

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

ERIQ FITZPATRICK, *Applicant*

vs.

**FAST RETAILING USA, INC.;
HARTFORD SACRAMENTO, *Defendants***

**Adjudication Numbers: ADJ13829431; ADJ13836041
Long Beach District Office**

**OPINION AND ORDERS
DISMISSING PETITION FOR RECONSIDERATION,
GRANTING PETITION FOR REMOVAL
AND DECISION AFTER REMOVAL**

By timely and verified petition, Eriq Fitzpatrick (applicant) seeks reconsideration of the Order Denying Petition for Change of Venue (Order) issued by a workers' compensation administrative law judge (WCJ) on March 22, 2023. The Order denied applicant's request to transfer the venue of this case from the Long Beach District Office to the Los Angeles District Office.

Applicant contends that good cause exists to support his request for a change of venue, and that the WCJ therefore erroneously denied his request.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), recommending that the petition for reconsideration be dismissed, or, alternatively, denied, as it should have been filed as a petition for removal. We have not received an answer to the petition from defendants.

We have considered the allegations of applicant's petition and the WCJ's Report. For the reasons discussed below, we will dismiss applicant's petition for reconsideration, grant the petition as a petition for removal, rescind the Order, and return this matter to the trial level for further proceedings consistent with this opinion.

RELEVANT FACTS

Applicant sustained injury on May 20, 2019 to his right shoulder and sustained a second injury on February 3, 2020 to his right hip while working as a customer advisor/sales associate for defendant, Fast Retailing USA, Inc. (Pretrial Conference Statement, December 2, 2022, pp. 2, 4.)

During a hearing on January 17, 2023, WCJ Diana L. Marsteiner discussed the breakdown of the attorney-client relationship between applicant and his attorney, as well as applicant's request to change venues from the Long Beach District Office to the Los Angeles District Office due to "transportation issues." (Minutes of Hearing (MOH), January 17, 2023.) WCJ Marsteiner agreed to relieve applicant's attorney as his attorney of record and continued trial to March 21, 2023 in order to provide applicant with time to locate a new attorney and to file a petition for change of venue. (MOH, January 17, 2023.)

On March 21, 2023, applicant, acting in pro per, submitted his Petition for Change of Venue. (Petition for Change of Venue, March 21, 2023, p. 1.) According to the minutes issued by WCJ Marsteiner during a hearing held the same day:

Applicant's Petition to Change Venue was received by the Court today and the [Presiding Judge] discussed the same with the parties. The [Presiding Juge] will issue a ruling on the petition forthwith. The parties also discussed transportation today and defendant agreed to provide applicant with transportation to trial. [Defendant] will reach out to applicant before the next hearing to give info on the transportation to trial.

(MOH, March 21, 2023.)

On March 22, 2023, Presiding Judge Cynthia A. Quiel issued the Order denying applicant's Petition for Change of Venue on the basis that defendant had agreed to provide applicant with transportation to attend trial at the Long Beach District Office. (Order, March 22, 2023.)

It is from this Order that applicant seeks reconsideration.

DISCUSSION

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.* (1980)

104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (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.)

An order denying a petition to change venue is not a final order from which reconsideration may be sought. (*California Casualty Indemnity Exchange and California Rotogravure v. Workers' Comp. Appeals Bd.* (1979) 44 Cal.Comp.Cases 1112, 1114 (writ denied).) Therefore, we will dismiss applicant's petition for reconsideration and treat the petition as a petition for removal instead.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd. (Cortez)* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd. (Kleemann)* (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).)

We observe that it is the responsibility of the parties and the WCJ to ensure that the record of the proceedings contains, at a minimum, the issues submitted for decision, the admitted evidence, and the stipulations of the parties. (*Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp.Cases 473, 475 (Appeals Board en banc) (*Hamilton*); Lab. Code, § 5313.) A proper record allows a reviewing tribunal, whether the Appeals Board or a court on further appeal, to understand the basis for the disputed decision. (*Hamilton* at p. 475.) The exhibits that the parties submit, and that the WCJ intends to receive into evidence, must be formally admitted and included in the record. (*Ibid.*)

Here, even if the parties did discuss the venue issue with WCJ Marsteiner and Presiding Judge Quiel, as indicated by the minutes issued by WCJ Marsteiner on March 21, 2023, those minutes are inadequate. (MOH, March 21, 2023.) The venue issue and the parties' stipulations (if any) were not framed, and, additionally, no evidence was admitted into the record. Therefore,

the trial record is inadequate, leaving us unable to evaluate the basis for Presiding Judge Quiel's decision to deny applicant's request for change of venue or the merits of applicant's arguments. (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 475; Lab. Code, § 5313.)

Accordingly, for these reasons, we will grant removal, rescind the March 22, 2023 Order, and return the matter to the trial level for development of the record as to the issue of whether venue should be transferred from the Long Beach District Office to the Los Angeles District Office. (See *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261] [the Appeals Board has the discretionary authority to develop the record when appropriate to fully adjudicate the issues]; see also Lab. Code, § 5313.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Order issued on March 22, 2023 is **DISMISSED** and **GRANTED** as a Petition for Removal.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that the Order issued on March 22, 2023 is **RESCINDED** and this matter **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 26, 2023

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

**ERIQ FITZPATRICK
LYDIA NEWCOMB
TESTAN LAW**

AH/cs

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