

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

**LUCIA DIEGO, *Applicant***

**vs.**

**MADONNA INN; administered by PREFERRED EMPLOYERS SAN DIEGO, *Defendants***

**Adjudication Number: ADJ16333581  
San Luis Obispo District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

Applicant seeks removal or, in the alternative, reconsideration of the Order taking the matter off calendar issued by the workers' compensation administrative law judge (WCJ) on December 20, 2023.

The crux of applicant's contention appears to be that the WCJ should have held a hearing on applicant's petition to disqualify Panel Qualified Medical Evaluator (QME) Ripu Arora, M.D. and that applicant suffered significant prejudice and irreparable harm.

We have not received an answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be treated as a Petition for Removal and that the Petition be denied.

We have considered the allegations in the Petition and the contents of the Report with respect thereto.

Based on our review of the record, and for the reasons discussed below, we will grant applicant's Petition, rescind the Order of December 20, 2023, and return the matter to the WCJ for further proceedings and decision.

## BACKGROUND

Applicant claimed injury to various body parts while employed by defendant as a housekeeper on May 9, 2021.

On November 3, 2023, applicant filed a petition to disqualify QME Dr. Arora and request a replacement panel, and requested a mandatory settlement conference (MSC) to hear the petition on November 22, 2023. (Applicant's declaration of readiness (DOR), filed November 3, 2023.) Defendant filed a response to applicant's petition to disqualify. On November 16, 2023, the WCJ granted the parties' joint request for a continuance and the matter was reset for hearing on December 13, 2023.

The matter proceeded to a hearing on December 13, 2023. No testimony was taken and no evidence was admitted. The minutes from the hearing states:

The applicant's attorney objects to additional issues being heard at today's hearing not set forth on the DOR. The issue of disqualification of the QME was discussed, but the WCJ was not provided with information regarding grounds for disqualification at this stage of litigation. The parties are considering the use of an AME or Agreed QME whose reporting will be treated for all intents and purposes as though it was generated by a QME. They are also considering returning to the QME to clarify statements regarding additional radiology. AA objects to the OTOC, but WCJ was not provided with grounds to properly disqualify the QME.

(December 20, 2023 minutes, p. 1.)

## 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" or determines a "threshold" issue that is fundamental to the 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, the following: injury AOE/COE, 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].)

Interlocutory procedural or evidentiary decisions, entered in the midst of the 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 1180 ("[t]he term ['final'] does not include intermediate procedural orders or discovery orders"); *Kramer, supra*, at 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 Order taking the matter off calendar is an interlocutory procedural decision and therefore, the removal standard applies. (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 substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, 10955(a); *Cortez, supra*; *Kleemann, supra*.) Additionally, 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).)

Moreover, the WCJ is required to ". . . make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties." (Lab. Code, § 5313; see *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc); *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621; Cal. Code Regs., tit. 8, § 10330.) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at 475.) The purpose of this requirement is to enable "the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]" (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).

We caution applicant's attorney that attaching documents to a petition that have not been admitted into evidence is a violation of WCAB Rule 10945. (Cal. Code Regs., tit. 8, § 10945(c)(1)-

(2.) “Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings” (Cal. Code Regs., tit. 8, § 10803) and “[t]he filing of a document does not signify its receipt in evidence...” (Cal. Code Regs., tit. 8, § 10670.)

Here, the adjudication file in EAMS does not contain a pre-trial conference statement or MOH/SOE as to applicant’s petition, there are no stipulations and/or issues identified, and there is no evidence admitted into the record. (Lab. Code, §§ 5313, 5502(d); Cal. Code Regs., tit. 8, §§ 10305(v), 10787, 10803, 10945.) In the absence of an evidentiary record, we are unable to evaluate the basis of the WCJ’s Order. Therefore, we must return this matter to the trial level for further proceedings. Upon return to the trial level, we recommend that the WCJ hold a hearing to allow the parties to frame the issues and any stipulations, submit exhibits as evidence, call witnesses, if necessary, lodge any objections, and make their legal arguments.

Accordingly, we grant applicant’s Petition, rescind the December 20, 2023 Order, and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Removal/Reconsideration of the Order issued by the WCJ on December 20, 2023 is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Removal/Reconsideration of the Workers' Compensation Appeals Board, that the Order of December 20, 2023 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**MARCH 4, 2024**

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

**LUCIA DIEGO  
LAW OFFICES OF JOSEPH E. LOUNSBURY  
ALBERT & MACKENZIE**

**JB/cs**

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