

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

LESA MASTEN, *Applicant*

vs.

**MJ HOUSING & SERVICES;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ18042123
San Diego District Office**

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

New Mexico Mutual, specially appearing, seeks reconsideration of the Order Denying New Mexico Mutual's Petition for Dismissal of Joinder (Order) issued by the workers' compensation administrative law judge (WCJ) on November 18, 2024, wherein the WCJ denied without prejudice New Mexico Mutual's Petition to Dismiss Joinder.

New Mexico Mutual contends in its Notice of Motion and Motion to Reconsider (Petition) that the Order is based on a mistake of fact regarding the date New Mexico Mutual objected to the Notice of Intention (NIT) to Join Party Defendant, and that the Order is in error because there is no basis for the WCAB to exercise personal jurisdiction over New Mexico Mutual.

We did not receive an Answer from any party.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied.

We have considered the allegations in New Mexico Mutual's Petition and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons discussed below, we will treat New Mexico's "Motion to Reconsider" as a petition for reconsideration, dismiss New Mexico Mutual's Petition to the extent it seeks reconsideration, and deny it to the extent it seeks removal.

BACKGROUND

In her Application for Adjudication (Application), applicant claimed that she received injuries to various body parts on September 17, 2021, while employed by defendant MJ Housing and Services. (8/3/23 Application.) Applicant, a New Mexico resident, was in California at a “work retreat” at the time of her injury. (8/3/23 Application; 6/6/24 Incident Report; 9/24/24 Minutes.)

Defendant State Compensation Insurance Fund (SCIF) requested that it be dismissed as a party defendant, contending that it does not provide insurance coverage to defendant MJ Housing for employees hired outside California and that applicant, hired in New Mexico, is not covered. (9/27/23 Petition for Dismissal for Lack of Coverage.) Applicant objected to SCIF’s request.

A pretrial conference statement (PTCS), signed by the parties on July 22, 2024, indicated that they stipulated to employment, and that insurance coverage was the issue for trial, including whether applicant has insurance coverage in New Mexico, and whether SCIF provides coverage for applicant’s injuries that occurred in California.

On July 16, 2024, SCIF filed a Petition for Joinder, seeking to join New Mexico Mutual. SCIF contended that New Mexico Mutual was the worker’s compensation insurance company for MJ Housing in New Mexico during the relevant time period, that applicant was hired in New Mexico, and that her claim is thus covered by New Mexico Mutual. This petition was denied without prejudice for failure to include required information, as was the Amended Petition for Joinder filed July 23, 2024. On August 16, 2024, SCIF filed another Amended Petition for Joinder, which included the necessary identifying information for New Mexico Mutual.

On August 20, 2024, the WCJ issued a Notice of Intention (NIT) to Join Party Defendant New Mexico Mutual, which was served on all parties and on New Mexico Mutual on August 22, 2024. The NIT stated:

On August 16, 2024, the defendant for MJ Housing & Services, insured by State Compensation Insurance Fund filed a second Amended verified Petition to Join Party Defendant New Mexico Mutual alleging they had insurance coverage.

GOOD CAUSE APPEARING,

NOTICE IS HEREBY GIVEN that an Order Joining as a party defendant New Mexico Mutual will issue twenty (20) days after service hereof, unless good cause to the contrary is shown in writing within said time:

New Mexico Mutual
PO Box 27810
Albuquerque, New Mexico 87125
UAN 21080331

It shall be the responsibility of the Defendant to request an Order for Joinder, no earlier than the thirtieth (30th) day following service hereof, by filing a request for Order for Joinder with a declaration under penalty of perjury that defendant was not served a copy of any objection to dismissal or joinder which any party or attorney of record may have filed.

(8/20/2024 NIT.)

On September 23, 2024 counsel for New Mexico Mutual, specially appearing¹, filed “Objection to Personal Jurisdiction: New Mexico Mutual’s Special Appearance Objecting to Jurisdiction and Seeking Dismissal of State Fund’s Petition for Joinder,” in which it argued that the California WCAB lacks personal and subject matter jurisdiction over New Mexico Mutual and it requested that SCIF’s Petition for Joinder be dismissed. (9/23/24 Objection.) Although the proof of service indicates that this Objection was filed and served on September 23, 2024, it was not entered into EAMS until November 14, 2024.

On September 24, 2024, the matter was heard and set for trial for November 12, 2024. (9/24/24 Minutes.) The minutes note that New Mexico Mutual filed an objection to SCIF’s petition for joinder. (*Id.*, at p. 2.) The minutes indicate, further, that,

The WCJ advised the AA that the applicant cannot have the same claim, for the same DOI, for the same body parts in tow [sic] different states. If the applicant has previously made/filed a claim in New Mexico then she cannot have a claim here. AA is going to discuss with the applicant. The attorney for New Mexico Mutula [sic] will find out if the applicant is represented by counsel in her New Mexico claim.

The matter is continued to allow the parties to flush out whether the applicant is represented in her New Mexico claim and confirmation of the claim. If the applicant does have the claim, she should Dismiss the current CA claim.

(*Ibid.*)

¹ Counsel for New Mexico Mutual specially appeared at the September 24 and November 12, 2024 hearings, and indicated it was specially appearing in its written filings dated September 23 and December 6, 2024. New Mexico Mutual did not generally appear. (*General Ins. Co. v. Superior Court of Alameda County* (1975) 15 Cal.3d 449, 453 [“Whether a particular act of the defendant reflects an intent to submit to the jurisdiction of the court, constituting a general appearance, depends upon the circumstances. [citations]”].)

At the November 12, 2024 hearing, New Mexico Mutual and the parties discussed whether there was California jurisdiction and whether SCIF has coverage, and the matter was set for trial for January 14, 2025. (11/12/24 Minutes.) The Minutes indicate that:

...the matter is not yet ready to proceed as the parties need to meet and confer on multiple issues including:

1. Where is the employer based and doing business? Does the ER have a license to do business in CA?
2. Where was the date of injury and what was the applicant doing when she was injured?
3. When was the Notice of Incident and ER first report of Injury filed and by whom?

The matter is continued for parties to meet and confer on the issues.
(*Ibid.*)

On November 18, 2024, the WCJ issued the Order Denying New Mexico Mutual's Petition for Dismissal of Joinder, denying the request without prejudice. (11/18/24 Order.) The WCJ indicated that the request was denied because New Mexico Mutual had 20 days to respond to the WCJ's August 20, 2024 NIT, but waited until November 14, 2024 to object, and because discovery related to jurisdiction was ongoing.

New Mexico Mutual timely filed its Notice of Motion and Motion to Reconsider in response to the November 18, 2024 Order.

DISCUSSION

I.

Former Labor Code section 5909² 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 All section references are to the Labor Code, unless otherwise indicated.

(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 December 11, 2024 and 60 days from the date of transmission is Sunday, February 9, 2025. The next business day that is 60 days from the date of transmission is Monday February 10, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)³ This decision is issued by or on Monday 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 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 December 11, 2024, and the case was transmitted to the Appeals Board on December 11, 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 11, 2024.

³ 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.

II.

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 (*Rymer*); *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]) 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.

In our en banc opinion in *Ledezma v. Kareem Cart Commissary and Mfg* (2024) 89 Cal.Comp.Cases 462, we observed that:

The above language [explaining the difference between final orders and non-final orders] has been used in dozens, if not hundreds of panel decisions issued by the Appeals Board. . . . (See e.g., *Navroth v. Mervyn’s Stores* 2023 Cal. Wrk. Comp. P.D. LEXIS 318; *Mendoza v. Rapid Manufacturing* 2023 Cal. Wrk. Comp. P.D. LEXIS 240, *Ramirez v. Vons, PSI*, 2022 Cal. Wrk. Comp. P.D. LEXIS 316.) The Appeals Board has consistently issued opinions stating that orders affecting trial setting are not final orders subject to reconsideration.

[W]here there is **genuine** confusion as to whether a decision is final, a party may file a petition seeking both reconsideration and/or removal. **A party may only file an alternative petition for reconsideration where good cause exists to believe that a final decision, order, or award issued.** When a petition is titled as a petition for reconsideration, even in the alternative, the Appeals Board must process it as a petition for reconsideration, which halts proceedings at the trial level. (Cal. Code Regs., tit. 8, § 10961 [limiting the WCJ’s power to act upon filing a petition for reconsideration].) Filing an alternative petition for reconsideration when it is not warranted is sanctionable.

(*Id.* at p. 476 (Emphasis in original).)

Here, the November 18, 2024 Order Denying New Mexico Mutual’s Petition for Dismissal of Joinder was not a final order. Rather, this was a pre-trial, interlocutory order that did not determine any substantive right or liability and did not determine a threshold issue. Notably, the WCJ has not yet ruled on SCIF’s underlying Petition for Joinder. Accordingly, the November 18, 2024 Order is not a “final” decision. We will, therefore, dismiss New Mexico Mutual’s Petition for Reconsideration and treat it as a Petition for Removal.

III.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers’ Comp. Appeals Bd. (Cortez)* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers’ Comp. Appeals Bd. (Kleemann)* (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*.) The petitioner must also 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).)

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. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is “one of ‘the rudiments of fair play’ assured to every litigant....” (*Id.* at p. 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].)

Section 5313 requires the WCJ to “make and file findings upon all facts involved in the controversy and [make and file] an award, order, or decision stating the determination as to the rights of the parties ... [and include] a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.” (Lab. Code, § 5313.) The WCJ’s decision “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Bd. en banc)), and the decision must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(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].) In *Hamilton*, we held that the record of proceedings must contain, at a minimum, "the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence." (*Hamilton, supra*, at p. 475.) In workers' compensation matters, "[d]emurrers, petitions for judgment on the pleadings and petitions for summary judgment are not permitted." (Cal. Code Regs., tit. 8, § 10515.)

Here, no joinder order has been issued. New Mexico Mutual's Petition to Dismiss Joinder was essentially a motion for summary judgment, wherein New Mexico Mutual requested that the WCJ rule on the merits of SCIF's Amended Petition for Joinder without a hearing. However, motions for summary judgment are not permissible in workers' compensation cases in California. (Cal. Code Regs., tit. 8, § 10515.) Rather, decisions in workers' compensation cases must be based upon an adequate record after providing all parties an opportunity to be heard, to protect the due process rights of everyone involved. (Lab. Code § 5313; *Hamilton, supra*, at p. 476; *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

A trial date was already scheduled in this matter, for January 14, 2025, but did not take place because of the pending reconsideration petition. (11/12/24 Minutes.) Upon return to the trial level, New Mexico Mutual or any party can file a declaration of readiness (DOR) for the trial to be re-calendared. Thus, New Mexico Mutual is not aggrieved by the November 18, 2024 Order, and will have its day in court on the issues it raised, including the joinder motion and other pending issues. At the trial, New Mexico Mutual and/or the parties will have the opportunity to put on evidence, to allow the WCJ to determine if New Mexico Mutual's Objection to the Joinder motion was timely filed, to address joinder, and to address personal and subject matter jurisdiction. Because the Order denying New Mexico Mutual's Petition to Dismiss Joinder was denied without prejudice, New Mexico Mutual has not waived their right to object at trial. After the WCJ issues a final order on the issues any aggrieved person can timely seek reconsideration. (Lab. Code, § 5900.)

For removal to be granted, the petitioner must show that substantial prejudice or irreparable harm will result if removal is not granted and 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, New Mexico Mutual did not make these required showings. We are not

persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

IV.

Finally, we find it necessary to admonish defendants and their attorneys, specially appearing for New Mexico Mutual in this matter.

We admonish defendant MJ Housing & Services, its insurance carrier New Mexico Mutual, and its attorneys Jeffrey Commisso and Justine M. Casey, with Sheppard, Mullin, Richter & Hampton, for failing to follow the applicable statutes and WCAB Rules for workers' compensation proceedings and causing numerous delays, including seeking reconsideration in response to a non-final order; filing pleadings that do not conform to practice in workers' compensation and incorrectly labeling pleadings; filing a motion for summary judgment on the joinder petition, when the WCAB Rules prohibit such motions; presenting arguments that are without merit and result in delay; and exceeding the page limit on its petition for reconsideration. (Cal. Code Regs., tit. 8, §§ 10421(b)(4), 10515, 10940(d), 10205.12(a)(10), 10205.12(b)(3).) Future compliance with the WCAB Rules is expected, and failure to do so will subject the offending party to sanctions. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421.)

Accordingly, we dismiss the Petition as one seeking reconsideration and deny it as one seeking removal.

For the foregoing reasons,

IT IS ORDERED that New Mexico Mutual's Petition for Reconsideration is **DISMISSED** and the Petition for Removal is **DENIED**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, 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.

**LESA MASTEN
MICHAEL YAP, ESQ.
STATE COMPENSATION INSURANCE FUND
SHEPPARD, MULLIN, RICHTER & HAMPTON LLC
NEW MEXICO MUTUAL**

MB/ara

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