

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

SARNICA KANE, *Applicant*

vs.

**COUNTY OF FRESNO, permissibly self-insured
administered by AIMS, *Defendants***

**Adjudication Number: ADJ14863932
Fresno District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. In the Report, the WCJ states that:

BACKGROUND/FACTS

Applicant herein claims injury to her left foot as a result of long hours of standing/walking on a hard marble floor. She reported this problem to her supervisor who confirmed the reporting. She was allowed to wear tennis shoes instead of dress shoes to attempt to alleviate the problem.

Two QMEs participated in this case, both of whom found injury AOE/COE, albeit through different mechanisms of injury. There are no medical reports negating injury.

This court found that applicant had sustained injury AOE/COE. It is from that finding that defendant is seeking reconsideration.

DISCUSSION

At the trial, applicant credibly testified regarding the onset of left foot pain, and reporting of such to her supervisor, who acknowledged the reporting and allowed her to wear more comfortable shoes. There was some dispute regarding how long she would have to stand. She was assigned to the Hall of Records of

Fresno County. That office had been closed for a substantial period of time as a result of the COVID-19 pandemic.

When applicant was given her assignment, that office was reopening to the public. Her job was to meet the patrons of the office seeking various records. There were a lot of people seeking assistance and her job was to stand/walk on the marble hallway to assist people in accessing websites to achieve their desired goals. At times, she would be able to sit at a desk inside the office.

The claim was denied and the parties proceeded to a QME. Dr. Kinchsular, D.P.N. Exh 11 & 12.

It appears that the QME did not issue the report [in] a timely fashion. Exh. 2. Defendant objected to the report *before* receiving it. Defendant failed, however, to attach the objection letter to QME form 31.5. The medical unit denied the request. Exh 6.

Finally, the request for replacement was perfected on December, 2021 after the report of Dr. Kinchsular was received. Exh. 8. A replacement panel issued. Exh 9.

The parties proceeded with the second panel and Dr. Timothy Van Dyne was selected as the new QME. Dr. Kinchsular had found the applicant's condition industrial on a cumulative basis. Dr. Van Dyne found [] the applicant's condition industrial on a specific basis. Exh I.

The Court found the applicant's condition industrial on a cumulative basis as the Court believes that the Kinchsular report controls, as a proper objection was not set forth prior to the issuance of the report in question.

Defendant claims that the error which resulted in the failure to attach the objection letter to QME Form 31.5 was merely a technical error. While in this case, no doubt based upon defendant's representation, this was an inadvertent error, one could envision a situation where a non-perfected request for replacement is filed perfecting the error only after the report is received, giving the party requesting the replacement the opportunity to perfect the error if the objecting party is dissatisfied with the report, or not perfecting it if otherwise satisfied with the report.

Defendant also raises the matter of due process. Defendant had the opportunity to object and request a replacement before the issuance of the report in question. Under these circumstances, there cannot possibly be a violation of due process. The proper method to obtain a new panel was available, but improperly utilized. That is the reason why the objection must be fully set forth before the report is issued.

In this case, Dr. Van Dyne's opinion was unnecessary given that the report of Dr. Kinchsular controls the decision in the case for the reasons set forth herein.

Having considered the testimony at the time of trial and the reporting of Dr. Kinchsular, a finding of injury AOE/COE is appropriate. There is no need to appoint a regular doctor under LC Sec. 5701.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration herein be DENED.

(Report, at pp. 1-4, emphasis in original.)

Upon our preliminary review, we are persuaded that petitioner sought the proper remedy of reconsideration. 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 a finding regarding a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Upon our preliminary review, we note that defendant alleges that the evidence in the record does not justify the Findings of Fact and that the WCJ acted without or in excess of his power pursuant to Labor Code section 5903.

Therefore, taking into account the statutory time constraints for acting on this petition and for the reasons stated above, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate. When a final decision issues, any aggrieved party may timely seek reconsideration. (Lab. Code, §§ 5900, 5903.)

Our order granting defendant's Petition for Reconsideration *is not a final order* subject to writ of review.¹ (Lab. Code, § 5950 et seq.) Thus, we will defer issuance of our final decision on the merits of the Petition for Reconsideration (*Ibid.*) This is an interlocutory order granting reconsideration and not a final decision that determines any substantive right or liability on the merits of any of the issues pending on reconsideration or that determines a threshold issue. 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

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interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

A petition for a writ of review generally may be sought only from a final order, decision, or award of the Board. (Lab. Code, §§ 5900, 5901, and 5950; *Gumilla v. Industrial Acci. Com.* (1921) 187 Cal. 638, 639-640 (*Gumilla*); *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1255 (*Hikida*); *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1074 (*Maranian*); *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 (*Pointer*); *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (1978) 82 Cal.App.3d 39, 45 (*Kramer*).)

For the foregoing reasons,

IT IS ORDERED that Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration after consideration of the entire record, including the issues raised by defendant's Petition for Reconsideration is **DEFERRED**.

IT IS FURTHER ORDERED that pending the issuance of a Decision after Reconsideration in the above case, all further correspondence, objections, motions, requests and communications *relating to the petition(s)* shall be filed only with the Office of the Commissioners of the Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102), or its e-mail address (WCABgrantforstudy@dir.ca.gov). It is within the discretion of the Workers' Compensation Appeals Board to determine whether any document submitted for filing is accepted for filing (Cal. Code Regs., tit. 8, § 10615(c) [eff. January 1, 2022]).

IT IS FURTHER ORDERED that all trial level documents not related to the petition(s) are not subject to this order **EXCEPT** that given WCAB Rule 10961 (Cal. Code Regs., tit. 8, § 10961), when the parties file a stipulations with request for award or a compromise and release agreement in this case, *all* parties shall simultaneously notify the Workers' Compensation Appeals Board of the filing at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102), or its e-mail address (WCABgrantforstudy@dir.ca.gov).

IT IS FURTHER ORDERED that if the party filing the petition(s) decides to withdraw the petition(s) for any reason, the party shall immediately notify the Workers' Compensation Appeals Board of the withdrawal at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102), or its e-mail address (WCABgrantforstudy@dir.ca.gov).

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 10, 2023

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

**SARNICA KANE
LAW OFFICE OF DANIEL EPPERLY
BRADFORD & BARTHEL
EMPLOYMENT DEVELOPMENT DEPARTMENT**

PAG/abs

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