WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VI TRI LIEU (deceased); CHAI SAECHAO, *Applicant*

vs.

BOTTLING GROUP dba PEPSICO;
ACE AMERICAN INSURANCE COMPANY, administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ15071496
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks removal in response to a June 5, 2025 Findings of Fact and Order (F&O) issued by a workers' compensation administrative law judge (WCJ), in which the WCJ found that applicant sustained injury arising out and in the course of employment (AOE/COE) while employed as a Warehouse Lead at Sacramento, California by Pepsico. The WCJ ordered that the report of Dr. Mahmud dated February 6, 2025 and applicant's cover letter dated February 26, 2025 may be sent to the panel qualified medical evaluator (QME) Dr. McClintock-Greenberg for review and comment.

Defendant contends, in pertinent part, that it will be substantially prejudiced and irreparably harmed if the report by Dr. Mahmud can be sent for review and comment to the QME and that the WCJ's clear bias in favor of applicant has resulted in substantial prejudice and irreparable harm.

We have not received an Answer from applicant. The WCJ has filed a Report and Recommendation on Petition for Removal (Report), recommending that we deny removal in this matter.

We have considered the allegations of the Petition for Removal and the contents of the Report of the WCJ with respect thereto. Based on our review of the record and upon the WCJ's analysis of the merits of defendant's arguments in the Report, and, as discussed in more detail

below, we will treat the petition as one seeking reconsideration rather than removal. We will grant the Petition for Reconsideration for the purpose of rescinding the F&O and substituting a new Order, which removes the finding as to injury; we make no changes to the WCJ's order with respect to the report of Dr. Mahmud and applicant's cover letter.

FACTS

Applicant, Chai Saechao (decedent's putative spouse), initially filed two claims.

In the first claim, applicant claimed that while employed by defendant as a warehouse lead on November 24, 2020, Vi Tri Lieu (decedent), sustained injury AOE/COE in form of COVID-19, which led to his death on December 27, 2020. This date of injury has been assigned case number ADJ15071496.

In the second claim, applicant claimed that while employed by defendant as a warehouse lead from November 23, 2020 to November 24, 2020, decedent sustained injury AOE/COE in the form of COVID-19, resulting in his death on December 27, 2020. This date of injury has been assigned case number ADJ14868756. However, in the Stipulation and Order dated October 20, 2022, the parties stipulated to dismissing case number ADJ14868756.

On May 10, 2024, applicant amended the specific injury, ADJ15071496, to reflect a date of injury of January 6, 2020 and to include the right ankle, right foot, right lower extremities – multiple part, and body system (diabetes).

The parties have selected Andrew McClintock Greenberg, M.D., Ph.D, as the QME in internal medicine. The QME issued three reports and was deposed on August 29, 2024. (Joint Exhibits 101-104.) In the latest report dated June 4, 2024, the QME opined "no data indicates that Mr. Lieu's COVID-19 infection was due to industrial exposure." (Joint Exhibit 102, p. 4.) On August 29, 2024, the PQME confirmed his opinion at the deposition. (Joint Exhibit 101, p. 35:9-14.)

Per applicant attorney's request, Massed Mahmud D.O., Ph.D. issued a report dated February 6, 2025. (Applicant's Exhibit 1.) Applicant sought to provide the QME with Dr. Mahmud's report, which defendant objected to.

On May 27, 2025, the parties proceeded to an expedited hearing, framing the issues as follows:

1. Whether applicant may send Dr. Mahmud's report dated February 6, 2025, obtained under Labor Code section 4064(d)[1] and applicant's cover letter dated February 26, 2025, to the QME for review.
2. Defendants object and rely on *Batten v. WCAB* 241 Cal.App.4th 1009 and *Valdez v. WCAB* 57 Cal.4th 1231.

(Minutes of Hearing (MOH), May 27, 2025, at p. 2:5-9.)

The parties also stipulated to the following facts:

3. Applicant Vi Tri Lieu, born July 6, 1976, while employed on January 6, 2020, in Sacramento, California, as a warehouse lead by PepsiCo, insured for workers' compensation by ACE American, sustained injury in the course of employment with body parts still in dispute.

(*Id.* at p. 2:1-4.)

On June 5, 2025, the WCJ issued his F&O, finding that applicant sustained injury AOE/COE while employed as a Warehouse Lead at Sacramento, California by Pepsico. (Findings of Fact No. 1.) The WCJ ordered that the report of Dr. Mahmud dated February 6, 2025 and applicant's cover letter dated February 26, 2025 may be sent to the PQME Dr. McClintock-Greenberg for review and comment. (Order No.1.)

On June 11, 2025, defendant filed the Petition for Removal.

DISCUSSION

I.

Preliminarily, former 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.

[1] All section references are to the Labor Code, unless otherwise indicated.

(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 June 17, 2025, and 60 days from the date of transmission is August 16, 2025, which is a Saturday. The next business day that is 60 days from the date of transmission is Monday, August 18, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision was issued by or on August 18, 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 shall constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on June 17, 2025, and the case was transmitted to the Appeals Board on June 17, 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 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 June 17, 2025.

[2] 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.

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 [43 Cal.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 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.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether 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 Bd. en banc).) 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 made findings as to injury AOE/COE and the existence of an employment relationship. These are final orders subject to reconsideration and not removal. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650].) Although the decision contains findings that are final, the petitioner is only challenging an interlocutory finding/order in the decision regarding whether the report by Dr. Mahmud may be submitted to the PQME for review and comment. 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).)

Here, based upon our review 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 defendant.

III.

Next, we observe that in the June 5, 2025 F&O, the WCJ failed to list any body parts with respect to his finding of injury AOE/COE in the Findings of Fact #1. At the expedited hearing, the parties stipulated the decedent sustained injury AOE/COE with body parts still in dispute. (MOH, May 28, 2025, p. 2:1-4.) However, failure to include at least one of the body parts injured in a stipulation to injury can lead to anomalous results, and it is a practice that should be avoided. At least one body part must be identified because a finding that an injury occurred without an identified body part may not be a legally enforceable AOE/COE finding. (Lab. Code, § 3600(a); *South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297–298 [80

Cal.Comp.Cases 489].) Simply put, without an identified body part, the finding is only that an injury happened, and without a body part, defendant's obligation to advance benefits may not accrue.

Here, the WCJ must address the issue of injury AOE/COE in the first instance. (See *Gangwish v. Workers' Comp. Appeals Bd.* (*Gangwish*) (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].) Moreover, the WCJ's determination of any finding "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 477 (en banc decision); *Hernandez v. Staff Leasing* (2011) 76 Cal.Comp.Cases 343).) There is currently no medical evidence in the record to support that the decedent sustained any injury to any body parts. Thus, we will remove Findings of Fact #1 of the June 5, 2025 F&O.

IV.

Finally, to the extent the verified petition appears to contend that the WCJ's comments and actions at the expedited hearing evinced prejudice or bias towards defendant, we note that defendant has filed a petition for removal and not one for disqualification. (Petition, at p. 8:3-5.)

Section 5311 provides that a party may seek to disqualify a WCJ upon any one or more of the grounds specified in Code of Civil Procedure section 641. (Lab. Code, § 5311; see also Code Civ. Proc., § 641.) Among the grounds for disqualification under section 641 are that the WCJ has "formed or expressed an unqualified opinion or belief as to the merits of the action" (Code Civ. Proc., § 641(f)) or that the WCJ has demonstrated "[t]he existence of a state of mind … evincing enmity against or bias toward either party" (Code Civ. Proc., § 641(g)).

Under WCAB Rule 10960, proceedings to disqualify a WCJ "shall be initiated by the filing of a petition for disqualification supported by an affidavit or declaration under penalty of perjury stating in detail *facts* establishing one or more of the grounds for disqualification … ." (Cal. Code Regs., tit. 8, § 10960, italics added.) It has long been recognized that "[t]he allegations in a statement charging bias and prejudice of a judge must set forth specifically the facts on which the charge is predicated," that "[a] statement *containing nothing but conclusions and setting forth no facts* constituting a ground for disqualification may be ignored," and that "[w]here no *facts* are set forth in the statement *there is no issue of fact to be determined.*" (*Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 399, italics added.) Under no circumstances may a party's unilateral and subjective perception of bias afford a basis for disqualification. (*Haas v. County of San Bernardino*

*(*2002) 27 Cal.4th 1017, 1034; *Robbins v. Sharp Healthcare* (2006) 71 Cal.Comp.Cases 1291, 1310-1311 (Significant Panel Decision).)

Also, it is "well settled … that the expressions of opinion uttered by a judge, in what he conceives to be a discharge of his official duties, are not evidence of bias or prejudice" under section 641(g) (*Kreling*, *supra*, 25 Cal.2d at pp. 310-311; accord: *Mackie*, *supra*, 154 Cal.App.2d at p. 400) and that "[e]rroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias or prejudice, especially when they are subject to review" (*McEwen v. Occidental Life Ins. Co.* (1916) 172 Cal. 6, 11; accord: *Mackie*, *supra*, 154 Cal.App.2d at p. 400.) Similarly, "when the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies" the judge under section 641(g). (*Kreling*, *supra*, 25 Cal.2d at p. 312; see also *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219 ["When making a ruling, a judge interprets the evidence, weighs credibility, and makes findings. In doing so, the judge necessarily makes and expresses determinations in favor of and against parties. How could it be otherwise? We will not hold that every statement a judge makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias."].)

Here, defendant contends the WCJ has shown a clear bias in favor of applicant and to the detriment of defendant. (Petition, at p. 8:3-7.) However, we note defendant has not filed a Petition for Disqualification nor made any request for disqualification with a declaration or affidavit providing facts, declared under penalty of perjury, that are sufficient to establish disqualification pursuant to section 5311, WCAB Rule 10960, and Code of Civil Procedure section 641(f) and/or (g). Thus, to the extent defendant requests disqualification due to the WCJ's bias, we deny that request.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the F&O issued by the WCJ on June 5, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the F&O issued by the WCJ on June 5, 2025 is **RESCINDED** and the following **SUBSTITUTED** therefore:

ORDER

IT IS ORDERED THAT the report of Dr. Mahmud dated February 6, 2025 and applicant's cover letter dated February 26, 2025 may be sent to Panel QME Dr. McClintock-Greenberg for review and comment.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 18, 2025

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

CHAI SAECHAO
SU LAW
STOCKWELL, HARRIS, WOOLVERTON & HELPHREY

JL/abs

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