

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

RONNIE BARNES, *Applicant*

vs.

**STATE OF CALIFORNIA, EMPLOYMENT DEVELOPMENT DEPARTMENT,
Legally Uninsured, Adjusted by STATE COMPENSATION INSURANCE FUND,
STATE EMPLOYEES, *Defendants***

**Adjudication Number: ADJ4399741 (LBO 0115442)
Long Beach District Office**

**OPINION AND ORDER
DISMISSING PETITION FOR
RECONSIDERATION AND
DENYING PETITION
FOR REMOVAL¹**

In the Order Vacating Submission and Setting Further Proceedings of July 9, 2024, the Workers' Compensation Administrative Law Judge ("WCJ") vacated the WCJ's prior submission order of June 12, 2024. In addition, the WCJ ordered that further proceedings "shall be held in person" at a status conference set for August 26, 2024 at 8:31 a.m. The WCJ also included the following footnote in the Order Vacating Submission and Setting Further Proceedings of July 9, 2024: "It is well-established that a decision must be based on admitted evidence in the record. (*Hamilton v. Lockheed Corp.* (2001) 66 Cal. Comp. Cases 473, 476.) In this matter, while the parties have filed trial briefs in support of their respective positions, no evidence was offered regarding the issue submitted. As such, the submission shall be vacated so that the parties can offer evidence in support of their respective positions."

Applicant, who is self-represented, filed a timely petition for reconsideration of the Order Vacating Submission and Setting Further Proceedings of July 9, 2024. Applicant alleges that he

¹ Commissioners Deidra E. Lowe, Marguerite Sweeney, and Frank M. Brass signed the Appeals Board's previous decision in this matter, i.e., the Opinion and Order Denying Petition for Reconsideration dated November 2, 2017. Commissioners Lowe, Sweeney, and Brass are no longer members of the Appeals Board. New panel members have been substituted in their place.

“filed his amended trial brief on April 16, 2024 with four exhibits as reference,” and that “on July 7, 2024 applicant filed his response to defendant’s pre-trial brief and his post-trial brief restating his facts and EAMS evidence numbers for reference.”

The Appeals Board did not receive an answer from defendant.

As a preliminary matter, we note that 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 August 5, 2024, and the sixtieth day following the date of transmission is October 4, 2024. This decision is issued on or before October 4, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

We also note that 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 August 5, 2024 and the case was transmitted to the Appeals Board on August 5, 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 August 5, 2024.

Turning to the merits of applicant's petition for reconsideration, we have considered the allegations of applicant's petition and the contents of the WCJ's Report and Recommendation ("Report") with respect thereto. Based on our review of the record, and for the reasons stated in said Report,² which we adopt and incorporate to the extent indicated in the attachment to this opinion, we will dismiss applicant's petition to the extent it seeks reconsideration and deny it to the extent it seeks removal.

Addressing applicant's petition in further detail, we note that 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".])

² In his Report, the WCJ points out that "the parties referenced four bills, AB 227, SB 228, SB 899, and SB 863 [as being] in the issue. Each bill is rather extensive and the parties did not articulate which particular section of the aforementioned bills that they believed applied or should not apply to the matter at hand." To the extent the WCJ is implying or suggesting that the issue presented by the parties should be further narrowed to enable the WCJ to make a sensible decision on the merits, we agree.

Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the WCJ's Order Vacating Submission and Setting Further Proceedings of July 9, 2024 solely resolves an intermediate procedural or evidentiary issue or issues. The Order does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a "final" decision, and applicant's petition will be dismissed to the extent it seeks reconsideration.

Treating applicant's petition for reconsideration as a petition for removal, we note that removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that 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*.) 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, for the reasons stated in the WCJ's Report, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to the applicant.

Finally, we note that applicant filed an "objection" in addition to the petition for reconsideration discussed above. Treating this objection as a supplemental petition, we reject the objection pursuant to WCAB Rule 10964(a). The rule provides that "[w]hen a petition for reconsideration...has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board." (Cal. Code Regs., tit. 8, § 10964(a).) Although the Board has discretion to accept and consider a supplemental petition, parties must follow Rule 10964 and seek permission from the Board to submit a supplemental pleading. In addition, parties must attach the proposed pleading to the request. We reject applicant's "objection" because he did not comply with WCAB Rule 10964.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **DISMISSED**.

IT IS FURTHER ORDERED that applicant's Petition for Reconsideration, taken as a Petition for Removal, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER



/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 16, 2024

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

**RONNIE BARNES
STATE COMPENSATION INSURANCE FUND**

JTL/ara

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

REPORT AND RECOMMENDATION
OF WORKERS' COMPENSATION JUDGE ON
PETITION FOR RECONSIDERATION

I.
INTRODUCTION

Date(s) of Injury: 3/12/1981

Occupation: Employment Claims Assistant

Body Parts Accepted: Right Knee and Back

Identity of Petitioner: Applicant, in pro per

Timeliness: The Petition was timely filed on July 29, 2024.

Verification: The Petition was verified.

Petitioner's Contentions: The Petitioner contends that the Order dated July 9, 2024 which vacated the submission and ordered supplemental proceedings was in error. The Petitioner seeks reconsideration upon the following grounds:

(1) The evidence does not justify the findings of fact, and

(2) The findings of fact do not support the order, decision or award.

II.
FACTS

This matter involves a case in which Judge Joel Gray issued an Order Denying Applicant's Petition to Reopen and Supplemental Findings and Award for Litigation Expense and Self-Procured Medical Treatment in January 26, 1984¹. Many hearings have occurred since the issuance of that Award.

On March 26, 2024, the parties appeared for trial. The parties represented that they had narrowed the issue for the court to address².

On April 29, 2024, the parties went to trial on the issue that they framed. The issue was whether AB 227, SB 228, SB 899, and SB 863 amend or alter the 1/26/1984 Award³. At the trial, the parties declined to offer any exhibits because they believed it to be a legal issue⁴. The parties requested an opportunity to file post-trial briefs. The parties were given the deadline of June 12, 2024 to file their trial briefs. On that date, the matter was submitted⁵.

¹ As part of the Award, Defendant was assessed a 10% penalty of self-procured medical treatment and all further medical treatment. See Order Denying Applicant's Petition to Reopen and Supplemental Findings and Award for Litigation Expense and Self-Procured Medical Treatment dated January 26, 1984.

² Minutes of Hearing dated March 26, 2024.

³ Minutes of Hearing dated April 29, 2024, page 3, lines 3-4.

⁴ Minutes of Hearing dated April 29, 2024, page 3, lines 5-6.

⁵ Minutes of Hearing dated April 29, 2024, page 1, lines 21-23.

On July 9, 2024, after review of the record submitted, the undersigned issued an Order Vacating Submission and Setting Further Proceedings⁶. Pursuant to that Order, further proceedings were scheduled for August 26, 2024 at 8:31 a.m.

It is from this Order vacating and setting further proceedings that the Petitioner has filed a timely Petition for Reconsideration.

To date, there has been no response filed by the Defendant to the Petition for Reconsideration.

III. DISCUSSION

RECONSIDERATION

The Petitioner seeks reconsideration on two grounds. First, the Petitioner alleges that the evidence does not justify the findings of fact. And secondly, the Petitioner alleges that the findings of fact do not support the order, decision or award.

In this matter, the Petitioner overlooks that the parties did not offer any evidence at trial relevant to the issue presented⁷. The Petitioner also overlooks that no findings of fact have been issued in regard to the question presented to the court. Ultimately, the undersigned has not yet taken any action as it pertains to the issue presented to the court upon which a Petition for Reconsideration can be based. Therefore, the Petition for Reconsideration is [subject to dismissal for lack of a final order issued by the WCJ].

REMOVAL

Should the Appeals Board deem the Petition for Reconsideration a Removal, the undersigned responds as follows:

Removal is an extraordinary remedy rarely exercised by the Appeals Board. Cortez v. Workers' Comp. Appeals Bd. (2006) 136 Cal. App. 4th 596, 599. Title 8, California Code of Regulations §10955 sets forth the grounds for filing a Petition for Removal. Specifically, the Petitioner must demonstrate that the order, decision or action will result in significant prejudice and/or irreparable harm.

In this matter, the parties submitted the case on the issue of whether AB 227, SB 228, SB 899, and SB 863 amend or alter the January 26, 1984 Award issued by Judge Joel Gray. At trial, neither party offered any evidence because they believed that it was a legal question⁸. After the matter was submitted, the record was reviewed and it was determined that the submission should be vacated. It is well established that a decision must be based on admitted evidence in the record⁹.

⁶ The submission was vacated because there was no evidence offered and admitted into the record on the date of the trial by the Parties which addressed the issue that the parties submitted to the court.

⁷ Minutes of Hearing dated April 29, 2024, page. 3, lines 5-6.

⁸ Minutes of Hearing dated April 29, 2024, page. 3, lines 5-6.

⁹ Hamilton v. Lockheed Corp. (2001) 66 Cal. Comp Cases 473, 476.

Here, no documentary or testimonial evidence was offered by either party regarding the issue submitted. Furthermore, the parties referenced four bills, AB 227, SB 228, SB 899, and SB 863 in the issue. Each bill is rather extensive and the parties did not articulate which particular section of the aforementioned bills that they believed applied or should not apply to the matter at hand. Ultimately, a workers' compensation judge is vested with the power, jurisdiction and authority to hear and determine all issues of fact and law and issue any interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of a case¹⁰. The undersigned exercised that authority in issuing the interim order vacating the submission and setting further proceedings in order to provide the parties with due process by providing them with an opportunity to present evidence regarding the issue at hand. Ultimately, providing the parties with an opportunity to have a complete record upon which a decision can be made in no way significantly prejudices or causes irreparable harm to either party. As such, should the Petition for Reconsideration be deemed a Removal, the Petition does not meet the standards set forth in Title 8, California Code of Regulations Section 10955.

IV.
RECOMMENDATION

It is respectfully requested that the Petition for Reconsideration dated July 29, 2024 be denied.

DATE: August 5, 2024

Dewayne P. Marshall
WORKERS' COMPENSATION JUDGE

¹⁰ Title 8, California Code of Regulations Section 10330.