WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARLA CROSS, *Applicant*

vs.

STATE OF CALIFORNIA; DEPARTMENT OF TRANSPORTATION DEPARTMENT OF REHABILITATION, *Defendants*

Adjudication Number: ADJ769213 (FRE0198930)
Fresno District Office

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and/or Removal 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, rescind the January 24, 2023 Minute Order, substitute our own order to preserve applicant's election against CalTrans and defer all other issues. We will then return this matter to the trial level for further proceedings and decision.

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 January 24, 2023 Minute Order documents applicant's election against CalTrans. Because this is a threshold issue, we treat the petition as one seeking reconsideration.

There is no evidentiary record in this matter upon which to determine the liability for benefits to which the Minute Order alludes. All awards, orders and decisions of the Appeals Board must be supported by substantial evidence in the record. (Lab. Code § 5952(d); *Lamb v. Workers' Comp. Appeals Bd*. (1974) 11 Cal.3d 274, 280 [39 Cal.Comp.Cases 310].) That record must permit us to conduct meaningful review of the issues raised. (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Board en banc).)

> In *Hamilton*, we stated that:
> 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.
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> The evidence submitted by the parties must be formally admitted and must be included in the record to enable the parties to comprehend the basis for the decision.
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> Furthermore, a proper record enables any reviewing tribunal, be it the Board on reconsideration or a court on further appeal, to understand the basis for the decision.
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> * * *
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> The WCJ must prepare the minutes of hearing and a summary of evidence at the conclusion of each hearing. These must include all interlocutory orders, admissions and stipulations, the issues and matters in controversy, a descriptive listing of all exhibits received for identification or in evidence and the disposition of the matter. (Cal. Code Regs., tit. 8, §10566.)
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> * * *

Medical reports and other admitted documentary evidence must be clearly listed in the recorded minutes of the conference hearing or trial. Such admitted evidence should be clearly labeled with exhibit numbers conforming to the list of admitted evidence.

The filing of a document does not signify its receipt in evidence, and only documents that have been received in evidence or are listed in Board rule 10750 shall be included in the record of proceedings on the case. (Cal. Code Regs., tit. 8, §10600.) ….

* * *

In summary, the Labor Code and the Board's rules contain explicit instructions concerning the contents of the record of a case. It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence.

(*Hamilton v. Lockheed Corporation, supra,* 66 Cal.Comp.Cases at pp. 475 - 477; see also Cal. Code Regs., tit. 8, §§ 10787, 10670, 10803.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the January 24, 2023 Minute Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 24, 2023 Minute Order is **RESCINDED** and **SUBSTITUTED** with a new Order, as provided below.

IT IS FURTHER ORDERED that applicant elects to proceed against the State of California Department of Transportation (CalTrans) pursuant to their right 5500.5(c) and that all other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 10, 2023

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

MARLA CROSS
GARY HILL
STATE COMPENSATION INSURANCE FUND

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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.
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