

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

MARIA JESUS SERVIN, *Applicant*

vs.

KRAFT HEINZ FOODS CO.;
Administered by GALLAGHER BASSETT SERVICES, INC., *Defendants*

**Adjudication Number: ADJ12089427
Anaheim District Office**

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

Applicant seeks removal of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on October 30, 2020. As relevant herein, the WCJ found that applicant sustained injury arising out of and in the course of employment (AOE/COE),¹ that defective notice was provided by the Qualified Medical Evaluator (QME) Dr. Nima Yavari pursuant to Administrative Director (AD) Rule 34(a), and that applicant's attorney's advocacy letter to the QME after receiving defendant's objection constituted an ex parte communication with the QME. The WCJ ordered a replacement QME panel pursuant to AD Rule 31.5(a)(11).

Applicant contends that her due process rights were violated when the WCJ rendered a decision on the advocacy letter that had not been raised as an issue in the pre-trial conference statement.

Defendant filed an Answer. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that we deny removal.

We have considered the allegations of the Petition, the Answer, and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and for the reasons discussed below, we will treat the Petition as one seeking reconsideration and affirm the F&O,

¹ We note that the WCJ adopted a stipulation by the parties that included injury AOE/COE.

except amend it to strike the finding that applicant's attorney's advocacy letter to the QME was an ex parte communication (Finding of Fact 4).

FACTUAL BACKGROUND

Applicant, while employed from June 26, 1994, to November 15, 2018, as a machine operator by Kraft Foods Global, Inc., sustained injury arising out of and in the course of employment to her neck and lumbar spine. (Minutes of Hearing (MOH), October 29, 2020, p. 2:4-7.)

On October 29, 2020, at the hearing, the parties raised only one issue for the WCJ's consideration:

Whether the defendant is allowed a replacement panel pursuant to Rule 34(a) and Rule 31.5(a)(11) based on QME's failure to issue the QME Appointment Notification Form within 5 business days on defense counsel. Applicant's attorney failed to provide the QME with defense attorney's information. Applicant asserts defendant was placed on notice with applicant's own Appointment Notice served on 8/19/20 and applicant contends defendant's request for a Replacement Panel was untimely as it was filed 15 days from when they became aware per 8 CCR 31.5(a)(11).

(MOH, *supra*, at p. 2:18-24.)

DISCUSSION

I.

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

² All further statutory references are to the Labor Code unless otherwise stated.

A decision issued by the WCJ may address a hybrid of both threshold and interlocutory issues. If the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

The F&O here included a stipulated fact that applicant sustained injury AOE/COE to her neck and lumbar spine. Injury AOE/COE is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's inclusion of the stipulated fact rendered his decision a final order subject to reconsideration.

Although the F&O contains a finding on a threshold issue, applicant only challenges the WCJ's finding that her advocacy letter to the QME was an ex parte communication. This is an interlocutory decision and is subject to the removal standard rather than reconsideration pursuant to the discussion above. (See *Gaona, supra.*)

II.

Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice...." (*Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shiple*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision, holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.*)

Like the Court in *Shiple*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shiple, supra*, 7 Cal.App.4th at p. 1108.) Applicant's Petition was timely filed on November 19, 2020. Our failure to act was due to a procedural error and our time to act on applicant's Petition was tolled.

III.

Section 5904 provides that the petitioner for reconsideration "shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the

reconsideration is sought other than those set forth in the petition for reconsideration.” (Lab. Code, § 5904.)

Here, applicant only raised one issue in her Petition; the finding that applicant’s attorney’s advocacy letter to the QME was an ex parte communication. Thus, we only address this issue on reconsideration and leave the remainder of the F&O undisturbed.

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)(1)-(2); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

All parties in workers' compensation proceedings retain their fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157–158 [65 Cal.Comp.Cases 805].) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, 577, “[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.”

Due process guarantees all parties the right to notice of hearing and a fair hearing. (*Rucker, supra*, at 157–158.) 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.4 703, 710 [57 Cal.Comp.Cases 230].)

Here, the MOH reflects that the parties did not raise the issue of whether applicant’s attorney’s advocacy letter to the QME was an ex parte communication. (MOH, *supra*, at p. 2:18-24.) Thus, we are persuaded that applicant’s due process rights were violated when the WCJ made a finding on an issue that was not raised at trial. We note that in the Report, the WCJ acknowledged

that the ex parte communication finding was not material to the WCJ's order of a replacement QME panel. Therefore, we strike Finding of Fact 4.

Accordingly, we treat applicant's Petition as one seeking reconsideration, grant reconsideration, and affirm the F&O, except amend it to strike Finding of Fact 4.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the October 30, 2020 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the October 30, 2020 Findings and Order is **AFFIRMED**, **EXCEPT** it as **AMENDED** as follows:

[Finding of Fact 4 is rescinded in its entirety.]

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

DEIDRA E. LOWE, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 23, 2021

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

**MARIA JESUS SERVIN
LEWIS BRISBOIS ET AL
LAW OFFICES OF RAMIN YOUNESSI**

SS/ab

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