

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

**JOSE ORTEGA, *Applicant***

**vs.**

**SEGALE AND CERINI, INC.; WESCO INSURANCE CO., administered by AMTRUST,  
*Defendants***

**Adjudication Number: ADJ11073181  
San Francisco District Office**

**OPINION AND ORDER  
DENYING PETITION  
FOR RECONSIDERATION**

We have considered the allegations of defendant's Petition for Reconsideration, applicant's 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, 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.

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 (AOE/COE), 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 injury AOE/COE. Injury AOE/COE is a threshold issue fundamental to the claim for benefits. 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 regarding whether applicant is entitled to treatment outside of the medical provider network (MPN). (See *Babbitt v. Ow Jing* (2007) 72 Cal.Comp.Cases 70, 78-79 (Appeals Board en banc) [applicant's substantive right to medical treatment is unchanged by the MPN statutes which "simply allow another method for providing that medical treatment"].) 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).)

As discussed in the WCJ's report, the Minutes of Hearing from the trial reflect that the WCJ outlined the issue to be adjudicated as "Whether applicant can treat outside of the MPN based on alleged violation by defendant of AD regulations regarding implementation of their MPN." (Minutes of Hearing, January 11, 2022, p. 4.) Both parties' attorneys were asked to confirm if the stipulations and issues were stated correctly. (*Id.*) Defense counsel responded "Yes, Your Honor." (*Id.*) There was no objection by either party to how the issue was framed and the WCJ decided the issue as identified at trial. There was therefore no violation of defendant's right to due process. (See *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312] ["Due process requires notice and a meaningful opportunity to present evidence in regards to the issues."].)

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.

Therefore, we will deny the Petition as one seeking reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the Findings & Award & Order issued by the WCJ on January 12, 2022 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**March 30, 2022**

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

**HANNA BROPHY MACLEAN MCALEER & JENSEN  
JOSE ORTEGA  
LAW OFFICES OF NADEEM MAKADA**

*AI/pc*

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