

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

WILLIAM MICKENS, *Applicant*

vs.

**CLEVELAND BROWNS; NEW ENGLAND PATRIOTS; NEW YORK JETS;
GREAT DIVIDE INSURANCE COMPANY, administered by BERKELEY SPECIALTY;
UNITED STATES FIDELITY & GUARANTY, administered by GALLAGHER
BASSETT; TRAVELERS INDEMNITY COMPANY, successor in interested by merger
to GULF INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ7171783
Santa Ana District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration to further study the factual and legal issues in this case.¹ This is our decision after reconsideration.

Defendants Cleveland Browns (“Browns”) and New England Patriots (“Patriots”) filed a Petition for Reconsideration and/or Removal (“Petition”), seeking review of the Minute Order dated October 17, 2018, wherein the workers’ compensation administrative law judge (WCJ) rejoined the Browns and Patriots to the case as party defendants, despite dismissals with prejudice having previously issued against both parties.

We did not receive an Answer. We did receive a Report and Recommendation on Petition for Removal from the WCJ, recommending that removal be denied. For the reasons discussed below, while we agree that the Petition seeks review of a non-final order, as our decision after reconsideration, we will rescind the WCJ’s order rejoining the Browns and Patriots and return the matter to the trial level for further proceedings consistent with this opinion.

¹ Commissioners Lowe and Sweeney, who were on the panel that granted reconsideration to further study the factual and legal issues in this case, no longer serve on the Appeals Board. Other panelists have been assigned in their place.

FACTS

Applicant filed an Application for Adjudication, alleging cumulative trauma injuries to multiple body parts sustained while employed as a professional football player during the period from 1996 to 2007, while employed by the Browns, the Patriots, and the New York Jets (“Jets”). With the consent of applicant, based upon out-of-state litigation involving the National Football League Management Council and the National Football League Players Association, both the Browns and the Patriots were dismissed with prejudice. (See Order of Dismissal of Defendant New York Patriots with Prejudice; Order of Dismissal of Defendant Cleveland Browns with Prejudice.)

Applicant’s claim against the remaining defendant, the Jets, was scheduled to go forward on October 17, 2018. At that time, according to the Report, “the WCJ had a discussion with the parties where it was determined that the Cleveland Browns and New England Patriots were necessary parties in deciding California jurisdiction over the claim.” (Report, at p. 2.) The WCJ accordingly issued the instant order rejoining the Browns and Patriots, pursuant to Labor Code section 5703.5(b).² (See Minutes of Hearing, 10/17/2018, at p. 1.)

This Petition for Reconsideration and/or Removal followed.

DISCUSSION

A petition for reconsideration may only be taken 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; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) 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, 650-651, 655-656].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian, supra*, 81 Cal.App.4th at p. 1075 (“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”); *Rymer, supra*, 211 Cal.App.3d at p. 1180 (“[t]he term

² Further references are to the Labor Code unless otherwise stated.

[‘final’] does not include intermediate procedural orders or discovery orders”); *Kaiser Foundation Hospitals (Kramer)*, *supra*, 82 Cal.App.3d 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.

Here, the Minute Order rejoining the Browns and the Patriots is not a final order that determines any substantive right or liability, nor is it a threshold issue that is fundamental to the claim for benefits, and we will consider the Petition as a Petition for Removal.

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 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.*) 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).)

Any decision to rejoin parties previously dismissed with prejudice should be based upon an adequate record after providing the parties an opportunity to be heard, in the same manner as any other order touching on the parties’ due process rights. (Lab. Code § 5313; Cal. Code Regs., tit. 8, § 10833; *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), *citing Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

Pursuant to section 5703.5(b), a WCJ has broad powers to join interested parties to a case. (§ 5307.5(b); *Superior Care Facilities v. Workers’ Comp. Appeals Bd.* (1994) 27 Cal.App.4th 1015, 1023.) Failure to object to joinder in a timely matter ordinarily waives any later objection to the propriety of joining the party to the case. (*Superior Care, supra*, 27 Cal.App.4th at p. 1023.)

A dismissal with prejudice is the modern name for a common law retraxit. (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 820-821, *quoting Robinson v. Hiles* (1953) 119 Cal.App.2d 666, 672.) Dismissal with prejudice “has the same effect as a common law retraxit and bars any future action on the same subject matter.” (*Torrey Pines, supra*, 216 Cal.App.3d 820–821; *Wouldridge v. Burns* (1968) 265 Cal.App.2d 82, 84; *Ghiringhelli v. Riboni* (1950) 95 Cal.App.2d 503, 506.) Accordingly, the doctrine of res judicata bars further litigation of issues

after a voluntary dismissal with prejudice to the same extent it does after a judgment on the merits. (*Torrey Pines, supra*, 216 Cal.App.3d at 821; *Sears v. DeMota* (1958) 157 Cal.App.2d 216, 222.)

Res judicata precludes further litigation of issues when the same issue has already been litigated and finally decided in a case involving the same parties. (*Pac. Coast Medical Enters. v. Dep't of Benefit Payments* (1983) 140 Cal.App.3d 197, 214, quoting *Henn v. Henn* (1980) 26 Cal.3d 323, 329-330.) Res judicata is not jurisdictional, and, as such, it may be waived if not properly raised by pleading or evidence. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 977.)

A voluntary dismissal of an entire action deprives the court of subject matter jurisdiction as well as personal jurisdiction of the parties. (*Casa de Valley View Owner's Assn. v. Stevenson* (1985) 167 Cal.App.3d 1182, 1192.) Subject matter jurisdiction "cannot be conferred by consent, waiver, or estoppel, . . ." (*Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 207.) Accordingly, an order issued after voluntary dismissal of an entire action is void on its face for lack of subject matter jurisdiction, and may be set aside at any time; the doctrine of waiver does not apply. (See *Harris v. Billings* (1993) 16 Cal.App.4th 1396, 1405.)

However, a voluntary dismissal of a portion of a lawsuit, as opposed to a voluntary dismissal of the entire case, deprives the Court only of personal jurisdiction over the dismissed party or parties; the Court retains subject matter jurisdiction over the controversy. (*Casa De Valley, supra*, 167 Cal.App.3d at 1192.) Because personal jurisdiction is waived by a further appearance in the case without objection, when a party is no longer before the court due to a dismissal but further action is taken against that party by the court without objection, the court's action is not void for lack of subject matter jurisdiction. (See *Ibid.*)

Here, defendants were voluntarily dismissed with prejudice based upon the stipulation of the parties. These dismissals preclude further litigation against defendants pursuant to the doctrine of res judicata, to the same extent as if the case has been finally litigated and decided in defendants' favor. (See *Torrey Pines, supra*, 216 Cal.App.3d at 821.) However, instead of providing the effected parties the opportunity to be heard, the WCJ simply rejoined them, without allowing them the chance specially appear to contest the joinder. Under the circumstances, we believe this course of action violated the parties' due process rights to be heard prior to having such action taken against them.

Accordingly, as our decision after reconsideration, we rescind the WCJ's Order rejoining the Browns and the Patriots, and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Minute Order issued October 17, 2018 is **RESCINDED**, and the matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 28, 2023

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

**WILLIAM MICKENS
BOBER PETERSON
COLANTONI COLLINS
GUILFORD SARVAS
HANNA BROPHY
ALBERT MACKENZIE
NBO LAW
SEYFARTH SHAW
WALL MCCORMICK**

AW/ara

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