

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

**DONALD MERRILL, *Applicant***

**vs.**

**DEPARTMENT OF STATE HOSPITALS ATASCADERO; administered by STATE  
COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ17180418  
San Luis Obispo District Office**

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

Defendant seeks reconsideration of an Order issued by the PWCJ on September 13, 2023. The Order states: "GOOD CAUSE APPEARING; IT IS ORDERED THAT the Employment Development Department continue to move to file and perfect any claimed lien in this Workers, [*sic*] Compensation case and defer any and all collection procedures until such time."

Applicant did not file an Answer.

The PWCJ prepared a Report and Recommendation on Petition for Reconsideration (Report).

Defendant requested leave to file a Supplemental Petition For Reconsideration (Supplemental Petition).

We have considered the allegations of the Petition for Reconsideration (Petition), the contents of the Report, the Supplemental Petition, and we have reviewed the record in this matter. For the reasons discussed below, we dismiss defendant's Petition because it seeks reconsideration of a non-final order, grant defendant's Petition as a Petition for Removal, and rescind the PWCJ's Order.

**BACKGROUND**

Applicant filed an application for adjudication on April 21, 2023, alleging a specific injury to his psyche on November 6, 2021, while employed by defendant as a registered nurse.

On August 21, 2023, applicant filed a Declaration of Readiness (DOR) requesting the following:

IDL AND TD WERE PAID WITH KNOWLEDGE THAT APPLICANT WAS RECEIVING EDD. EDD HAS STARTED GARNISHING TAX REFUNDS IN AN EFFORT TO REPAY THEIR LIEN. LETTERS TO EDD SENT ON 6/29/23 WITH NO RESPONSE. EMAIL SENT TO SCIF ON 6/7/23 WITH NO RESPONSE. WCAB INTERVENTION REQUESTED

On September 13, 2023, the PWCJ held a Status Conference with applicant and defendant (SCIF.) At the time of the status conference, the Employment Development Department (EDD) was not a party to this matter.<sup>1</sup> The PWCJ issued the Order.

On September 21, 2023, defendant filed a Petition for Reconsideration of the Order issued by the PWCJ on September 13, 2023.

On September 25, 2023, EDD filed a lien and original bill.

On September 29, 2023, the PWCJ filed a Report and Recommendation on Petition for Reconsideration.

On October 4, 2023, defendant requested leave to file a Supplemental Petition for 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. (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

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<sup>1</sup> The PWCJ states in his report: “. . . At that hearing a minute Order issued, to preserve the status quo, it was meant [*sic*] put the Employment Development on notice that to have standing in the Workers’ Compensation case, they needed to file a lien. It also admonished them to defer collection proceedings only in the Workers’ Compensation case until they had filed a lien.”

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.

The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a “final” decision and the petition will be dismissed to the extent it seeks reconsideration.

Here, the Order issued by the PWJC on September 13, 2023, does not resolve anything thus it is not a final order and the reconsideration standard does not apply. Further, at the time of the status conference EDD was not a party to this matter. EDD did not become a party to this matter until September 25, 2023, when it filed a Notice of Lien and an EDD Lien.

After the WCJ issued his Report and Recommendation, on October 4, 2023, defendant filed a request for leave to file a Supplemental Petition For Reconsideration with accompanying supplemental pleading. Pursuant to WCAB Rule 10964(a), we accept and consider the Supplemental Petition. (Cal. Code Regs., tit. 8 §10964.)

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*.) 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).)

The statutory and regulatory duties of a WCJ include the issuance of a decision that complies with Labor Code section 5313. “The Labor Code and the Board’s rules set forth what must be included in a proper trial record. 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 admissions and stipulations of the parties, and the admitted evidence.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Bd. en banc) (*Hamilton*)). The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Id.* at p. 476, citing *Evans v. Workmen’s Comp. Appeals Bd.*

(1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].) “For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record.” (*Hamilton*, supra, 66 Cal.Comp.Cases at p. 476.)

The Appeals Board’s record of proceedings is maintained in the adjudication file and consists of: the pleadings, minutes of hearing and summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits marked but not received in evidence, notices, petitions, briefs, findings, orders, decisions, and awards, and the arbitrator’s file, if any. . . . 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.) The WCJ’s decision “must be based on admitted evidence in the record.” (*Hamilton*, supra, 66 Cal.Comp.Cases at p. 476.)

The minutes of hearing and summary of evidence (MOH/SOE) shall be prepared at the conclusion of each trial and filed in the record of proceedings. (Cal. Code Regs., tit. 8, § 10787(c).) The MOE/SOE must include the “admissions and stipulations, the issues and matters in controversy, a descriptive listing of all exhibits received for identification or in evidence (with the identity of the party offering the same).” (Cal. Code Regs., tit. 8, § 10787(c)(3).) “Even at a conference, the record must be properly maintained, especially if documents were accepted and a decision issued.” (*Hernandez v. AMS Staff Leasing* (2011) 76 Cal.Comp.Cases 343, 349 [2011 Cal. Wrk. Comp. LEXIS 49, \*12-13].)

Here, the minutes of hearing are skeletal and merely state under other/comments: “See attached Order. ” There is no record nor summary of evidence to review to determine the basis of the WCJ’s Order.

Accordingly, we dismiss the Petition for Reconsideration and grant the Petition to the extent it seeks removal, and rescind the Order.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Order issued September 13, 2023, is **DISMISSED**.

**IT IS FURTHER ORDERED** that the Petition for Removal of the Order issued on September 13, 2023, is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Removal of the Workers' Compensation Appeals Board that the decision of September 13, 2023, is **RESCINDED** and that the matter is **RETURNED** to the trial level for the PWCJ for further proceedings consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



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

**November 20, 2023**

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

**DONALD MERRILL  
SPATAFORE GRANT  
STATE COMPENSATION INSURANCE FUND**

**DLM/oo**

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