

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

JUAN MALDONADO, *Applicant*

vs.

**SO CAL REGION OVERNIGHT, INC., DBA EXPAK GROUND; PRAETORIAN
INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ9105321
Pomona District Office**

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

We have considered the allegations of the Petition for Removal/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 for the reasons stated below, we will grant reconsideration and amend the WCJ's decision solely to clarify that there is no final order as to the issue of earnings. Based upon the WCJ's analysis of the merits of petitioner's arguments in the WCJ's report, we will otherwise affirm the August 9, 2021 Findings and Order.

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, the petitioner is only challenging interlocutory findings/orders in the decision regarding development of the record and the recalculation of average weekly earnings. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*) Solely for the sake of clarifying that the WCJ did not make any final finding as to the issue of earnings, we will amend Findings of Fact 2 from "[t]he parties are ordered to adjust the applicant's pay to accurately capture unpaid overtime" to "The issues of average weekly earnings and temporary disability are deferred and returned to the trial level for further proceedings. The parties are ordered to adjust the calculation of average weekly earnings, the temporary disability indemnity rate, and penalties and interest, if any. Jurisdiction is reserved at the trial level if there is any dispute.

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, § 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, based upon the WCJ's analysis of the merits of the petitioner'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.

Therefore, we will grant reconsideration and amend the WCJ's decision solely to clarify that there is no final order as to the issue of earnings and will otherwise affirm the August 9, 2021 Findings and Order.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the August 9, 2021 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the August 9, 2021 Findings and Order is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. The issues of average weekly earnings and temporary disability are deferred and returned to the trial level for further proceedings. The parties are ordered to adjust the calculation of average weekly earnings, temporary disability indemnity rate, and penalties and interest, if any. Jurisdiction is reserved at the trial level if there is any dispute.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 28, 2022

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

**JUAN MALDONADO
CANLAS LAW GROUP
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

PAG/pc

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