

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

VERONICA RINCON, *Applicant*

vs.

**THE PERMANENTE MEDICAL GROUP INC. Permissibly Self Insured;
administered by ATHENS ADMINISTRATORS, *Defendants***

**Adjudication Numbers: ADJ11612609; ADJ12184014
San Jose District Office**

**OPINION AND DECISION AFTER
RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration. Applicant in pro per filed a Petition for Reconsideration (Petition) seeking reconsideration of the WCJ's October 7, 2022 order to compel applicant's attendance at an agreed medical re-examination (AME).

Applicant's Petition requests the following: "Please remove Dr. Fugimoto [*sic*] AME Evaluator from my case I do not feel safe seeing him again." Defendant filed an answer. The WCJ filed a Report and Recommendation (Report) and she recommended that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the report of the WCJ with respect thereto. Based on our review of the record, the Petition seeks reconsideration of a non-final order, and we will vacate our grant of reconsideration and dismiss it as a Petition for Reconsideration and treat it as a Petition for Removal, grant Removal, rescind the order and return the matter to the trial level for further proceedings consistent with this opinion.

BACKGROUND

Applicant sustained an injury arising out of and arising in the course of employment to the bilateral wrists and claims to have sustained an injury to the psyche, left shoulder and cervical spine while employed as a lab assistant II.

On October 6, 2022 defendant filed a Petition to Compel applicant's attendance at an Agreed Medical Examination (AME) re-evaluation with Ronald Fujimoto, D.O.

On October 7, 2022 the WCJ issued an Order compelling applicant's attendance at the AME re-evaluation with Dr. Fujimoto without a Notice of Intent (NOI).

Applicant filed a letter date-stamped October 7, 2022 objecting to the Order to compel.

Applicant filed a Petition for Reconsideration of the Order compelling applicant to attend an AME re-evaluation with Dr. Fujimoto date-stamped October 7, 2022.

On October 17, 2022 defendant filed an Answer.

DISCUSSION

I.

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, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) 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, 650-651, 655-656].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian, supra*, 81 Cal.App.4th at p. 1075 [65 Cal.Comp.Cases at p. 655] ("interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "); *Rymer, supra*, 211 Cal.App.3d at p. 1180 ("[t]he term ['final'] does not include intermediate procedural orders or discovery orders"); *Kaiser Foundation Hospitals (Kramer), supra*, 82 Cal.App.3d at p. 45 [43 Cal.Comp.Cases at p. 665] ("[t]he term ['final'] does not include intermediate procedural orders").) Such interlocutory decisions include pre-trial orders regarding evidence, discovery, trial setting, venue, and similar issues.

Here, the WCJ's decision solely resolves an intermediate discovery issue regarding compelling applicant to attend an AME re-evaluation. 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 applicant’s petition for reconsideration will be dismissed. Thus, we will treat applicant’s petition as a Petition for Removal. A party may petition for removal of an interim order. (Cal. Code Regs., tit. 8 §10955.) 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, 136, fn. 2].) 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).) In light of the considerations discussed below, we conclude that granting removal is appropriate in this matter.

II.

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) As required by Labor Code 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 p.475.) Additionally, decisions by the WCJ and the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp Appeals Bd.* (1970) 1 Cal.3d. 627 [35 Cal.Comp.Cases 16].)

Here, since the WCJ did not set the Petition for a hearing, there is no record to review.

Moreover, all parties in workers' compensation proceedings retain their fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157–158, [65 Cal.Comp.Cases 805] (*Rucker*).) “The core of due process is the right to notice and a meaningful *opportunity* to be heard.”(Emphasis added) (*Lachance v. Erickson* (1998) 522 U.S. 262, 266 [139 L. Ed. 2d 695, 118 S. Ct. 753]. “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

objections.” (*Fortich v. Workers Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449 [56 Cal.Comp.Cases 381].) The “essence of due process is simply notice and the opportunity to be heard.” (*San Bernardino Cmty. Hosp. v. Workers’ Comp. Appeals Bd.* (McKernan) (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986].)

Determining an issue without giving the parties notice and an opportunity to be heard violates the parties’ right to due process. (*Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal. Comp. Cases 584], citing *Rucker*, supra, at 157-158.) A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal. Comp. Cases 584]; *Rucker*, supra, at 157–158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal. Comp. Cases 21]; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4 703, 710 [57 Cal. Comp. Cases 230].)

Due process requires that parties be given notice and an opportunity to be heard and/or to object to a petition. Based on the petition of any party, the WCJ may hear and decide discovery disputes. (*Allison v. W.C.A.B.* (1999) 72 Cal. App. 4th 654, 664, 84 Cal. Rptr. 2d 915, 64 Cal. Comp. Cases 624, 632.) Here, the issue is whether the WCJ’s order compelling an AME re-examination Order is valid. In order for an order to be valid, notice and the opportunity to be heard must be given to applicant.

On October 6, 2022 defendant filed a verified petition to compel applicant’s attendance at an AME medical re-evaluation and attached to the petition is a proof of service listing applicant and defendant administrator. Defendant also filed a proposed order. On October 7, 2022 a mere one day after defendant filed the Petition, the WCJ issued an order compelling applicant to attend a re-evaluation with AME Dr. Fujimoto. On October 17, 2022 defendant served applicant with the order to compel attendance at a re-evaluation with AME Dr. Fujimoto.

A review of the record in EAMS reflects that the WCJ did not hold a hearing regarding defendant’s Petition, nor did she issue a Notice of Intent (NOI) as set forth in WCAB Rule 10832. Had she done so, applicant would have had an opportunity to object and/or to be heard by the WCJ regarding defendant’s petition.

WCAB Rule 10832 states:

(a) The Workers' Compensation Appeals Board may issue a notice of intention for any proper purpose, including but not limited to:

- (1) Allowing, disallowing or dismissing a lien;
- (2) Granting, denying or dismissing a petition;
- (3) Sanctioning a party;
- (4) Submitting the matter on the record; or
- (5) Dismissing an application.

(b) A Notice of Intention may be served by designated service in accordance with rule 10629.

(c) If an objection is filed within the time provided, the Workers' Compensation Appeals Board, in its discretion may:

- (1) Sustain the objection;
- (2) Issue an order consistent with the notice of intention together with an opinion on decision; or
- (3) Set the matter for hearing.

(d) Any order issued after a notice of intention shall be served by the Workers' Compensation Appeals Board pursuant to rule 10628.

(e) An order with a clause rendering the order null and void if an objection is received is not a Notice of Intention and must be served by the Workers' Compensation Appeals Board.

(Cal. Code Regs., tit. 8, § 10832.)

Here, the WCJ's should have held a hearing on the merits of defendant's Petition. By failing to set the defendant's Petition for a hearing applicant's due process rights were violated in addition there is no record to review. If the WCJ had held a hearing she could have taken and admitted evidence and this would have created a record of the proceedings for review. Further, a NOI should have been issued with the Order further ensuring applicant's right to due process. Accordingly, we vacate our grant of reconsideration, dismiss applicant's petition as one for reconsideration, grant applicant's petition as one for removal, rescind the October 7, 2022 Order to Compel, and return the matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Order Granting Petition for Reconsideration issued by the Workers' Compensation Appeals Board on December 5, 2022 is **VACATED**.

IT IS FURTHER ORDERED that applicant's Petition for Reconsideration of the Order to Compel is **DISMISSED**.

IT IS FURTHER ORDERED that applicant's Petition for Removal is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that the October 7, 2022 Order to Compel is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 30, 2023

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

**VERONICA RINCON, IN PRO PER
JAMES T. WITKOP, ESQ.**

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