

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

GREGG VIDEGAIN, *Applicant*

vs.

NANCY MARKWELL dba MARKWELL FARMS, *Defendant*

**Adjudication Number: ADJ10255057
Anaheim District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration filed by defendant, Nancy Markwell dba Markwell Farms, 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 based upon the WCJ's analysis of the merits of defendant's arguments in the WCJ's report, we will deny the Petition as one seeking reconsideration.

Defendant filed a timely, unverified Petition for Reconsideration of the WCJ's Findings & Order (F&O), issued on May 9, 2022. In the F&O, the WCJ found that the medical record in the case required further development and ordered additional panel QMEs in the specialties of psychiatry and internal medicine.

Defendant contends that allowing the additional panel QMEs will result in significant prejudice and irreparable harm to defendant because there was no basis for the WCJ to order the panels. The Petition for Reconsideration contains numerous documents attached in violation of WCAB Rule 10945(c). (Cal. Code Regs., tit. 8, § 10945(c).) These documents have been removed and discarded. (*Id.*) The filing party is admonished to follow the WCAB's Rules in future matters. Applicant did not file an answer to defendant's petition.

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 threshold issues. (F&O, p. 1.) The WCJ found that applicant sustained an injury arising out of and in the course of employment and also determined applicant's temporary disability rate. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, defendant is only challenging an interlocutory finding/order in the decision. (F&O, p. 2.) Defendant disputes the WCJ's interlocutory order for additional panel QMEs. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*)

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 defendant'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.

We note that, had we not denied the petition, we would have dismissed it for lack for verification. Labor Code section 5902¹ requires that a petition for reconsideration be verified. (Lab. Code, § 5902; see also Cal. Code Regs., tit. 8, § 10510(d).) In *Lucena v. Diablo Auto Body* (2000) 65 Cal.Comp.Cases 1425 (Significant Panel Decision), it was held that where a petition for reconsideration is not verified as required by section 5902, the petition may be dismissed if the petitioner has been given notice of the defect (either by the WCJ's report or by the respondent's answer) unless, within a reasonable time, the petitioner either: (1) cures the defect by filing a verification; or (2) files an explanation that establishes a compelling reason for the lack of verification and the record establishes that the respondents are not prejudiced by the lack of verification. Here, the petition is not verified and notice of this defect was specifically given in the WCJ's report. (WCJ Report, p. 1.) Moreover, a reasonable period of time has elapsed, but defendant has neither cured the defect by filing a verification nor offered an explanation of why a verification cannot be filed. Consequently, had we not denied the petition on the merits, we would have dismissed defendant's petition for lack of verification.

¹ All further statutory references are to the Labor Code unless otherwise stated.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration/Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 1, 2022

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

**GREGG VIDEGAIN
LAW OFFICES OF JEFFREY BIGONGER
LAW OFFICES OF KERRY O'BRIEN**

AH/oo

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