

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

WYATT MITCHAM, *Applicant*

vs.

**APPSHOSTING, INC.; BYUNG SAM YUN, ASHOK BALASUBRAMANIAN and
LARRY WENSHAN ZHAO, individuals and substantial shareholders, *Defendants***

**Adjudication Numbers: ADJ7965556; ADJ7965560
Anaheim District Office**

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

Defendant seeks removal, or, in the alternative, reconsideration, in response to the Order taking off calendar issued by the workers' compensation administrative law judge (WCJ) on January 19, 2022. As relevant herein, the WCJ also ordered further development of the record.

Defendant contends, as relevant herein, that the applicant acted in bad faith by not signing the pretrial conference statement, that applicant did not exercise due diligence in failing to amend his applications for adjudication of claim to include the neck as an injured body part, that discovery had closed thus precluding applicant from requesting an additional QME panel in internal medicine, that regular physician Richard Woods M.D.'s reports did not state that applicant had complained of neck symptoms to Dr. Woods and therefore applicant should be precluded from amending his applications to include the neck¹.

Applicant did not file an answer. We received a Report and Recommendation (Report) from the WCJ on the Petition for Removal and Reconsideration.

We have considered the allegations of the Petition for Removal and Reconsideration and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, we will dismiss the Petition as one for reconsideration and we will treat the Petition as one for removal,

¹ Defendant is reminded that attaching documents to a petition may be a violation of WCAB Rule 10945 (Cal. Code Regs., tit. 8, § 10945) and documents may not be considered that are not part of the evidentiary record.

rescind the WCJ's orders, and return this matter to the WCJ for further proceedings consistent with our decision.

FACTUAL BACKGROUND

In ADJ7965560, on September 14, 2010, while employed by the defendant as a vice president of sales, applicant claims he sustained injury to various body parts.

In ADJ7965556, on October 19, 2010, while employed by the defendant as a vice president of sales, applicant claims he sustained injury to various body parts.

Dr. Woods is the regular physician in case number ADJ7965560.

Dimitri Sirakoff, D.O. is applicant's primary treating physician in both cases.

Trial was set for January 19, 2022. The January 19, 2022 Minutes of Hearing (MOH) state in relevant part:

After a discussion with the parties and a review of some of the medical evidence and notices in Filenet, it is apparent to this court that further discovery is needed. First, the pretrial conference statement was not filed as ordered by Judge DeWeese, the pretrial conference statement must be completed so the court can review the issues identified and the exhibits listed in the exhibit sheet. This will be completed before the matter can be set for trial the next time.

Secondly, the applicant to file an amended application including the neck. This has been at issue as Dr. Sirakoff addresses this in his report. The amended application shall be filed within 30 days of today's date.

Third, as the applicant is claiming internal injuries, a PQME in internal medicine is needed. Defendant will not stipulate so a petition and/or request needs to be filed by the applicant. The PQME can be requested on the case number where no PQME has been obtained yet.

Fourth, Dr. Woods is to address the cervical spine; Dr. Woods to reevaluate the applicant.

Fifth, applicant has raised a conflict with defense attorney as he was partners with applicant's prior counsel.

ORDER(S): Based on the above, the matter is ordered off calendar to complete the discovery as set forth above. Defendant to set the reevaluation with Dr. Woods and provide all records not previously reviewed by Dr. Woods so he can address the cervical spine and determine the [Whole Person Impairment] WPI. Dr. Woods to comment on [arising out of and in

the course of employment] AOE/COE as to the claimed neck injury. All defendant's defenses are reserved to trial.

(MOH, January 19, 2022, pp. 1-2.)

On January 24, 2022, applicant filed an amended Application for Adjudication of Claim in case number ADJ7965560 alleging, in relevant part, injury to his back, bilateral wrists, bilateral shoulders, psyche and circulatory system².

In its petition, defendant asks that we rescind the WCJ's January 19, 2022 orders and order the cases set for trial with further discovery closed.

The WCJ issued a Report and Recommendation on the Petition for Removal and Reconsideration reiterating his January 19, 2022 orders.

DISCUSSION

I.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.)³ 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

² We note applicant did not claim the neck (cervical spine) as an injured body part in the amended application for adjudication. Additionally, no amended application for adjudication was filed at all in case number ADJ796556 following the January 19, 2022 hearing.

³ All statutory references not otherwise identified are to the Labor Code.

limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues. Here, all of the orders by the WCJ are interim orders. Thus, we will dismiss the Petition as one for reconsideration.

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 substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) Here, we will grant removal because we are persuaded that petitioner has shown that substantial prejudice or irreparable harm will result if removal is not granted.

II.

The statutory and regulatory duties of a WCJ include the issuance of a decision that complies with Labor Code section 5313. An adequate and complete record is necessary to understand the basis for the WCJ's decision and the WCJ shall “. . . make and file findings upon all facts involved in the controversy[.]” (Lab. Code, § 5313; *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [2001 Cal.Wrk.Comp. LEXIS 4947] (Appeals Bd. en banc)⁴ (*Hamilton*)). As required by 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 475.) The purpose of this requirement is to enable “the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]” (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]).

⁴ En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].)

The Appeals Board's record of proceedings is maintained in the adjudication file and consists of: the pleadings, minutes of hearing and summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits marked but not received in evidence, notices, petitions, briefs, findings, orders, decisions, and awards, and the arbitrator's file, if any. . . . Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings. (Cal. Code Regs., tit. 8, § 10544.)

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].) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572,

[The] commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law. (*Id.* at 577.)

Due process guarantees all parties the right to notice of hearing and a fair hearing. (*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].) Here, no documents or testimony were admitted into evidence at the January 19, 2022 hearing. Moreover, due process requires that the parties have the opportunity for a hearing and to create a record so that the orders can be meaningfully considered upon review. In the absence of an evidentiary record, we are unable to evaluate the basis for the WCJ's orders on the January 19, 2022 MOH. Therefore, we will rescind the January 19, 2022 orders and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Orders issued by the WCJ on January 19, 2022 is **DISMISSED**.

IT IS FURTHER ORDERED that the Petition for Removal of the Orders issued by the WCJ on January 19, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Orders issued by the WCJ on January 19, 2022 orders **RESCINDED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 14, 2022

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

**WYATT MITCHAM
DJG LAW GROUP, INC.
OFFICE OF THE DIRECTOR – LEGAL UNIT**

HAV/ara

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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