

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ROMUALDO FERREYRA, *Applicant*

vs.

**REWOOD EMPIRE VINEYARD;
ZENITH INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ10449684
Oakland District Office**

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

Applicant seeks reconsideration of the Finding and Order Re: Replacement QME Panel pursuant to 8 CCR § 31.5 (Represented Case) (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 30, 2020. As relevant herein, the WCJ found that Qualified Medical Evaluator (QME) Dr. David Willat could not schedule an examination within 60 or 90 days pursuant to Administrative Director (AD) Rule 31.5(a)(2). (Cal. Code Regs., tit. 8, § 31.5(a)(2).) The WCJ ordered the Medical Director to issue a replacement QME panel.

Applicant contends that the WCJ should not have replaced Dr. Willat because he discovered by happenstance that Dr. Willat was available for deposition on December 3, 7, 11, or 15, 2020.

Defendant filed an Answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report). The WCJ recommended that we treat the petition as one for removal and that the Petition for Removal be denied.

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 dismiss the Petition as one seeking reconsideration, grant the Petition as one seeking removal, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this decision.

FACTUAL BACKGROUND

The factual background is taken from the Report:

The parties appeared in front of me at a status conference on November 24, 2020, based upon defendant's October 15, 2020 Declaration of Readiness to Proceed (DOR). Defendant contends that in the time before its DOR, it had set Dr. Willat's deposition for April 22, 2020, June 8, 2020 and August 6, 2020. The first deposition was re-set due to COVID concerns, which is certainly an excusable reason for the rescheduling. When defendant attempted to get a new date following the cancellation of the third deposition date of August 6, 2020 date, it was advised that Dr. Willat was on a leave of absence until November. In e-mails attached to its Answer, defendant documents that it was informed on November 5, 2020 that Dr. Willat's leave of absence was extended until January 1 2021.

At the November 24, 2020 status conference, the following was set forth in the "Comments" section, "Due to unavailability of Dr. Willat, a replacement panel shall issue in the specialty of chiropractic medicine." No objection by applicant is referenced to this comment at the time of the hearing.

Applicant now contends that, based upon information obtained from another case (as set forth in an attachment to its Petition), Dr. Willat has been available for his deposition as early as December 3, 2020. Applicant also alleges that defendant's representations regarding Dr. Willat's availability for deposition at the time of the November 24, 2020 status conference were inaccurate.

(Report, *supra*, at p. 2.)

DISCUSSION

I.

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 F&O here did not determine any substantive right or liability and did not determine a threshold issue. Accordingly, the WCJ’s decision is not a final order and the Petition will be dismissed to the extent it seeks reconsideration. Instead, the F&O is subject to removal. For the reasons stated above, we will treat the Petition as one seeking removal.

II.

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 significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).)

A WCJ is required to “make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.” (Lab. Code, § 5313; see also *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-22 [2010 Cal. Wrk. Comp. LEXIS 74] (Appeals Board en banc).) As required by Labor Code section 5313 and explained in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Board en banc), “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” The WCJ’s opinion on decision “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.” (Citation omitted.) (*Id.* at p. 476.)

The WCJ's decision "must be based on admitted evidence in the record." (*Hamilton, supra*, at p. 476.) Part of the WCJ's responsibility is to "frame the issues and stipulations for trial." (*Id.* at p. 475.) In *Hamilton*, we held that the record of proceeding must contain, at a minimum, "the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence." (*Id.* at p. 476.)

The issue that we face on removal is that there is an insufficient record to evaluate applicant's Petition or the WCJ's F&O. For example, it is not entirely clear what issue the WCJ adjudicated. Defendant filed a Declaration of Readiness to Proceed (DOR) on the issue of a QME replacement panel. According to the DOR, defendant was unable to schedule a deposition of the QME. At the hearing on November 24, 2020, the WCJ issued a replacement panel "due to unavailability of QME Dr. Willat." (Minutes of Hearing, November 24, 2020, Comments.) However, on November 30, 2020, the WCJ issued the F&O, in which he ordered a QME replacement panel based on AD Rule 31.5(a)(2). This rule pertains to the replacement of a QME or QME panel when the QME cannot schedule an examination of the employee within 60 or 90 days of the initial request for an appointment. This rule does not pertain to the scheduling of a deposition of a QME.

Another issue is that the WCJ's decision must be based on the admitted evidence in the record. The only two exhibits that have been admitted as evidence in the record were submitted during an expedited hearing conducted in 2017 on issues unrelated to the current QME dispute. In the Report, the WCJ referenced or mentioned various documents, such as e-mails attached to defendant's Answer and documents attached to applicant's Petition. The record does not indicate that these documents have actually been admitted into evidence.

Upon return to the trial level, we recommend that the WCJ hold a hearing to allow the parties to frame the issues and any stipulations, submit exhibits as evidence, call witnesses, if necessary, lodge any objections, and make their legal arguments.

Accordingly, we dismiss the Petition as one seeking reconsideration, grant the Petition as one seeking removal, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

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

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

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the November 30, 2020 Findings and Order is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 16, 2021

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

**ROMUALDO FERREYRA
KNOPP PISTIOLAS
CHERNOW & LIEB
ZENITH INSURANCE COMPANY**

SS/abs

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