

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

ALICIA ORTIZ, *Applicant*

vs.

**PEBBLE BEACH COMPANY, PERMISSIBLY SELF-INSURED,
ADMINISTERED BY INTERCARE, *Defendants***

**Adjudication Number: ADJ13377367
Salinas District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Defendant seeks reconsideration of the April 6, 2022 Order Rescinding Findings and Order of 3/8/2022 and Amended Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) determined applicant is not entitled to the presumption of compensability under Labor Code section 3212.88.¹ The F&O further determined that the reports of Dr. Fishman are insufficient to support a determination of injury arising out of and in the course of employment (AOE/COE), and that applicant may still meet her burden of proving injury AOE/COE without the presumption of section 3212.88.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and Petition for Removal (Petition), and the contents of the report of the WCJ with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, and for the reasons below, we will deny the 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*,

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

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 a threshold issue. The WCJ determined that applicant is not entitled to the presumptions of section 3212.88. Determinations regarding the applicability of presumptions of compensability are threshold orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal. Comp. Cases 650].) Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order setting aside the March 8, 2022 Findings and Order and providing for development of the record. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*, 5 Cal.App.5th 658, 662.)

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, for the reasons stated in the WCJ's

report, 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.

The WCJ raised the issue of injury AOE/COE at trial *sua sponte*, and over the objection of defendant. (January 25, 2022 Minutes of Hearing and Summary of Evidence, at 2:17.) Injury AOE/COE was not raised as an issue for trial by the parties in the pre-trial conference statement. (Pre-trial Conference Statement, dated November 17, 2021.) Applicant's trial brief asserted that the medical record required development to address the issue of injury AOE/COE. (Applicant's Trial Brief, dated February 7, 2022, at 6:19.) Defendant's trial brief contended the presumptions of section 3212.88 were not available to applicant, and that applicant's employment did not put her at greater risk of injury. (Defendant's Trial Brief, dated February 7, 2022, at 8:1.) Defendant further quoted AME Dr. Fishman, as stating, "right now I don't have enough information without speculation to [opine to causation] but that the record needs to be developed more." (*Id.* at 3:28, quoting Ex. D-5, transcript of the deposition of Ira Fishman, M.D., dated August 16, 2021, at 37:24.)

The WCJ entered a finding that applicant did not sustain injury AOE/COE. (Findings and Order, dated March 8, 2022.) Applicant sought reconsideration by petition dated March 27, 2022, averring the record to be incomplete with respect to causation of the COVID infection. (Applicant's Petition for Reconsideration at 2:25.) In rescinding the order finding no injury AOE/COE, the WCJ noted that the issue of injury AOE/COE "was raised for the first time by the WCJ at trial, in the interests of judicial economy. However, judicial economy must give way to considerations of due process, and on further reflection, it is clear that the parties intentionally sought bifurcation of the issues and for good reason did not ask the Board to make a final determination on the injury AOE/COE issue." (F&O, Opinion on Decision, p. 3.)

We agree with the WCJ's conclusion that applicant may still sustain the requisite burden of establishing injury AOE/COE without the presumption of injury. (See *Faust v. City of San Diego*, 68 Cal.Comp.Cases 1822, 1832, fn. 8; 2003 Cal. Wrk. Comp. LEXIS 585 (Appeals Bd. en banc), "in the absence of the presumption, it becomes applicant's burden to establish industrial causation by a reasonable medical probability.")

The WCJ further concluded that AME Dr. Fishman's conclusions, "do not qualify as substantial medical evidence on the AOE/COE issue, because his requests for additional information necessary for rendering a final and fully-informed opinion on AOE/COE have largely

not been met. The record requires further development.” (Report, at p. 3, para. 2.) The WCAB has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924] [“principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims (citations)”]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

We deny the Petition for Reconsideration, accordingly.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 20, 2022

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

**ALICIA ORTIZ
WILSON & WISLER
D'ANDRE LAW**

SAR/abs

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