WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DERRICK LITTLE, *Applicant*

vs.

WALKER CONCRETE; LIBERTY MUTUAL, *Defendants*

Adjudication Number: ADJ2841961 (SJO 0191311)
Lodi District Office

OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the November 7, 2024 Order Taking Off Calendar wherein the workers' compensation administrative law judge (WCJ), in a Minutes of Hearing (MOH) dated November 7, 2024, ordered the November 7, 2024 status conference off calendar as he found "no valid issue pending."

Applicant contends that the status conference was taken off calendar without discussion of the issues listed within his Declaration of Readiness to Proceed (DOR) dated October 16, 2024. Applicant further contends that the WCJ "violated [his] constitutional rights" and Labor Code section[1] 132a. (Petition for Reconsideration (Petition), p. 3.)

We have not received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition and 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 applicant is not newly aggrieved.

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

FACTS

Applicant, while employed by defendant as a cement mixer driver, sustained an industrial injury on May 2, 1997 to his head, neck, back, left shoulder, left arm, and psyche. Along with the workers' compensation claim, applicant also filed a Labor Code section 132a claim.

The parties agreed to resolve the workers' compensation claim via a Stipulations with Request for Award. Settlement was based upon a 65% permanent disability valued at $65,662.50 with open future medical. The Award was issued by the WCJ on February 8, 2007.

At the same time, the parties also entered into a Compromise and Release Agreement resolving the limited issue of the Labor Code section 132a claim. The claim was settled in the amount of $7,000 and the Order Approving Compromise and Release was issued by the WCJ on February 8, 2007.

Thereafter, the parties entered into a Compromise and Release Agreement resolving future medical as well as the issues of earnings, temporary disability, apportionment, permanent disability, self-procured medical treatment, and vocational rehabilitation benefits/supplemental job displacement benefits. Settlement was for "$60,000 new money." The Order Approving Compromise and Release was issued by the WCJ on July 30, 2009.

On October 18, 2011, applicant filed a Declaration of Readiness to Proceed alleging that he did not receive "increased compensation, reinstatement and reimbursement for lost wages and work benefits as entitled under the laws of California and/or the Labor Code section 132(a)."

According to Minutes of Hearing dated November 10, 2011, these issues were previously litigated:

> THE COURT: Mr. Little is asserting a 132(a) claim is that correct, sir?
>
> MR. LITTLE: Yes.
>
> THE COURT: And is asserting that the prior settlement of $7,000 was procured by fraud, is that correct, sir?
>
> MR. LITTLE: Yes. Yes, your honor.
>
> THE COURT: Okay. It appears that this issue may have been previously litigated, but I am going to allow Mr. Little to present his case to a trial Judge, and so this matter will be set for trial on the sole issue of whether the prior $7,000 settlement of the 132(a) claim was procured by fraud and should be rescinded and whether the issue is *res judicata*, given the past rulings of Judge Levin and the Workers' Compensation Appeals Board.

Thereafter, the WCJ issued a Findings and Order (F&O) on May 8, 2012 wherein he ordered a take nothing after issuing the following Findings of Fact:

1. Applicant's claims to set aside the 2/8/07 Compromise and Release of his workers' compensation discrimination (Labor Code 132a) case, and the 2/8/07 Order approving Compromise and Release, are barred by the doctrine of *res judicata*. Applicant previously requested the same relief, on essentially the same grounds, in 2007. On 4/17/07 the Board ruled against his request by Order Denying Petition to Rescind Settlements and Orders Approving Them, *affirmed by* Order Denying Reconsideration on 6/26/07.

2. To the extent that portions Applicant's petition appear to seek "penalties" for unreasonable delay or denial of his medical treatment (which would arise under Labor Code 5814), these claims are barred both by the Statute of Limitations and by Applicant's express settlement of those claims in the Compromise and Release of his regular workers' compensation case by C&R filed and approved on 7/30/09.

3. To the extent that portions of Applicant's petition make claims for benefits under Labor Code §5313, that section does not provide a right to benefits. It is simply a procedural section that establishes a deadline for the decision of a WCJ in a case, and the content and procedure for issuing a decision.

4. To the extent that portions of Applicant's petition make claims for benefits under Insurance Code § 10782, there is no such code section.

5. To the extent that portions of Applicant's petition make claims under C.C.P. § 170 *et seq.*, those statutes do not provide workers' compensation remedies or benefits. They simply establish criteria for disqualification of trial judges.

6. To the extent that portions of Applicant's petition make claims under various other state and federal statutes, civil and criminal, or for other civil remedies, none of these claims is within the jurisdiction of the Workers' Compensation Appeals Board.

The WCJ noted in his Opinion on Decision (OOD) that "When a party has had his day in court, he may not re-litigate the issues by filing new papers that allege essentially the same complaints. The doctrine of bar is known as *res judicata* ('the thing that has been adjudicated'). That is applicant's situation here."

Upon issuance of the above F&O, applicant submitted a petition for writ of review to the Court of Appeal. It was denied on August 9, 2012. Thereafter, applicant submitted a petition for review to the California Supreme Court. It was denied on September 26, 2012.

On October 16, 2024, applicant filed a Declaration of Readiness to Proceed for a status conference on the issues of employment, compensation rate, permanent disability, future medical treatment, and "compensation payment." Per an attached letter titled "Attachment #1 Declaration

of Readiness to Proceed," applicant made several allegations, including premature settlement of his claims, the right to reopen his claims, coercion on the part of various WCJs in the settlement of his claims, reimbursement for alleged payment of medical costs, alleged nonpayment of the $7,000 settlement for the 132a claim, and improper collection and calculation of attorney's fees.

The matter proceeded to a status conference on November 7, 2024. At the status conference, the WCJ issued a Minutes of Hearing ordering the matter be taken off calendar as there was "no valid issue pending."

DISCUSSION

I.

Preliminarily, 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, 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 under the Events tab 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 December 12, 2024, and 60 days from the date of transmission is February 10, 2025. This decision was issued by or on February 10, 2025, so that we have timely acted on the petition as required by section 5909(a).

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. Section 5909(b)(2) provides that service of the Report and Recommendation shall constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on December 12, 2024, and the case was transmitted to the Appeals Board on December 12, 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on December 12, 2024.

II.

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.* (*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 [43Cal.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.* (*Gaona*) (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 November 7, 2024 Order Taking Off Calendar wherein the WCJ found applicant had no valid issues pending, was not a final order. Thus, we consider the Petition under the removal standard.

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, as explained below, 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 applicant.

III.

Turning now to the Petition, applicant alleges that the WCJ violated his "constitutional rights and Labor Code Section 132a" at the November 7, 2024 status conference when he did not look at applicant's case, did not allow applicant to speak, "privately discussed [applicant's] case with the opposing party without [applicant's] input, and dismissed his case (OTOC was granted) right away." (Petition, p. 3.) As noted on the Minutes of Hearing, the WCJ took the November 7, 2024 status conference off calendar and found "no valid issue pending." (Minutes of Hearing, November 7, 2024.)

Section 5900(a) provides in pertinent part that:

> Any person aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board or a workers' compensation judge under any provision contained in this division, may petition the appeals board for reconsideration in respect to any matters determined or covered by the final order, decision, or award, and specified in the petition for reconsideration.

(Lab. Code, § 5900(a).)

For parties seeking redress that have already submitted an issue for reconsideration and/or review to the Appeals Board and/or the Courts, the parties must demonstrate that they are newly

aggrieved. In the instant matter, applicant raised no new issues and has made no new contentions in his Declaration of Readiness to Proceed. As such, applicant has provided no evidence that he is newly aggrieved. Accordingly, his Petition is dismissed.

IV.

Lastly, we advise applicant that repetitive, meritless, and ineffectual filings may lead to proceedings for the purpose of declaring applicant as a vexatious litigant pursuant to WCAB rule 10430. WCAB Rule 10430 states in its totality as follows:

(a) For purposes of this rule, "vexatious litigant" means:

> (1) A party who, while acting in propria persona in proceedings before the Workers' Compensation Appeals Board, repeatedly relitigates, or attempts to relitigate, an issue of law or fact that has been finally determined against that party by the Workers' Compensation Appeals Board or by an appellate court;
>
> (2) A party who, while acting in propria persona in proceedings before the Workers' Compensation Appeals Board, repeatedly files unmeritorious motions, pleadings or other papers, repeatedly conducts or attempts to conduct unnecessary discovery, or repeatedly engages in other tactics that are in bad faith, are frivolous or are solely intended to cause harassment or unnecessary delay; or
>
> (3) A party who has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction(s) or occurrence(s) that are the subject, in whole or in substantial part, of the party's workers' compensation case. For purposes of this rule, the phrase finally determined" shall mean:
>
> > (i) That all appeals have been exhausted or the time for seeking appellate review has expired; and
> >
> > (ii) The time for reopening under Labor Code sections 5410 or 5803 and 5804 has passed or, although the time for reopening under those sections has not passed, there is no good faith and non-frivolous basis for reopening.

(b) Upon the petition of a party, or upon the motion of any workers' compensation judge or the Appeals Board, a presiding workers' compensation judge of any district office having venue or the Appeals Board may declare a party to be a vexatious litigant.

(c) No party shall be declared a vexatious litigant without being given notice and an opportunity to be heard. If a hearing is requested, the presiding workers' compensation

judge or the Appeals Board, in their discretion, either may take and consider both oral and documentary evidence or may take and consider solely documentary evidence, including affidavits or other written declarations of fact made under penalty of perjury.

(d) If a party is declared to be a vexatious litigant, a presiding workers' compensation judge or the Appeals Board may enter a prefiling order," i.e., an order which prohibits the vexatious litigant from filing, in propria persona, any Application for Adjudication of Claim, Declaration of Readiness to Proceed, petition or other request for action by the Workers' Compensation Appeals Board without first obtaining leave of the presiding workers' compensation judge of the district office where the request for action is proposed to be filed or, if the matter is pending before the Appeals Board on a petition for reconsideration, removal or disqualification, without first obtaining leave from the Appeals Board. For purposes of this rule, a petition" shall include, but not be limited to, a petition to reopen under Labor Code sections 5410, 5803 and 5804, a petition to enforce a medical treatment award, a penalty petition or any other petition seeking to enforce or expand the vexatious litigant's previously determined rights.

(e) If a vexatious litigant proposes to file, in propria persona, any Application for Adjudication of Claim, Declaration of Readiness to Proceed, petition or other request for action by the Workers' Compensation Appeals Board, the request for action shall be conditionally filed. Thereafter, the presiding workers' compensation judge, or the Appeals Board if the petition is for reconsideration, removal or disqualification, shall deem the request for action to have been properly filed only if it appears that the request for action has not been filed in violation of subdivision (a). In determining whether the vexatious litigant's request for action has not been filed in violation of subdivision (a), the presiding workers' compensation judge, or the Appeals Board, shall consider the contents of the request for action and the Workers' Compensation Appeals Board's existing record of proceedings, as well as any other documentation that, in its discretion, the presiding workers' compensation judge or the Appeals Board asks to be submitted. Among the factors that the presiding workers' compensation judge or the Appeals Board may consider is whether there has been a significant change in circumstances (such as new or newly discovered evidence or a change in the law) that might materially affect an issue of fact or law that was previously finally determined against the vexatious litigant.

(f) If any in propria persona Application for Adjudication of Claim, Declaration of Readiness to proceed, petition or other request for action by the Workers' Compensation Appeals Board from a vexatious litigant subject to a prefiling order is inadvertently accepted for filing (other than conditional filing in accordance with subdivision (e) above), then any other party may file (and shall concurrently serve on the vexatious litigant and any other affected parties) a notice stating that the request for action is being submitted by a vexatious litigant subject to a prefiling order as set forth in subdivision (d). The filing of the notice shall automatically stay the request for action until it is determined, in accordance with subdivision (e), whether the request for action should be deemed to have been properly filed.

(g) A copy of any prefiling order issued by a presiding workers' compensation judge or by the Appeals Board shall be submitted to the Secretary of the Appeals Board, who shall maintain a record of vexatious litigants subject to those prefiling orders and who shall annually disseminate a list of those persons to all presiding workers' compensation judges.

(Cal. Code Regs., tit. 8, § 10430.)

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the November 7, 2024 Order Taking Off Calendar is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 10, 2025

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

DERRICK LITTLE
LAW OFFICE OF AV & YEMPUKU

RL/*cs*

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