

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

JAIME VILLALOBOS, *Applicant*

vs.

**UNITED PARCEL SERVICE;
LIBERTY MUTUAL INSURANCE COMPANY, *Defendants***

**Adjudication Numbers: ADJ11340473, ADJ11340474, ADJ11340475
Salinas District Office**

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

Applicant seeks reconsideration, or in the alternative removal, of the Minute Order dated September 12, 2022 closing discovery, with the exception of the deposition of Agreed Medical Evaluator Mark Anderson, M.D., scheduled for January 27, 2023. Applicant avers significant prejudice in the order closing discovery because he received medical reporting shortly after the MSC revealing new diagnoses and resulting in amendment of his claim.

We have received an Answer from the defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending we dismiss applicant's petition.

We have considered the allegations of the Petition for Reconsideration and Removal, the Answer, and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, we will dismiss the petition to the extent it seeks reconsideration and grant it to the extent it seeks removal.

FACTS

Applicant claims injury to the back, sleep loss, side effects from medications, GERD, intestines, heart/hypertension and psyche, while employed as a delivery driver/clerk by United

Parcel Service (defendant) on June 27, 2017. Applicant also claims to have sustained a specific injury on February 22, 2017 in Case No. ADJ11340473, and a cumulative trauma injury from July 31, 2016 to July 31, 2017 in Case No. ADJ11340475.

The parties have selected Mark Anderson, M.D. as the Agreed Medical Evaluator (AME) in orthopedics. (Petition, at 2:15; Answer, at 2:18.)

On July 21, 2022, defendant filed a Declaration of Readiness to Proceed, requesting a Mandatory Settlement Conference (MSC) on issues of permanent disability, medical treatment and apportionment.

On July 29, 2022, applicant objected to the DOR, averring ongoing discovery including the need to cross-examine AME Dr. Anderson, and difficulty obtaining industrial medical treatment in Oregon. (Objection to DOR, dated July 29, 2022, at 1:20.) The objection stated applicant's intention to schedule the deposition of Dr. Anderson. (*Id.* at 3:2.)

On September 12, 2022, the parties proceeded to MSC. The minutes reflect a stipulation to go off calendar, which the WCJ granted, along with additional notation that, "[d]iscovery closed on this case only, except for the deposition of Dr. Mark Anderson on 1/27/23."

On September 13, 2022, applicant amended his application to include, "sleep loss, side effects from medications, GERD, intestines, heart/hypertension and psyche."

Applicant's Petition contends that applicant's hypertensive condition was first diagnosed on the day of the MSC, September 12, 2022, and that applicant acted promptly in amending his applications to reflect this new diagnosis. (Petition, at 6:23.) Applicant further contends he has sustained injury to the psyche, and that the closure of discovery abrogates his due process rights. (*Id.* at 8:14.)

Defendant's Answer requests the consolidation of all three of applicant's pending cases. (Answer, at 6:13.) Defendant observes that applicant amended his applications only after the September 12, 2022 order closing discovery, and that applicant engaged in impermissible communication with the WCJ following the conclusion of the MSC. (Answer, at 7:8; 8:16.)

The WCJ's report observes that applicant did not object to the closure of discovery at the MSC, and that there is no evidence linking applicant's elevated blood pressure with his industrial injury. (Report, at p. 2.) The WCJ rejects defendant's assertion that applicant engaged in ex parte contact with the WCJ, because defense counsel was copied with every email. (*Ibid.*) The WCJ observes that the defendant's DOR listed only one case number, resulting in action from the MSC

on that specific matter. (*Ibid.*) The WCJ concludes that, “[a]pplicant has not shown why medical evidence concerning his alleged non-orthopedic conditions could not have been obtained, if he needed it, with the exercise of due diligence prior to the MSC.” (*Id.*, at p. 3.)

DISCUSSION

In *Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 [57 Cal.Comp.Cases 493] (“Shiple”), the Court of Appeal determined that where the Workers’ Compensation Appeals Board (WCAB) fails to timely act on a petition for reconsideration due to no fault of the petitioner, due process requires that the Board consider the petition on the merits, rather than deny it by operation of law under Labor Code section 5909. Here, through no fault of applicant the WCAB did not take timely action on defendant’s petition. Accordingly, and pursuant to *Shiple*, we will address applicant’s Petition, dated September 14, 2022, on the merits. (*Shiple, supra*, at 1107; Labor Code § 5900, 5903; Cal. Code Regs., tit. 8, § 10955(a).)

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 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.

Here, the WCJ’s decision solely resolves an intermediate procedural or evidentiary issue or 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.

Applicant contends the closure of discovery results in undue prejudice, as it precludes development of the record to address newly identified injuries. (Petition, at 6:19.) Defendant responds that applicant has not acted with due diligence in the prosecution of his claim. (Answer, at 7:4.)

Applicant’s Petition describes a history of difficulty in obtaining out-of-state medical treatment. Per the Petition, applicant relocated to Oregon in 2020, but continued to treat with Peter Abaci, M.D., primarily through telemedicine appointments. (Petition, at 2:19.) However, Dr. Abaci’s staff advised applicant that the physician could not continue to act as primary treating physician (PTP) without in-person appointments. (*Ibid.*) The parties identified the Summit Medical Group to act as the new PTP, and applicant attended his first appointment there on June 20, 2022. (*Id.* at 3:7.) Applicant’s second appointment with his new PTP was scheduled for September 12, 2022, the same day as the MSC. Applicant’s verified Petition contends that applicant’s blood pressure was very high that day, and that applicant’s treating physician referred him to urgent care for treatment of the hypertension issue. (*Id.* at 5:7.) Upon receipt of the medical records from the September 12, 2022 PTP visit, applicant promptly filed amended applications to include injured body parts of “heart/hypertension.” Additionally, applicant alleges injury to his psyche as a result of his work injuries. (Petition, at 5:27.)

The Appeals Board “may not leave undeveloped matters which its acquired, specialized knowledge should identify as requiring further evidence.” (*West v. Industrial Acci. Com.*(1947) 79 Cal.App.2d 711, 719 [1947 Cal.App. LEXIS 889].) Given the timely amendment to the application, we believe it is incumbent upon the parties to develop a record capable of sustaining a determination as to whether the pleaded injuries arose out of and occurred in the course of applicant's employment. (*Kuykendall v. Workers' Comp. Appeals. Bd.* (2000) 79 Cal.App.4th 396 [94 Cal. Rptr. 2d 130, 65 Cal.Comp.Cases 264]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924].)

Consequently, we conclude that the medical evidence which was adduced on the afternoon of the MSC constituted a change circumstance, and in light thereof, that the order closing discovery will result in significant prejudice to applicant. Accordingly, we will dismiss the petition to the

extent it seeks reconsideration, grant the petition to the extent it seeks removal, and rescind the order closing discovery.

We also address defendant's request for consolidation of applicant's three pending cases. (Answer, at 6:13, referencing Case Nos. ADJ11340473, ADJ11340474, and ADJ11340475.) We observe that WCAB Rule 10396 permits consolidation of cases for reasons including common issues of fact or law, the avoidance of duplicate or inconsistent orders, and the efficient utilization of judicial resources. (Cal. Code Regs., tit. 8, § 10396.) We further observe that as the AME, Dr. Anderson is tasked with addressing, "all medical issues arising from all reported claims of injury at the time of an evaluation." (*Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418, 425 [2014 Cal. Wrk. Comp. LEXIS 41] (Appeals Bd. en banc).) Accordingly, we believe that it may be appropriate for the WCJ to consider issuing an order of consolidation in tandem with a determination of how best to proceed with discovery in subsequent proceedings before the WCAB.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DISMISSED** and the Petition for Removal is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the order closing discovery dated September 12, 2022 is **RESCINDED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 6, 2023

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

**JAIME VILLALOBOS
SPRENKLE, GEORGARIOU & DILLES
LUNA, LEVERING & HOLMES**

SAR/abs

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