all parties of record and on the parties to be joined.

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[22] EAMS ID# 50720024

[23] Also produced was a "Certificate of Liability Insurance" naming Simplify HR as the insured, State National Insurance Company as the insurer, and a "Employees assigned to J&J Snack Foods ... in reference to Horizon Personnel Services, Inc.".

[24] EAMS ID# 77740655

[25] EAMS ID# 77740651

[26] EAMS ID# 77740648

[27] EAMS ID# 77740644

[28] EAMS ID# 50502350: Petitioner is represented by the finn of Korey Richardson; as of February 16, 2024, the law firm of Roxborough, Pomerance, Nye & Adreani filed a notice of association of defense counsel.

As of March 29, 2024, Petitioner had yet to file evidence that it had served the Notices of Intent rejoinder.[29]

As of March 29, 2024, Petitioner had not amended its Production responses or filed a verification.

On March 29, 2024, this Court issued a "Notice of Intent to Impose Further Sanctions Against Defendant Employers Outsourcing; and Order to Produce Witness for Trial.[30] Petitioner was notified of this Court's intent to impose further sanctions for filing an untimely, unverified, and incomplete Production response; and for failure to file proof that the NOIs rejoinder had been served. Additionally, Michael Anthony Walstad was ordered to appear for Trial on April 17, 2024.

Petitioner did not file for reconsideration or removal from this Order to produce the witness, or the NOI re sanctions.

On April 3, 2024, Petitioner filed a Compromise and Release ("C&R) settlement agreement,[31] which was presented to the Honorable Judge Sallie Doyle for review. Judge Doyle completed a "Walk Through Appearance Sheet", noting that the issues raised by this Court (i.e., sanctions) could not be settled by the parties, and she deferred action on the settlement to this WCJ.[32]

Per the C&R, Petitioner is uninsured. On April 5, 2024, this WCJ placed a Note in the EAMS management system that the C&R did not include cashier checks. Cashiers checks were then filed into EAMS on April 9, 2024.33[33]

Upon receipt of the cashiers checks, this WCJ did review the C&R and supporting documents for consideration and approval. Based on this Court's review of the settlement documents, there was substantial concern about the adequacy of the settlement in light of the lack of medical reporting explaining the basis of the settlement.

Meanwhile, it was not until April 4, 2024, after Petitioner attempted to walk-through the settlement with a different judge, that Petitioner served the NOI rejoinder[34] on all parties including those to be joined.

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[29] Regulation 10629(d), requires, "Within 10 days from the date on which designated service is ordered, the person designated to make service shall serve the document and shall file the proof of service."
[30] EAMS ID# 77801307
[31] EAMS ID# 51247412
[32] EAMS ID# 77824978
[33] EAMS ID# 51332637
[34] EAMS ID# 51265790, 51261325, 51265926, 51266021, 51266189 and 51266301.

On April 10, 2024, Petitioner filed a "Defendant Employers Outsourcing' s Response to the March 29, 2024 Notice of Intent to Impose Further Sanctions Against Defendant Employers Outsourcing.[35] In said response, Petitioner asserted that its responses were timely; that it was unaware that its responses had to be verified; and that the failure to serve the NOI rejoinder was an inadvertent mistake.[36] *Petitioner also asserted that the reason it did not name any Persons Most Knowledgeable (PMK) was because it believed that this Judge's order only required the witnesses to be disclosed and produced on the date of trial.*[37] As to any dispute over the sanctions raised by this Court, the response reads: "Counsel for Employers Outsourcing advised Judge Doyle during the walk-through that Employers Outsourcing would pay the sanctions in conjunction with the settlement."[38]

On April 10, 2024, Petitioner also submitted a "Defendant Employers Outsourcing's Second Production of Documents Pursuant to Minutes of Hearing Order Served January 31, 2024."[39] This response was verified and included a "privilege log". However, on its face the document was not responsive to the Court's order to disclose most of the documents requested.[40] This included basic documents such as Applicant's personnel file and any documents which would show what other businesses may meet the statutory definition of employer. Further, there was still no identification of a PMK that could address any of the seven categories (A-G) of documents sought by this Court.[41]

On April 11, 2024, this Court continued Trial to May 16, 2024. This was done because of the late service of the NOI rejoinder, because Petitioner had still not fully complied with the Production order, and because action on the C&R was being suspended.[42]

An Order Suspending Action on Compromise and Release then issued on April 17, 2024, advising the parties that the medical evidence in EAMS was insufficient to determine whether there was a basis to deny the claim and seek a "Beltran" finding, and whether the settlement of TD, PD and future medical care was adequate.[43] The parties were advised, "Absent written responses in 30

[35] EAMS ID# 51343826
[36] This Court accepts Petitioner's argument that it is afforded an additional 5 days for service; but without verification and a complete response, there remains an issue as to whether petitioner has complied in a timely manner.
[37] Service was effectuated by email on the EAMS administrator email address provided by counsel for Petitioner.
[38] This statement appears to be incongruous with the assertion that Petitioner did not know about the issues for Trial.
[39] EAMS ID# 51343 826, at Page 4, Lines 3-7
[40] EAMS ID# 51343967
[41] In neither pleading filed on April l 0, 2024, did Petitioner identify any PMK.
[42] EAMS ID# 77841401
[43] EAMS ID# 77862992

days, and absent an Order to the contrary, this issue will be heard at the Anaheim District Office before the undersigned Judge at 8:30 a.m., on May 16, 2024."

On April 18, 2024, this Court issued a "Notice re Sanctions: and Order to Produce Witnesses".[44] This notice was neither a notice of intent to issue further sanctions nor a ruling on any prior NOI re sanctions; but rather deferred the issue of sanctions pending further hearing (and thus an opportunity to be heard). This notice also noted that Petitioner had still not complied with the order to produce and disclose. Petitioner was advised that the issue of sanctions was deferred pending the hearing that had been set, and that the sanctions may include sanctions under Labor Code Section 3722. Petitioner was again advised that Michael Anthony Walstad was to appear for trial.

III. DISCUSSION

[**TIMELINESS OF PETITION** section omitted.][45]

[44] EAMS ID# 77865759

[45] [Footnote 45 is omitted.]

RECONSIDERATION AND REMOVAL

The Petition was filed as a Petition for Reconsideration, and in the alternative, as a Petition for Removal. This Court disagrees with Petitioner's argument that a Petition for Reconsideration is appropriate.

This matter was set for Trial on May 16, 2024. Trial is now automatically stayed by the Petition for Reconsideration. The filing of a Petition for Reconsideration of a non-final order setting a matter for trial itself may be viewed as a frivolous and bad faith action. See *Aguilar v. Certified Concierge Services*, 2016 Cal. Wrk. Comp. P.D. Lexis 196.

As explained in great detail in the en bane decision of *Ledezman v. Kareem Cart Commissary*, [ADJ8965291] (*Ledezma*) (April 10, 2024, en banc decision):

> "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."
>
> "The above language has been used in dozens, if not hundreds of panel decisions issued by the Appeals Board, including the August 28, 2023 Opinion served upon Garrett Law Group in Alfredo Ledezma (ADJ15382349; ADJ15382351). (See,

> e.g., Navroth v. Mervyn's Stores, 2023 Cal. Wrk. Comp. P.D. LEXIS 318, *4; Mendoza v. Rapid Manufacturing, 2023 Cal. Wrk. Comp. P.D. LEXIS 240, *2; Ramirez v. Vons, PSI, 2022 Cal. Wrk. Comp. P.D. LEXIS 316, *5.) 7 The Appeals Board has consistently issued opinions stating that orders affecting trial setting are not final orders subject to reconsideration."
> ...
>
> "A party may only file an alternative petition for reconsideration where good cause exists to believe that a final decision, order, or award issued."

The Petition for Reconsideration in the instant matter does not identify a final decision, order, or award, and thus must be dismissed. See, e.g., *Knisley v. WCAB*, (2000) 65 Cal. Comp. Cases 1155, 1163 (writ denied); Gardner v. WCAB, (1999) 64 Cal. Comp. Cases 723 (writ denied); *Martinez v. WCAB*, (1999) 64 Cal. Comp. Cases 303 (writ denied); *California Casualty Indemnity Exchange v. WCAB (Siegwart)*, (1979) 44 Cal. Comp. Cases 1112, 1114 (writ denied).

Accordingly, the Petition should be treated as a Petition for Removal. Such relief is an extraordinary remedy rarely exercised by the Appeals Board. See *Cortez v. WCAB* (2006), 136 Cal.App.4th 596, 599, fn. 5 [71 Cal. Comp. Cases 155]; *Kleemann v. WCAB*, (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., § 10955(a))[46]

In the present matter, the only sanction order issued to date was not appealed and has (according to Petitioner) already been paid; this Court has issued other NOIs re sanctions but has afforded Petitioner a hearing date and thus due process and an opportunity to be heard; additional parties have been notified of the Court's intent to join them as parties, but has not done so to date; and the settlement submitted has not been rejected but merely suspended pending provision of additional evidence and/or a hearing on the matter (which this Court had set for May 16, 2024).

[46] Unless otherwise stated, all references to Regulations are to Cal. Code Regs. Title 8.

DUE PROCESS AND OTICE OF ISSUES FOR TRIAL

Petitioner complains that it is unable to determine what type of Hearing was set for May 16, 2024.

This ignores the plain language of the Minutes of Hearing from January 30, 2024:

> "MATTER SET FOR TRIAL ON LIMITED ISSUE OF SANCTIONS AND COSTS AGAINST EMPLOYERS OUTSOURCING; WHETHER EMPLOYERS OUTSOURCING IS AN EMPLOYER; AND JOINDER OF ADDITIONAL PARTIES"

Further, the Minutes of Hearing (MOH) dated April 11, 2024[47], explicitly document that the Trial set for April 1 7, 2024, had to be continued to May 16, 2024, after Petitioner failed to timely serve four separate notices of intent to join parties.

Despite being the cause of the delay, Petitioner complains, "The April 18, 2024 Order also prematurely sets a hearing or trial when certain pa1iies have only recently been joined and either have yet to appear or have just appeared in the last few days." Petition for Reconsideration, Page 11: Lines 22-28.

These remain the same issues for Trial.

JUDGE AS ADVOCATE AND ADJUDICATOR

Petitioner avers that this Court has predetermined the case and is impermissibly serving as both an advocate and adjudicator. However, this Court has and continues to afford Petitioner with opportunities via written pleadings and via multiple hearings to present evidence and arguments addressing issues of employment, adequacy of the settlement, joinder of additional parties, and sanctions.

The undersigned's authority as defined under Labor Code Section 133 and Regulation 10330 extends to issuing interlocutory orders in that " ... the workers' compensation judge shall have full power, jurisdiction and authority to hear and determine all issues of fact and law presented and *to issue any interim, interlocutory and .final orders, findings, decisions and awards as may be necessary to the full adjudication of the case ...* ". (Emphasis added)

Labor Code Section 5813, authorizes this WCJ to address sanctions either raised by a party or" upon the Appeals Board's own motion".

[47] EAMS JD# 77841401

Code of Regulations Section 10421 (a) further provides that on its own motion or upon the filing of a petition pursuant to Regulation 10510, the Workers' Compensation Appeals Board may order payment of reasonable expenses, including attorney's fees and costs and, in addition sanctions as provided in Labor Code Section 5813.

Therefore, a Workers' Compensation Judge functions on behalf of the Appeals Board until reconsideration is granted, and is authorized under Labor Code Section 5813, Regulations 8 CCR 10330 and 8 CCR 10421(a), to act in his or her discretion to raise and address the issue of sanctions where warranted. See *Molina v. Dessert Shades*, 2022 Cal. Wrk. Comp. P.D. Lexis 367.48[48]

It is well established that the Appeals Board, having original jurisdiction, may retain jurisdiction on any issue (Labor Code Section 133). By regulation, they retain exclusive authority to address certain issues (8 CCR 10320).

Per CCR 10330, a WCJ has the power and authority to issue almost any order necessary to the full adjudication of the case, except for ce1iain orders that are expressly reserved for the appeals board, a member thereof or the presiding WCJ. See CCR 10320, CCR 10338 and CCR 10344.

None of the matters exclusively reserved by the appeals board relate to the matter of joinder of parties or sanctions. The authority to sanction a party for their conduct still begins with the judge, derived from the appeals board under these facts, unless or until, the appeals board grants reconsideration. See *Molina v. Dessert Shades*, 2022 Cal. Wrk. Comp. P.D. Lexis 367.

These broad powers have been cited in many cases to support decisions by a WCJ. See *Hern v. Mattingly*, 2012 Cal. Wrk. Comp. P.D. LEXIS 636 (closing discovery at status conference) They have been used by WCJs to order witnesses to appear at conferences. See *Henkel v. Weyrick Cos., Inc*., 2010 Cal. Wrk. Comp. P.D. LEXIS 237.

Further, a WCJ has authority to conduct proceedings for direct and hybrid contempt. See Labor Code Section 5309(c).

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[48] WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB*, (1989) 209 Cal. App. 3d 1260, 1264, fn. 2,257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en bane decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal. App. 4th 1418, 1425, fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)].

At trial, a WCJ "may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties". See Labor Code Section 5708; *Davis v. Interim Healthcare*, (2000) 65 Cal. Comp. Cases 1039, 1043-44 (appeals board en banc).[49] The WCJ has a "great deal of flexibility in the manner in which the truth may be inquired into and ascertained in workers' compensation cases." *Martinez v. Associated Engineering & Construction Co.* (1979) 44 Cal. Comp. Cases 1012, 1018 (appeals board en bane). A WCJ has discretion in the type of evidence that may be admitted at trial, as well as how the proceedings are conducted, subject to the requirement that the due process rights of the parties are protected.

Additionally, a WCJ has discretion to raise an issue at trial sua sponte, or "on its own will or motion," if it is not raised by the parties. The appeals board has upheld decisions in several cases in which a WCJ considered an issue sua sponte, even though the parties did not raise the issue in the pretrial conference statement. See *Verwoerdv. WCAB* (1973) 38 Cal. Comp. Cases 411 (writ denied).; *Oakland Unified School District v. WCAB (Oler)* (1991) 56 Cal. Comp. Cases 139 (writ denied); and *Willis v. WCAB*, (1998) 63 Cal. Comp. Cases 229 (writ denied).

Here, Petitioner complains that it is improper for a WCJ to set a "hearing to adjudicate allegations raised by the WCJ", but this is precisely within this Court's purview. Whether additional sanctions shall issue has not been determined by this Court, as the hearing set by this Court has yet to take place.

To buttress its argument, Petitioner cites the case of *Knudsen v. Department of Motor Vehicles*, (2024) 101 Cal. App. 5th 186. Said case provides scant guidance without a full analysis of the powers and authority of DMV hearing officers, but the case cites that such hearings are quasi-criminal in nature. Petitioner does not cite the voluminous workers' compensation cases that set forth the duties and authority of a Workers' Compensation Judge.

To be clear, this Court has neither bias nor enmity toward Petitioner and has not reached an unqualified opinion as to the merits of action. See *Montgomery v. Los Angeles Unffzed School District*, 2023 Cal. Wrk. Comp. P.D. Lexis 232. The actions of this Court have been in direct response to actions (and inaction) by Petitioner. This Court would be abrogating its duties if it did not inquire into these actions. The appeals board and by extension this Court has a duty to develop

[49] In *Gee v. WCAB* (2002) 67 CCC 236. the Court of Appeal disapproved of *Davis* to the extent that a statutory presumption had to be raised as a separate issue.

the record and not to leave unanswered issues that are identified as requiring further evidence. *Raymond Plastering v. WCAB (King)*, (1967) 32 Cal. Comp. Cases 287. See also *McLean v. WCAB* (1975) 40 Cal. Comp. Cases 179 (Court of Appeal opinion unpublished in official reports). This is true regardless of whether the issue is identified by a party or the Court.

SETTLEMENT

Petitioner avers that this Court's Order from April 18, 2024, "should be deemed moot as the Applicant and Employers Outsourcing, who are both represented by counsel, reached a settlement by way of a Compromise and Release" ("C&R"), and that this Court "has enough information to approve the settlement".[50] The C&R is for the sum of $80,000.00.

Whether the C&R does render all other issues moot is, at least initially, the providence of this trier of fact. Unlike the civil court arena, WC.Ts are required to review settlements for adequacy. This mandate is set forth in WCAB Regulation § 10700 (now consolidated, and formerly known as regulations § 10870 & § 10882) which states as follows:

> (a) When filing a Compromise and Release or a Stipulations with Request for Award, the filing party shall file all agreed medical evaluator reports, qualified medical evaluator reports, treating physician reports, and any other that are relevant to a determination of the adequacy of the Compromise and Release or Stipulations with Request for Award that have not been filed previously.
>
> (b) The Workers' Compensation Appeals Board shall inquire into the adequacy of all Compromise and Release agreements and Stipulations with Request for Award, and may set the matter for hearing to take evidence when necessary to determine whether the agreement should be approved or disapproved, or issue findings and awards.
>
> (c) Agreements that provide for the payment of less than the full amount of compensation due or to become due and undertake to release the employer from all future liability will be approved only where it appears that a reasonable doubt exists as to the rights of the parties or that approval is in the best interest of the parties.

The OSA placed Petitioner on notice that the lack of medical records and the lack of support for a "Beltran" finding are the basis for the OSA. The Petition does not address these deficiencies.

The date of injury is a CT ending April 21, 2022. The C&R reflects that no temporary disability, permanent disability or medical treatment has been paid to date. The C&R does not

[50] Petition for Reconsideration, Page 12, Lines 5-17.

reference any medical reporting finding that Applicant has reached maximum medical improvement. The C&R indicates that Applicant's TD rate is $453.33. It is unclear from the evidence provided whether this Applicant has a claim for 104 weeks of TD pursuant to Labor Code Section 4656. If so, Applicant has a potential claim of $47,146.32 in TD.

Additionally, the body parts listed in the C&R are: 1) 100- Head; 2) 130 -Eye; 3) 300- Upper Ext; and 4) 330- Hand. The C&R includes language that Applicant is not alleging injury to any other body parts.

This is in conflict with the Application for Adjudication which in addition to those four body systems listed in the C&R, also pleads the following (emphasis added):

> DUE TO REPETITIVE WORK. BODY PARTS INJURED 100 HEAD 130 EYES 300 BI-UPPER EXTREM 330 BI-HANDS 320 BI- WRISTS 340 BI-FINGERS 420 **LOWER BACK 500 BI-LOWER EXTREM 519 BI-LEGS 513 BI-KNEE 530 BI-FEET 520 BI-ANKLES 410 ABDOMEN 842 PSYCHE 841 STRESS**

According to the "comments" added to Paragraph 9 of the C&R, the "settlement is based on the present medical record". However, the medical records provided by the parties are sparse.

With the settlement the parties filed reporting from Dr. Edwin Haronian signed February 6, 2024, November 17, 2023, and September 21, 2023.[51] The doctor's reporting reflects that Applicant is "status post left total hip arthroplasty and left total knee arthroplasty", that *Defendant was not paying for the medical treatment,* and that after Applicant has sufficiently recovered from the surgeries to his left hip and knee, Applicant would be undergoing a right total knee arthroplasty. The doctor reported that Applicant walked with an antalgic gait and was using a cane. This reporting also stated that Applicant was suffering from both cervical and lumbar radiculopathy.

The report from September 2023 states that Applicant was to remain on TTD.
The report from Dr. Haronian dated November 17, 2023, includes diagnosis for the cervical spine, lumbar spine, and injuries to one or more wrist, shoulder, and knee.

These body parts - the left hip, left knee, right knee, cervical spine, and lumbar spine - are not referenced in the C&R. There is a lack of medical reporting that provides this Court with guidance as to the future medical treatment this Applicant will require (other than a right total knee

[51] EAMS ID# 51247413

arthroplasty - as in, total knee replacement - is planned) or the extent of his permanent impairment (other than that he walks with a cane, has difficulty with prolonged standing and ambulation, and has a reduction in his functional capacity and activities of daily living).

No medical reporting or other evidence has been submitted to indicate there is a question of doubtful liability on the employer's part for this claim.

Additionally, it is noted that Petitioner has submitted cashiers checks for Applicant and Applicant's counsel[52], as well as for Dr. Haronian.[53] However, Dr. Haronian reported that both Applicant's left total hip surgery and left knee surgery were performed by a Dr. Solberg "on a private basis". No reporting from Dr. Solberg has been filed and there is no proof that Dr. Sol berg's treatment lien has been addressed by Petitioner.

Since the OSA was issued no party has since filed additional medical records to explain the basis of the settlement. The settlement includes the "head" and "eye" as body parts, but there are no medicals addressing these body parts, or otherwise an explanation of how these body parts are valued in the settlement.

Further, Petitioner was requesting a "Thomas" finding (such terminology is a relic of the vocational rehabilitation era that has since been more commonly replaced by the "Beltran" vernacular germane to Supplemental Job Displacement Vouchers), without setting forth any information that evinces the existence of facts or issues that raise the substantial possibility that adverse findings would totally bar the applicant's entitlement to any benefits for the injury alleged.

These are deficiencies that potentially could have been addressed at the Hearing on May 16, 2024 (as the OSA states, "Absent written responses in 30 days, and absent an Order to the contrary, this issue will be heard at the Anaheim District Office before the undersigned Judge at 8:30 a.m., on May 16, 2024"). Since as of the time the Petition was filed, Petitioner had yet to file additional medical records, provide support for the "Beltran" finding or otherwise amend the C&R, this Court cannot presume that the C&R will be adjudged adequate. Again, no final decision has been made and this Court has afforded the parties an opportunity to be heard on the matter.

Accordingly, all other issues have not been rendered "moot" as asserted by Petitioner.

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[52] EAMS ID# 51332637
[53] EAMS ID# 51332638

JOINDER

This Court does not presume that the submitted C&R will be deemed adequate, and joinder of additional parties may be necessitated. This Court has issued a Notice of Intent to join additional employers, but has not yet joined them. Whether additional parties are necessary defendants to this case has not yet been determined by this Court (though it is noted that no party subject to the NOI re joinder has filed an objection since service of the NOIs was effectuated on April 4, 2024).

A WCI is empowered to join additional parties necessary for the full adjudication of the case at any time. [Labor Code§ 5307.5(b); Cal. Code Regs., tit. 8, § 10380] Only the party joined may properly claim to be aggrieved by the joinder. [See *Eleijian v. HR Comp Staffing, LLC,* (2015) 2015 Cal. Wrk. Comp. Comp. P.D. LEXIS 279, *11-12 (Appeals Board noteworthy panel decision) ("While it can be assumed that applicant attorney is not happy with the addition of another party to an already complicated matter, I do not believe that applicant is actually 'aggrieved' by the order."); see also *Butler v. Charles Schwab*, 2012 Cal. Wrk. Comp. P.D. Lexis 270 ("We cannot discern how Schwab, or ESIS, or Bohm can be aggrieved by the joinder of Zurich.")

Concerning joinder of a party, the WCAB recently issued the decision of *Aguero v. Brian Hunt DPI; UEBTF*, (2024 panel decision) [ADJ121643], which addressed the best practice for judges to follow in joining additional parties pursuant to WCAB Rule 10832: "Here, ... in keeping with due process, the better practice is to issue a notice of intention."[54]

In the present matter, this Court has ensured that the parties to be joined have been properly served and that they are afforded a full opportunity to either object or participate in the proceedings.

Petitioner has not set forth a legal basis for why these actions exceed this Court's jurisdiction or how Petitioner is being prejudiced or irreparably harmed by this Court's actions regarding joinder (particularly when Petitioner filed a petition to join an additional party, which this Court denied without prejudice).

Petitioner confuses the NOIs re Joinder with actual orders to join these additional parties. These parties have yet to be joined and a determination has yet to be made whether joinder of these

[54] "Here, there was no hearing and thus no minutes and summary recording stipulations, defining the issues, and identifying the evidence related to the potential joinder of the substantial shareholders. In addition, the WCJ issued the Joinder Order without an opinion on decision. As a result, there is no meaningful opportunity to review the WCJ's decision to join petitioner. More significantly, a fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal."

additional parties is necessary. A hearing on the issue, set for May 16, 2024, has been cancelled as a result of the Petition for Reconsideration.

Pending a hearing on these matters, Petitioner's Petition for Reconsideration/Removal is premature.

EMPLOYMENT

Pursuant to Labor Code Section 3602(d)(l), an employer may secure the payment of compensation on employees provided to it by agreement with another employer by entering into a valid and enforceable agreement with that other employer under which the other employer agrees to obtain, and has, in fact, obtained workers' compensation coverage for those employees. Thus, a general and special employment relationship can be established by contract between a general and a special employer. See *Serrano v. Select Staffing*, (2016) 81 Cal. Comp. Cases 777.

However, "in order to fulfill its part of the bargain under a Section 3602(d) agreement, the leasing employer must inform its insurance company that it is engaged in employee leasing and obtain a separate policy for workers provided to a client. ff an entity agrees to be an employer under Section 3602(d) but does not obtain workers' compensation insurance and does not process payroll, that entity is not an employer." See *Santelices v. Baron HR, LLC*, 2020 Cal. Wrk. Comp. P.D. Lexis 10 [emphasis added].

At this point, Petitioner has neither established that it entered into a valid and enforceable contract with any co-employer, nor established the existence of a valid and enforceable agreement. Insurance Code Section 11663 address liability as between insurers of general and special employers, which is dependent in part on whether the special employer has the applicant on its payroll. No determination has been made at this time as to whether Applicant was on Petitioner's payroll or on a "co-employers" payroll. See *Santelices v. Baron HR, LLC*, 2020 Cal. Wrk. Comp. P.D. Lexis 10.[55]

[55] An agreement with another employer that a PEO will act as a general employer is insufficient to render the PEO applicant's employer if the PEO did not act as applicant's employer in some fashion, for example, by processing payroll and issuing paychecks or obtaining workers' compensation insurance."; "A PEO or similar entity engaging in employee leasing cannot be self-insured and is subject to specific rules promulgated by the Insurance Commissioner. (Lab. Code,§ 3701.9; Ins. Code,§§ 11651, 11657, 11658.) "Every workers' compensation insurer shall adhere to a uniform experience rating plan filed with the commissioner by a rating organization4 designated by the commissioner and subject to his or her disapproval." (Ins. Code, § l1734(a).) The Insurance Commissioner has adopted a Unifom Statistical Reporting Plan (USRP) and an Experience Rating Plan (ERP) to facilitate reporting of data and assignment of an experience modification to each employer that is experience rated.5 (Ins. Code, §§ 11734, 11736; Allied Interstate Inc. v. Sessions Payroll Management Inc. (2012) 203 Cal.App.4th 808, 137 Cal. Rptr. 3d 516.) In order to prevent employers from improperly avoiding an unfavorable experience modification or selling access to a favorable experience modification, the ERP includes rules delineating which entities are subject to a particular experience modification.6 Insurance policies issued to employers engaged in an employee leasing arrangement7 must comply

The documents produced thus far do not make it clear to this Court whether Petitioner in the capacity of a PEO is the general employer "by contract".[56]Accordingly, at this stage in the proceedings, Petitioner has admitted it is uninsured and has not provided substantial evidence clarifying whose payroll Applicant was on at the time of injury.

Further development of the record is warranted as to this issue. And this information is likely germane to the issue of whether further sanctions should issue.

ADJUDICATION OF INSURANCE COVERAGE

Petitioner asserts that this WCJ is exceeding his authority by setting the issue of "insurance coverage" for Trial. Tthat is incorrect. Petitioner has admitted that it is uninsured. Its insurance coverage or lack thereof is not in dispute. And insurance coverage of other parties has not been raised as a triable issue by this Court.

While insurance coverage itself is not at issue, employment is an issue specified for trial, and whether there is good cause to join additional parties; these are issues discrete from that of insurance coverage. Petitioner has been made aware that whether Employers Outsourcing meets the definition of employer is an issue for trial.

The issue of identity of Applicant's employer(s) - including general and special employers - must be determined by a WCJ unless parties stipulate to submit the issue to arbitration. See Labor Code Section 5275; *Santelices v. Baron HR, LLC*, 2020 Cal. Wrk. Comp. P.D. Lexis 10[57]; *Sanchez v. Baron HR*, 2019 Cal. Wrk. Comp. P.D. Lexis 509.

As noted in the Petition, there are pending Notices of Intent to join additional parties. These notices were not based on any petition for joinder filed by any party, but based on the pleadings, representations and evidence provided by Petitioner who admitted it is uninsured.

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with certain requirements found in the ERP, including a requirement that there be a separate policy written to cover the liability of the workers provided to a client by the labor contractor."

[56] See *Viveros v. Quality Staffing Services*, 2019 Cal. Wrk. Comp. P.O. Lexis 401: "The Appeals Board held in the case of *Corona v. Koosharem dba Select Staffing* (2016 Cal. Wrk. P.D .LEXIS 542) that even after a general and special employer entered into agreements, pursuant to labor Code §3602(d), the employers remain jointly and severally liable."

[57] "As an initial matter, we note that the outcome of the insurance coverage dispute may depend on the identity of applicant's employer or employers. Unless the parties stipulate to submit the issue of employment to an arbitrator, the issue of employment is determined by a workers' compensation administrative law judge, while the issue of insurance coverage is subject to mandatory arbitration."

Petitioner argues that an "Order" from this Court dated April 18, 2024, violates Labor Code Section 5275 because issues of insurance coverage are subject to mandatory arbitration. However, no "Order" was issued on that date which concerned insurance coverage. The only reference to insurance coverage was a statement that since Petitioner has acknowledged that it was uninsured that Petitioner should be ready to address at the hearing set for May 16, 2024, whether it was subject to penalties pursuant to Labor Code Section 3722:

> "Further, Defendant has submitted a Compromise and Release settlement agreement which includes an acknowledgement that the Defendant is uninsured. Defendant is notified that the hearing set for May 16, 2024, shall address, inter alia, whether the Defendant shall be assessed a penalty pursuant to Labor Code Section 3722."

LABOR CODE SECTION 3722

As set forth in Labor Code Section 3712, "The securing of the payment of compensation in a way provided in this division is essential to the functioning of the expressly declared social public policy of this state in the matter of workers' compensation."

Labor Code Section 3716 sets forth the basis to join the Uninsured Employers Benefits Trust Fund (UEBTF). As noted above, there is no evidence that benefits have been paid to Applicant. Upon the admission by Petitioner that it is uninsured, this Court raised the prospect of joining the UEBTF. Petitioner has argued that joinder of UEBTF is unwarranted.[58]

Pursuant to Labor Code Section 3722(d), "If upon the filing of a claim for compensation under this division the Workers' Compensation Appeals Board finds that any employer has not secured the payment of compensation as required by this division and finds the claim either non-compensable or compensable, the appeals board shall mail a copy of their findings to the uninsured employer and the director, together with a direction to the uninsured employer to file a verified statement pursuant to subdivision (e). After the time for any appeal has expired and the adjudication of the claim has become final, the uninsured employer shall be assessed and pay as a penalty ... "

[58] A WCJ is not obligated to wait for an adjudication on the issue of employment prior to joining the Uninsured Employers Benefits Trust Fund. To the extent that any grievances could be claimed to the joinder, they could only be asserted by the Uninsured Employment Benefits Trust Fund and not the uninsured Defendant. See *Calvo v. Five Properties*, 2022 Cal. Wrk. Comp. P.D. Lexis 297.

As set forth above, a Workers' Compensation Judge functions on behalf of the Appeals Board until reconsideration is granted. Pursuant to Labor Code Section 3716, which is within the same Article as Section 3722, this Court has jurisdiction to join the UEBTF.

In the "Notice Re Sanctions; and Order to Produce Witnesses" dated April 18, 2024, this Court placed Petitioner on notice that the issue of whether a penalty should be assessed pursuant to Labor Code Section 3722 would be addressed at the upcoming trial – this was not a notice of intent to award sanctions per Section 3722. Petitioner's objection to this notice was via the Petition for Reconsideration.

Petitioner avers that this Court has no jurisdiction to decide issues regarding sanctions pursuant to Labor Code Section 3722. Petitioner cites no case law in support of its position.

In the matter of *Betancourt v. Checkmate Staffing Services*, 2008 Cal. Wrk. Comp. P.D. Lexis 405, the Board held that it does not have jurisdiction to make findings and orders relating to assessment of penalties under Labor Code Section 3722. There is no discussion by the Appeals Board on the issue, and the decision is non-binding. However, this Court accepts the prior finding of the Appeals Board on this issue and does not intend to have the issue submitted for decision.

Accordingly, Petitioner's complaint as to Section 3722 is rendered moot.

IV. RECOMMENDATION

Petitioner has not established that it will be substantially prejudiced or irreparably harmed if its Petition is not granted. It is therefore respectfully recommended that the Petition be denied.

DATE: May 20, 2024

James P. Finete
WORKERS' COMPENSATION JUDGE