

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

MELANIE SEDANO, *Applicant*

vs.

**OCEANITAN LLC;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ14456607
Los Angeles District Office**

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

Applicant filed a Petition for Reconsideration and/or Removal (“Petition”), seeking review of a ruling allegedly made by workers’ compensation administrative law judge (WCJ) Holmes on October 26, 2021 to deny applicant’s Petition to Proceed to Expedited Hearing via Virtual Hearing.

We did not receive an Answer. We did receive a Report and Recommendation on Petition for Reconsideration from WCJ Holmes, recommending that the petition be denied. For the reasons described below, we will dismiss the Petition to the extent it seeks reconsideration, and deny it to the extent it seeks removal, because it seeks review of a decision that has not yet been made.

FACTS

On October 7, 2021, defendant State Compensation Insurance Fund (SCIF) filed a Declaration of Readiness, seeking an Expedited Hearing related to a medical treatment issue. A hearing was set for October 26, 2021, before WCJ Hutchison. Applicant filed a Petition to Proceed to Expedited Hearing via Virtual hearing, seeking to appear virtually at the October 26, 2021 Expedited Hearing. According to the Electronic Adjudication Management System (EAMS), this document was filed at 8:00 a.m. on October 26, 2021; the proof of service for the document, however, states that it was filed through EAMS on October 22, 2021, and the petition itself is dated October 19, 2021. The petition stated that the good cause for a virtual appearance was that

applicant had not responded to applicant's counsel's queries regarding applicant's vaccination status, and that the hearing representative planning to appear on behalf of applicant's attorney had unvaccinated children in his family.

According to the Petition and the Report, when the parties did not appear in person at the scheduled trial time of 8:30 a.m., WCJ Hutchison contacted defense counsel and the applicant's non-attorney representative via conference line. WCJ Hutchison informed the parties that she needed to recuse herself due to her prior employment with SCIF, and that WCJ Holmes would instead preside over the hearing at 11:00 a.m. According to the Petition, WCJ Hutchison informed the parties that WCJ Holmes had found no good cause to allow a virtual appearance, but the Report and the Minutes of Hearing (MOH) both state that no such ruling was made or issued. (See Petition at p. 2; Report at p. 3; MOH at p. 1.)

According to EAMS, applicant filed the instant Petition at 10:42 a.m., seeking reconsideration and/or removal of the order allegedly made by WCJ Holmes and relayed by WCJ Hutchison denying the petition to appear remotely.

At 11:00 a.m., WCJ Holmes called the case in Department 11 of the Los Angeles District Office; applicant's attorney failed to appear. At approximately 11:40 a.m., a non-attorney representative for applicant appeared. Shortly thereafter, WCJ Holmes discovered that applicant had filed the instant Petition just before the hearing, and therefore took the case off calendar.

DISCUSSION

A party may seek permission to appear remotely at a hearing by filing a petition pursuant to Rule 10510. (Cal. Code Regs., tit. 8, § 10510.)¹ Upon receipt of such a petition, a WCJ may issue a Notice of Intention pursuant to Rule 10832, or may hold a hearing on the matter, but due process requires some form of notice and opportunity to be heard. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal. Comp. Cases 584].) Any decision on a petition to appear remotely must be reduced to writing, and must 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

¹ Effective January 1, 2022, petitions related to remote hearings and/or remote appearances will be instead governed by new Rules 10815–17. (Cal. Code Regs., tit. 8, §§ 10815–17 (eff. January 1, 2022).)

(Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A stipulation between the parties constitutes good cause, and obviates the need to provide an opportunity to be heard or to create a record. (Cal. Code Regs., tit. 8, § 10835.) If a petition to appear remotely cannot be acted upon prior to the hearing, the WCJ should allow the parties to be heard and rule on the petition as the first order of business, before proceeding with the subject of the hearing itself.

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

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).)

Here, we are confronted with the unusual situation in which there does not appear to be any order from which applicant is seeking review. Contrary to the representations in the Petition,

the record appears clear that WCJ Holmes did not make or issue any ruling as to applicant's petition for a remote appearance. (See Report at p. 3; MOH at p. 1.) In the absence of any such order, we see no basis for the Petition. As a petition for reconsideration, the Petition is procedurally defective, both because it seeks review of an order which has not yet been made, and because even if the order had been made, an order denying a petition to appear remotely neither determines any substantive right or liability, nor does it determine a threshold issue that is fundamental to a claim for benefits.² As a petition for removal, by definition applicant has not shown irreparable harm because the petition seeks review of a decision that was never actually made.

More generally, issues surrounding remote appearances are apt to produce strong emotional reactions. However, we emphasize that all parties to workers' compensation proceedings must grant the WCJ and other participants the same level of respect in resolving these issues as they would in any other situation, and must adhere to all relevant WCAB rules.³

Finally, we note that because the underlying petition was in relation to a hearing date which has now been taken off calendar, it is moot and any future request to appear remotely must be via a new petition. As a matter of common sense, the further in advance of the hearing date such a petition is filed, the more likely the WCJ will be able to consider it prior to the hearing itself.

Accordingly, we will dismiss the petition to the extent it seeks reconsideration, deny it to the extent it seeks removal, and return the matter to the WCJ for further proceedings.

² In the future, when a petition for reconsideration is filed so shortly before a hearing that the WCJ is unable to review it prior to the hearing, the filing party should immediately alert the WCJ to the petition's existence at the first possible opportunity. Furthermore, Petitioner is now on notice that a petition for removal, not a petition for reconsideration, is the proper method for seeking review of a WCJ's decision on a petition to appear remotely.

³ Here, based upon the facts recounted in the Report, applicant's representative's behavior fell short of what is expected from a representative in the workers' compensation system. Although we will not pursue sanctions in this case, we remind applicant's representative that non-attorney representatives are subject to the same professional standards of conduct as attorneys, and that failure to adhere to those standards may result in the imposition of sanctions in future cases. (See Cal. Code Regs., tit. 8, §§ 10401, 10421.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 27, 2021

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

**MELANIE SEDANO
GARRETT LAW GROUP
STATE COMPENSATION INSURANCE FUND**

AW/ara

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

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