

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

CARMEN BAEZ, *Applicant*

vs.

EXCELSIOR FARMING, LLC; ZENITH, *Defendants*

**Adjudication Numbers: ADJ11423981, ADJ11423986
Fresno District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

We have considered the allegations of defendant's Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record and based upon the WCJ's analysis of the merits of defendant's arguments in the WCJ's Report, we will affirm the April 12, 2021 Findings of Fact, Order and Opinion on Decision.

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.

Although the decision contains a finding that is final, defendant is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (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 significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) Here, based upon the WCJ's analysis of the merits of defendant's arguments, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

While the parties may stipulate to the facts in controversy, the WCJ is not bound by the parties' stipulations and may make further inquiry into the matter "to enable it to determine the matter in controversy." (Lab. Code, § 5702; see also *Turner Gas Co. v. Workers' Comp. Appeals Bd. (Kinney)* (1975) 47 Cal.App.3d 286 [40 Cal.Comp.Cases 253] [the WCJ rejected the parties' stipulation that the employee had sustained a specific injury because the medical evidence supported finding a cumulative trauma injury].) When presented with Stipulations with Request for Award, the WCJ "shall inquire into the adequacy of all...Stipulations with Request for Award, and may set the matter for hearing to take evidence when necessary to determine whether the agreement should be approved or disapproved." (Cal. Code Regs., tit. 8, former § 10882, now § 10700(b) (eff. Jan. 1, 2020).) Here, the parties entered into stipulations as of April 2, 2019, regarding applicant's level of permanent disability based on a medical report from a qualified medical evaluator (QME). One day later, on April 3, 2019, defendant appeared on a walk through

basis, without applicant present, and the WCJ issued the Award. Defendant was designated to serve the Award, but the record does not contain a proof of service reflecting when defendant served applicant with the Award. Applicant's attorney sent a letter to defendant on April 9, 2019 advising that it did not have authorization to proceed with submitting the stipulations and enclosing a letter to the WCJ asking that the Award not be approved. (Applicant's Exhibit No. 22, Correspondence to Zenith, April 9, 2019.) Less than one month later, applicant's attorney filed a petition to set aside the Award. (Applicant's Exhibit No. 6, Petition to Set Aside, April 30, 2019.) The record therefore shows that applicant was diligent in seeking relief.

The hearing on applicant's petition took place almost two years later on March 9, 2021. Each party appeared at the hearing and had the opportunity to submit evidence and call witnesses. On April 12, 2021, the WCJ issued the Findings of Fact, Order and Opinion on Decision. In his decision, he concluded that the QME's report was not substantial evidence and could not support the Award. (See Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16] [award must be based on substantial evidence]; see also *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261] [Appeals Board has discretion to develop the record where there is insufficient evidence on an issue].) Thus, he set aside the Award and ordered further development of the record.

"The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of [Division 4] . . . At any time, upon notice and after the opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor." (Lab. Code, § 5803.) While the dissent makes much of the decision in *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1119-1120 [65 Cal.Comp.Cases 1], in *Weatherall*, the Court observed that: "that since compensation litigation involves adversary proceedings, the basic principles of procedural due process of the law must be meticulously followed, and there must be consistency regarding the record, the findings and the decision. (Citations omitted.)" Here, *defendant was provided with notice and an opportunity to be heard*, and defendant is entitled to challenge any future *final* decision by way of a timely filed petition for reconsideration. (Lab. Code, § 5900.) Moreover, defendant retains the right to conduct further discovery to develop the

record, and because the WCJ's decision was not a final decision on the merits, it can continue to advocate that applicant's permanent disability was accurately determined in the first instance by the QME. Applicant also, irrespective of the parties' prior stipulations, remains within the five-year period to reopen her claim for new and further disability over and above the 14% previously stipulated to by the parties. (Lab. Code, §§ 5410, 5804.) Consequently, defendant has not shown that it will be significantly prejudiced or irreparably harmed by the WCJ's decision to vacate the Award approving the Stipulations with Request for Award.

Therefore, we will affirm the Findings of Fact, Order and Opinion on Decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Order and Opinion on Decision issued by the WCJ on April 12, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



I DISSENT (see separate dissenting opinion),

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 4, 2021

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

**BRYAN LEISER
CARMEN BAEZ
CHERNOW AND LIEB**

AI/pc

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

DISSENTING OPINION OF COMMISSIONER LOWE

I respectfully dissent. I would rescind the WCJ's decision and issue a new decision finding that there is no good cause to set aside the Award in ADJ11423986.

The parties may stipulate to the facts in controversy. (Lab. Code, § 5702.) Stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].) As defined in *Weatherall*, "A stipulation is 'An agreement between opposing counsel . . . ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,' (Ballentine, Law Dict. (1930) p. 1235, col. 2) and serves 'to obviate need for proof or to narrow range of litigable issues' (Black's Law Dict. (6th ed. 1990) p. 1415, col. 1) in a legal proceeding." (*Weatherall, supra*, 77 Cal.App.4th at p. 1119.)

"Good cause" to set aside an order or stipulations depends upon the facts and circumstances of each case. "Good cause" includes mutual mistake of fact, duress, fraud, undue influence, and procedural irregularities. (*Johnson v. Workmen's Comp. Appeals Bd.* (1970) 2 Cal.3d 964, 975 [35 Cal.Comp.Cases 362]; *Santa Maria Bonita School District v. Workers' Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 848, 850 (writ den.); *City of Beverly Hills v. Worker's Comp. Appeals Bd. (Dowdle)* (1997) 62 Cal.Comp.Cases 1691, 1692 (writ den.); *Smith v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d 1160, 1170 [50 Cal.Comp.Cases 311] (writ den.)) To determine whether there is good cause to set aside stipulations between the parties, the circumstances surrounding their execution and approval must be assessed. (See Lab. Code, § 5702; *Weatherall, supra*, 77 Cal.App.4th at pp. 1118-1121; *Robinson v. Workers' Comp. Appeals Bd. (Robinson)* (1987) 194 Cal.App.3d 784, 790-792 [52 Cal.Comp.Cases 419]; *Huston v. Workers' Comp. Appeals Bd. (Huston)* (1979) 95 Cal.App.3d 856, 864-867 [44 Cal.Comp.Cases 798].)

As the moving party, applicant has the burden of proof to show by a preponderance of the evidence that she should be relieved from the stipulations she entered into with defendant. (See Lab. Code, § 5705 [the burden of proof rests upon the party with the affirmative of the issue]; see also Lab. Code, § 3202.5 ["All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence"].)

The record here does not show good cause to set aside the Award. The Award solely resolved the specific injury and expressly states that the 14% permanent disability rating was only

for the back. Applicant's cumulative trauma claim remains pending. The agreement was signed by a licensed interpreter and applicant's former attorney. Applicant's decision to obtain new counsel after approval of the Award does not constitute good cause to set aside the parties' stipulations, nor does a subsequent change of opinion about resolving her claim.

The WCJ set aside the parties' stipulations resolving the specific injury claim because he found the report of the QME Mark Lungren, D.C. did not constitute substantial evidence. It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) However, review of Dr. Lungren's October 26, 2018 report shows that the QME conducted the evaluation with the assistance of a licensed interpreter and followed the required procedures for conducting medical-legal evaluations. (Applicant's Exhibit No. 7, Report of Mark Lungren, D.C., October 26, 2018.) Dr. Lungren's report specified that the 5% whole person impairment "rating will attribute to the lumbar condition," and therefore, he did identify the body part for this rating, contrary to the WCJ's statement in his Report. (*Id.* at p. 6; WCJ's Report, May 4, 2021, p. 4.) He also concluded that the exam findings and record did not support the level of pain reported for the cervical spine and this body part "will be considered cured from the effects of this industrial injury." (Applicant's Exhibit No. 7, Report of Mark Lungren, D.C., October 26, 2018, p. 6.) This indicates that the QME found no residual impairment for the cervical spine. The lack of discussion about the cumulative trauma claim in Dr. Lungren's report is immaterial because that claim is still pending and was not addressed in the Award. Further discovery may consequently be conducted to address that claim. To the extent applicant believes her level of permanent disability from the specific injury is greater than 14%, she remains within the five-year period to petition to reopen her claim for new and further disability. (Lab. Code, § 5410.)

"Stipulations are designed to expedite trials and hearings and their use in workers' compensation cases should be encouraged." (*Robinson, supra*, 194 Cal.App.3d at p. 791.) While the Appeals Board has the authority to reject parties' stipulations, this "discretion does not validate capricious decisionmaking." (*Weatherall, supra*, 77 Cal.App.4th at p. 1119.) The "appropriate standard by which a stipulation should be set aside" is not whether it is "*bad* for the worker;" but rather, the standard is whether there is good cause to set aside the parties' stipulations. (*Id.* at p. 1121, emphasis in original.) "[When] there is no mistake but merely a lack of full knowledge of

the facts, which...is due to the failure of a party to exercise due diligence to ascertain them, there is no proper ground for relief.” (*Huston, supra*, 95 Cal.App.3d at p. 866, internal citation marks and citations omitted.)

Showing good cause to set aside an approved Award is a high bar. Good cause may not be premised merely on a change of opinion based on the same facts and a party cannot re-litigate the original award based on facts or evidence that were in existence at the time the original award was made. Applicant was represented by an attorney when she entered into the stipulations and the QME’s report issued several months before the Award. The majority concludes that defendant is not irreparably harmed by vacating the Award. A party is harmed by the undoing of an approved Award based on a showing that does not constitute good cause whether that Award is challenged by an applicant or defendant. Permitting a party to subsequently withdraw from an agreement because they have changed their mind endangers the finality of approved settlements. The result here undermines transactional stability in the workers’ compensation system and risks discouraging future settlements.

Therefore, I dissent.



WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 4, 2021

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

**BRYAN LEISER
CARMEN BAEZ
CHERNOW AND LIEB**

AI/pc

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