

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

VICTORIA NUNEZ, *Applicant*

vs.

**TRINITY HEALTH,
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ18581542
Fresno District Office**

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

Applicant seeks removal, or in the alternative, reconsideration, of the June 19, 2024 Order wherein the presiding workers' compensation administrative law judge (PWCJ) denied applicant's Petition for Change of Venue.

Applicant contends that pursuant to Labor Code sections¹ 5501.5(a) and 5501.6, good cause exists to transfer venue to Van Nuys due to the anticipated hardships of travel and the fact that applicant now resides in Los Angeles County full time. (Petition for Removal (Petition), pp. 5-8.)

We have received an Answer from defendant and the PWCJ has prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition, the Answer, the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will dismiss the Petition as one for reconsideration, grant the Petition as one for removal, rescind the June 19, 2024 Order, and return this matter to the trial level for further proceedings consistent with this decision.

¹ All further references will be to the Labor Code unless otherwise indicated.

FACTS

Applicant claimed that while employed by defendant as a nurse on July 30, 2022, she sustained an industrial injury to her head, left arm, bilateral shoulders, and back. Applicant also alleged compensable consequence injuries, including chronic pain syndrome, neurological issues, gait derangement, and injury to the psyche.

At the time of applicant's filing of her Application for Adjudication of Claim (Application), applicant resided part time in Los Angeles County. Applicant attorney's place of business was, and continues to be in Sherman Oaks, California, which is also located in Los Angeles County. Based upon the foregoing, Van Nuys was ultimately selected as applicant's venue of choice.

Pursuant to sections 5501.5(c) and 5501.6, defendant filed a Petition for Change of Venue from Van Nuys to Fresno. Defendant argued that because the injury occurred in Fresno and applicant and witnesses were all located in Fresno, the proper venue was Fresno. At the time, applicant was residing three days a week in Fresno and the remaining four days a week in Los Angeles County. An Order granting the change of venue issued without objection.

Applicant alleges that subsequently her employer was unable to accommodate applicant's work restrictions and applicant was taken off work. As a result, applicant began to reside full time in Los Angeles County.

On June 4, 2024, applicant then filed her own Petition for Change of Venue, requesting that the case venue to be changed back to Van Nuys.

On June 5, 2024, the PWCJ issued a notice of intention to change venue to Van Nuys.

On June 6, 2024, defendant issued a timely Objection, and on June 19, 2024, the PWCJ issued an Order denying applicant's Petition for Change of Venue.

According to his Report, the PWCJ based his decision on the parties' ability to request leave of court for a remote appearance. The PWCJ also believed that defendant had established good cause for the denial, including evidence of applicant's (part time) residency in Fresno County at the time of injury, and the filing of a Declaration of Readiness to Proceed and trial setting, which defendant argued constituted waiver by applicant to venue in Fresno County.

DISCUSSION

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

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

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

Here, according to Events, the case was transmitted to the Appeals Board on July 17, 2024, and 60 days from the date of transmission is September 15, 2024, which is a Sunday. The next business day from the 60-day date of transmission is Monday, September 16, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on September 16, 2024. As such, we have timely acted on the petition as required under section 5909(a).

Further, section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. This ensures that parties are notified of the accurate date for the commencement of the 60-day period during which the Appeals Board is to act upon a petition. As noted above in section 5909(b)(1), transmission of the case to the Appeals Board in

² WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

EAMS constitutes notice to the Appeals Board, and as noted above in section 5909(b)(2), service of the report and recommendation constitutes notice of transmission to the parties.

According to the proof of service, the Report in this case was served on July 17, 2024. The case was also transmitted to the Appeals Board on July 17, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. As such, parties were provided with notice of transmission per section 5909(b)(1) since the Report was served per section 5909(b)(2). Parties were therefore provided with actual notice as to commencement of the 60-day period.

We also find it relevant here to discuss the distinction between a petition for reconsideration and a petition for removal. A petition for reconsideration is taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order is defined as one that determines “any substantive right or liability of those involved in the case” or a “threshold” issue fundamental to a claim for benefits. (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd.* (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]; *Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Threshold issues include, but are not limited to, injury AOE/COE, jurisdiction, the existence of an employment relationship, and statute of limitations. (See *Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd.* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian, supra*, at 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, and other similar issues. Here, the Order addresses only an intermediate procedural issue. It does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a “final” decision, and the Petition for Reconsideration will be dismissed.

Removal is an extraordinary remedy rarely exercised by the appeals board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The appeals board will grant removal only if the petitioner can show that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a).) The petitioner must also demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (*Id.*) In the instant case, we believe substantial prejudice or irreparable harm will result if removal is denied and reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to applicant. As such, we will grant the Petition as one for removal.

Turning now to the issue of venue, pursuant to section 5501.5(a), an application for adjudication of claim may be filed:

- (1) In the county where the injured employee or dependent of a deceased employee resides on the date of filing.
- (2) In the county where the injury allegedly occurred, or, in cumulative trauma and industrial disease claims, where the last alleged injurious exposure occurred.
- (3) In the county where the employee's attorney maintains his or her principal place of business, if the employee is represented by an attorney.

(Lab. Code, § 5501.5(a).)

Here, the Application was filed in Los Angeles County, which was and continues to be the county wherein applicant attorney's principal place of business is located. As noted above, at the time, applicant alleges that she was residing part time in Los Angeles County and part time in Fresno County. She further alleges that after the PWCJ's Order for change in venue from Van Nuys to Fresno, her employer became unable to accommodate applicant's work restrictions, thereby forcing applicant to move to Los Angeles County full time.

Section 5501.6 addresses the issue of change of venue. Pursuant to this section:

- (a) An applicant or defendant may petition the appeals board for a change of venue and a change of venue shall be granted for good cause. The reasons for the change of venue shall be specifically set forth in the request for change of venue.
- (b) If a change of venue is requested for the convenience of witnesses, the names and addresses of these witnesses and the substance of their testimony shall be specifically set forth in the request for change of venue.

(Lab. Code § 5501.6.)

In her Petition for Change of Venue, applicant argued that there was a good cause to change the venue back to Van Nuys since travel to Fresno County for hearings would lead to “extreme hardship” due to applicant’s “chronic pain syndrome” and “neurological issues” preventing her from being able to “drive long distances.” (Petition for Change of Venue, June 6, 2024, p. 4.) Aside from the potential hardship, applicant noted that her attorney and treaters were also all located in Los Angeles County.

In its Objection, defendant contends that under section 5501.5(a)(2), the venue “shall” remain in Fresno as this is “the county where the injury allegedly occurred.” (Defendant’s Response to Petition for Removal, August 12, 2024, p. 2.) Section 5501.5(a), however, contains no such requirement. Although it is true that case venue may be based upon the location of an alleged injury, it is equally true that venue may also be based upon the location of applicant’s residence or applicant attorney’s principal place of business. As noted above, both applicant’s residence and applicant’s attorney’s principal place of business are in Los Angeles County.

The WCJ argues that parties may rely upon “remote hearings” going forward and there is no current evidence that applicant’s testimony “will be required at any hearing or Trial.” (Report, p. 5.) WCAB Rules 10816 and 10510 govern electronic appearances and WCAB Rule 10816 states in relevant part: “If a party intends to appear electronically at any hearing, they shall file a petition showing good cause pursuant to rule 10510.” (Cal. Code Regs., tit. 8, § 10816.) WCAB Rule 10510 requires, among other things, that “a request for action by the Workers’ Compensation Appeals Board...shall be made by petition.” (Cal. Code Regs., tit. 8, § 10510.)

Under the above WCAB Rules, electronic appearances are not a given. A petition is to be filed, and the party must establish good cause. Further, there is no guarantee that electronic appearances will be available indefinitely or will be granted with the same ease of recent years. Additionally, although there is no current anticipated need for applicant’s testimony, there is also no foretelling whether such testimony will be necessary in the future.

The WCJ argues that applicant’s change from a “hybrid residence to living full time in Los Angeles County” does not reinvoke section 5501.5(a) and underscores the fact that the “issue has been fully adjudicated” since applicant “did not object” to defendant’s original Petition for Change of Venue or the resulting Order. (Report, p. 5.) Although we agree that the time frame for the application of section 5501.5(a) has passed, we believe that section 5501.5(a) is instructive insofar

as section 5501.6 is concerned. As noted above, applicant, applicant's attorney, and applicant's treaters are all located in Los Angeles County. Although the residency of any one of these may not be enough to establish good cause, applicant has also indicated that travel to Fresno County for hearings would lead to extreme hardship due to applicant's ongoing health issues due to the alleged work injury. (Petition for Change of Venue, June 6, 2024, p. 4.)

Defendant argues that applicant's filing of a Declaration of Readiness to Proceed and the setting of a trial in Fresno constitute waiver. There is nothing within the Labor Code or case law, however, to suggest that applicant has waived her right to request a change of venue simply due to the filing of a Declaration of Readiness to Proceed or the setting of a trial. The issue of venue cannot and should not act as a backstop to other ongoing issues which require litigation. Applicant's lack of objection to defendant's original Petition and the resulting Order similarly do not constitute waiver. Unforeseen circumstances may arise which necessitate a change in venue. It is for this reason we see no specific exceptions outlined within section 5501.6.

Further, as explained in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [33 Cal.Comp.Cases 350-351], a decision "must be based on admitted evidence in the record" (*Id.* at p. 478) and must be supported by substantial evidence. (§§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Aside from providing assurance that due process is being provided, this "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) Here, it is evident that a further hearing is necessary to fully address applicant's arguments for a change in venue as there is not enough evidence in the record to support a denial of her Petition. Pursuant to *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [97 Cal Rptr. 2d 852, 65 Cal.Comp.Cases 805], all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (A fair hearing is "... one of 'the rudiments of fair play' assured to every litigant ..." (*Id.* at 158.)) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, "the commission ... must find facts and declare and enforce rights and liabilities, - in short, it acts as a

court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law.” (*Id.* at p. 577.) 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. (See *Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at 157- 158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

Accordingly, we dismiss the Petition as one for reconsideration, grant it as one for removal, rescind the June 19, 2024 Order, and return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the June 19, 2024 Order by the PWCJ is **DISMISSED**.

IT IS FURTHER ORDERED that applicant's Petition for Removal of the June 19, 2024 Order by the PWCJ is **GRANTED**.

IT IS FURTHER ORDERED that the June 19, 2024 Order denying applicant's Petition for Change of Venue is **RESCINDED**.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and decision by the PWCJ consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, 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.

**VICTORIA NUNEZ
LAW FIRM OF ROWEN, GURVEY & WIN
DUNCAN CASSIO LUCCHESI BINKLEY & VAN DOREN**

RL/cs

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

CS