WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SANDRA AVALOS, *Applicant*

vs.

ROYAL PLYWOOD, COMPANY/HOUSEHOLD INDUSTRIES, permissibly self-insured, adjusted by ATHENS ADMINISTRATORS, *Defendants*

Adjudication Number: ADJ16251404
Anaheim District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks removal of the June 11, 2025 Findings and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ). By the F&O, as relevant here, the WCJ found that while employed by defendant as a receptionist on May 5, 2022, applicant sustained injury arising out of and in the course of employment to the right ankle. The WCJ found applicant was "not required to answer psychological related questions, at this time," and applicant's attorney did not engage in bad faith or delay.

Defendant contends the WCJ erred by denying defendant their due process right to cross-examine applicant about potential causes of her alleged headaches.

We did not receive an answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that the Petition be denied.

In response to the Report, defendant filed a supplemental petition entitled "Petition for Approval of Supplemental Petition for Removal; CCR 10944, 10964." The supplemental petition disputes some of the WCJ's statements in the Report. Pursuant to WCAB Rule 10964, we have accepted and considered defendant's Supplemental Petition. (Cal. Code Regs., tit. 8, § 10964.)

We have considered the allegations of the Petition for Removal and the Supplemental Petition and the contents of the Report of the WCJ with respect thereto. Based on our review of the record and based upon the WCJ's analysis of the merits of petitioner's arguments in the WCJ's

Report, we will treat the Petition as one seeking reconsideration and deny the Petition as one seeking reconsideration.

I.

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, Labor Code 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.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code 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 11, 2025, and 60 days from the date of transmission is September 9, 2025. This decision is issued by or on September 9, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 July 11, 2025, and the case was transmitted to the Appeals Board on July 11, 2025. 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 11, 2025.

II.

The WCJ's Report detailed the following relevant facts:

> Applicant sustained an industrial injury to her right ankle on 5/5/22.[1] On 8/18/22, Applicant had her deposition taken by defendant. During the deposition, defense counsel began asking questions regarding the Applicant's psychological history. Applicant's counsel informed the defense counsel a psyche claim had not been pled. **Defendant's Exhibit A, pg. 22, lines 17-21**. Applicant had another deposition on 1/20/23. Defense counsel again began questioning the Applicant regarding her psychological history. Applicant's counsel, again, reminded defense counsel, a psyche claim was not being pled. **Defendant's Exhibit E, pgs. 63-64**. Applicant could not complete the deposition but defense counsel would not agree to continue or end the deposition, therefore, Applicant's counsel suspended the deposition. **Ibid pg. 67-69**. Applicant had Volume III of her deposition taken on 5/3/23. Once again, defense counsel began to question the Applicant regarding her psyche history. Applicant's counsel, once again, reminded defense counsel psyche was not being pled in this matter. **Defendant's Exhibit F, pg. 87**. Despite Applicant's counsel advising defense counsel that psyche was not at issue, defense counsel continued to ask psyche related questions. Applicant's counsel instructed his client to not respond. **Ibid pgs. 91-92, 94-96, and 111-114**.
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> On or around 10/25/24, defendant filed a Petition to Compel Deposition, Psyche Testimony and Psyche Medical Release. Parties attended a status conference on 12/2/24 at which time, Applicant's attorney reiterated Applicant had not pled psyche. **MOH dated 12/2/24, EAMS Doc ID 78653204**. The matter was set for a Mandatory Settlement Conference and then set for trial. Based upon the record presented to the court, the court denied defendant's Petition to Compel Applicant to answer question regarding psyche. It is from this Finding and Order that defendant petitions for Removal.

(Report, July 11, 2025, pp. 1-2.)

[1] To the extent applicant alleged injury to other body parts, as they were not raised at trial and not decided therein, they are assumed deferred.

III.

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.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, 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.

Here, the WCJ's decision includes findings regarding threshold issues as to the existence of an employment relationship between applicant and defendant, and that applicant suffered injury to her right ankle arising out of and in the course of employment by defendant. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final with respect to the finding of injury to applicant's right ankle, petitioner is only challenging the interlocutory finding that applicant is "not required to answer psychologically related questions, at this time," and the interlocutory order that defendant's Petition to Compel Applicant to answer psychological questions is denied. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

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, § 10955(a); 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).)

As discussed below, based upon our review of the record and the WCJ's analysis of the merits of defendant's arguments in the Report, 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 if the matter ultimately proceeds to a final decision adverse to petitioner. We therefore deny the Petition as one seeking reconsideration.

IV.

The dispute here is whether the WCJ erred in finding applicant was not required to answer psychologically related questions. For the reasons detailed below, we conclude that in this case, the WCJ did not err because an allegation of headaches does not constitute a waiver of medical privacy regarding psychiatric care history.

Notwithstanding the filing of a claim for workers' compensation benefits, applicants maintain a right to privacy. The California Constitution provides that, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Cal. Const. art. I, § 1.) California's constitutional right to privacy "extends to…medical records." (E.g., *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1198; see also, e.g., *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 41.)

Additionally, a patient enjoys a privilege to refuse to disclose any "confidential communication" between themself and a treating physician or psychotherapist pursuant to Evidence Code sections 990 et seq. (physician-patient privilege) and 1010 et seq. (psychotherapist-patient privilege).[2] However, Evidence Code sections 996 and 1016 provide an exception to the general physician-patient and psychotherapist-patient privileges, the "patient-litigant" exception,

[2] While the Appeals Board is generally not bound by common law or statutory rules of evidence and procedure (Lab. Code, §§ 5708, 5709), statutory privilege provisions are applicable in workers' compensation proceedings. (See e.g. *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654 [64 Cal.Comp.Cases 624]; *Martin v. Workers' Comp. Appeals Bd.* (1997) 59 Cal.App.4th 333 [62 Cal.Comp.Cases 1500]; *Hardesty v. McCord & Holdren, Inc.* (1976) 41 Cal.Comp.Cases 111 (Appeals Board Panel).) These statutory privilege provisions also extend to discovery, because discovery is permissible only if the request information is "not privileged." (Code Civ. Proc., § 2017(a); *Ameri-Medical Corp. v. Workers' Comp. Appeals Bd. (Lizzi/Rhooms)* (1996) 42 Cal.App.4th 1260, 1287 [61 Cal.Comp.Cases 149].)

providing in relevant part that "[there] is no privilege…as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by…[the] patient." (Evid. Code, §§ 996(a), 1016(a).)

"[I]n determining whether one has waived the right of privacy by bringing suit, our Supreme Court has noted that although there may be an implicit partial waiver, the scope of such waiver must be narrowly, rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by fear of exposure of private activities." (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1014; see also *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654 [64 Cal.Comp.Cases 624].) Further, in discussing the plaintiff's right of privacy, and specifically whether plaintiff had waived that right by filing suit, the Court of Appeal concluded that, "the filing of a personal injury action seeking damages for pain and suffering does not, ipso facto, place mental condition in issue as part of the claim," and that any waiver must be predicated on "specific averments or reasonable interpretations drawn from the pleading which *clearly place mental condition in issue*." (*Id*. at p. 1017, emphasis added.)

We further observe that, "[t]he burden [of proof] is on the party seeking the constitutionally protected information to establish direct relevance. (*Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 665.)

A showing of good cause for the production of privileged records requires more than speculation that, "in the records requested there could be material which might be relevant to various issues in the action, such as the nature and extent of emotional distress suffered, causation of the accident and petitioner's condition at the time of the accident. Mere speculation as to the possibility that some portion of the records might be relevant to some substantive issue does not suffice." (*Davis*, *supra*, 7 Cal.App.4th at p. 1017.) This is because in weighing applicant's rights to doctor-patient privilege, "the privilege is too important to be brushed aside when the mental condition of the plaintiff may be only peripherally involved." (*Id.* at 1017.)

As detailed below, defendant failed to meet their burden in establishing the relevance of applicant's mental health history in order to compel applicant to answer psychologically related questions. Applicant has not pled injury to her psyche and has not sought compensation for any psychiatric impairment. Accordingly, applicant has not waived her right to privacy as it relates to her psychiatric condition.

Defendant claims "[t]he WCJ erroneously states that a substantial medical report is required to establish the cross over between Applicant's documented psyche complaints and alleged headaches before Defendant may ask applicant psyche questions…" and goes on to provide reasons why defendant should be permitted at least a "limited inquiry" into the applicant's psychiatric history. (Supplemental Petition, p. 6, lines 10-14.) Defendant's zealous focus on applicant's psychiatric history, which is not alleged, rather than her headaches, which are alleged, is misguided and puts the cart before the horse.

Neurological and psychiatric injuries are evaluated as separate body parts and subject to different analyses. (See, e.g., Lab. Code, § 3208.3; American Medical Association's Guides to the Evaluation of Permanent Impairment (5th Edition).) There is no objective evidence linking applicant's alleged headaches and her mental health history, only defendant's assumptions. That is, defendant is improperly attempting to bring applicant's psychiatric condition and history before the court by drawing a correlation between headaches and psyche without any evidence that such a correlation exists. Defendant's inquiry should focus on what applicant has alleged, injury in the form of headaches. Yet, despite applicant's request for a neurology panel (Exh. J, Email Correspondence From AA Requesting Neuro Panel, September 11, 2024), *defendant denied the request*. (Exh. K, Email Correspondence from Defendant to AA Objecting to Neuro Panel Request, September 11, 2024.)

Defendant also claims discovery related to applicant's psychiatric history should be permitted because they have a duty to investigate. (Petition for Removal, July 3, 2025, pp. 10-11.) Such an argument misconstrues the duty and borders on frivolous. Defendant provides no legal authority to support this contention. Instead, the statutory and decisional authority cited by defendant reflects the duty to investigate arising in relation to an employer's liability for workers' compensation benefits, where an injured worker sought payment of benefits for impairments actually claimed. Applicant is not a medical professional, so defendant's attempts to rely on applicant's statements to conclude applicant is claiming an industrial psychiatric injury are improper.

Here, applicant did not allege psychiatric injury in her application for adjudication, and she has repeatedly emphasized she is not claiming an industrial psychiatric injury. (Def. Exh. A, p. 22, lines 17-21; Def. Exh. E, pp. 63-64; Def. Exh. F, pp. 87, 91-92, 94-96, 111-114.) Thus, because at this time, there is no potential compensable injury to applicant's psyche for which defendant may

be required to pay benefits, defendant has no duty to investigate injury to this body part. Once defendant has conducted discovery regarding the headaches and *if* there is medical evidence which correlates the headaches with a potential injury to psyche, and *if* applicant wishes to continue seeking compensation for injury to that body part, defendant may then seek to inquire about applicant's psychiatric history.

We were unable to discern any substance to defendant's remaining objections as they appear to be merely pro forma, and thus, we do not consider them further.

In this case, defendant fails to demonstrate the requisite significant prejudice or irreparable harm to justify removal because defendant has other avenues for discovery, including development of the record as to applicant's claimed injury in the form of headaches, which may or may not yield evidence of a nexus between headaches and psyche.

Accordingly, we deny the Petition as one seeking reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration/Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 5, 2025

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

SANDRA AVALOS
LAW OFFICES OF JAMES YANG
BERNAL & ROBBINS

DC/*cs*

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