

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

**ANN MARIE BOERSMA, *Applicant***

**vs.**

**OAKMONT MANAGEMENT GROUP, LLC; TRAVELERS PROPERTY  
CASUALTY COMPANY OF AMERICA, *Defendants***

**Adjudication Number: ADJ13890820  
Van Nuys District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION**

Applicant seeks reconsideration and removal of the May 10, 2023 Findings of Fact and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found in relevant part that applicant was not subject to discrimination in violation of Labor Code<sup>1</sup> section 132a and denied applicant's petition for a violation of section 132a.

The WCJ issued an Amended Report and Recommendation on Petition for Reconsideration/Removal (Report) recommending that the Petition for Removal be dismissed and the Petition for Reconsideration be denied. Defendant filed an Answer and applicant filed a Response to the Judge's Recommendations and Defendant's Answer to the Petition for Reconsideration and Removal.<sup>2</sup>

We have reviewed the allegations in the Petition for Reconsideration, the Answer, applicant's supplemental pleading, and the contents of the Report.

Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration and we will order that this matter be referred to a WCJ at the Appeals Board for

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise noted.

<sup>2</sup> We will treat this Response as a supplemental pleading and pursuant to our authority, we accept applicant's supplemental pleading. (Cal. Code Regs., tit. 8, § 10964.) We advise applicant that "[a] party seeking to file a supplemental pleading shall file a petition setting forth good cause for the Appeals Board to approve the filing of a supplemental pleading and shall attach the proposed pleading." (Cal. Code Regs., tit. 8, § 10964.)

a status conference. Our order granting reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

## I.

A petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that “it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice...” (*Shipley v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied the applicant’s petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board’s decision, holding that the time to act on applicant’s petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.) Like the Court in *Shipley*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Id.*) In this case, applicant filed the Petition on June 5, 2023. Thereafter, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties. Therefore, considering that the Appeals Board’s failure to act on that petition was in error, we find that our time to act on applicant’s Petition was tolled.

## II.

We also highlight the following legal principles that may be relevant to our review of this matter:

“It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment.” (Lab. Code, § 132a.)

Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee’s compensation shall be increased by one-half, but in no event more than ten thousand dollars (\$10,000), together with costs and expenses not in excess of two hundred fifty dollars (\$250).

Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.

(Lab. Code, § 132a(1).)

Section 132a protects an employee from retaliation or discrimination by an employer because of an exercise of workers' compensation rights. (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143 [63 Cal.Comp.Cases 944]; *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658 [43 Cal.Comp.Cases 1205]; *Department of Rehabilitation v. Workers' Comp. Appeals Bd. (Lauher)* (2003) 30 Cal.4th 1281, 1298-1299 [68 Cal.Comp.Cases 831]; *Smith v. Workers' Comp Appeals Bd.* (1984) 152 Cal.App.3d 1104, 1109 [49 Cal.Comp.Cases 212] (*Smith*); see *Usher v. American Airlines, Inc.* (1993) 20 Cal.App.4th 1520, 1526 [58 Cal.Comp.Cases 813].) This section has been "interpreted liberally to achieve the goal of preventing discrimination against workers injured on the job," while not compelling an employer to "ignore the realities of doing business by 'reemploying' unqualified employees or employees for whom positions are no longer available." (*Lauher, supra*, 30 Cal.4th at p. 1299 [citations omitted].) The employee must first establish discrimination by a preponderance of the evidence and then the burden shifts to the employer to establish an affirmative defense. (*Id.* at p. 1298.)

### III.

Finally, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Earley v. Workers' Comp. Appeals Bd.* (2023) 94 Cal.App.5th 1, 13-15 [88 Cal.Comp.Cases 769] [the Appeals Board has the authority to issue a final decision when it grants reconsideration but is not required to do so]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given

to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.]

“The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect.” (*Azadigian v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen’s Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [62 Cal.Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) 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. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650] [“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”].)

Labor Code section 5901 states in relevant part that:

“No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers’ compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. . . .”

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

IV.

Accordingly, we grant applicant's Petition for Reconsideration, order that this matter be set for a status conference, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings of Fact and Order issued by the WCJ on May 10, 2023, is **GRANTED**.

**IT IS FURTHER ORDERED** that this matter will be set for a Status Conference with a workers' compensation administrative law judge at the Appeals Board. Notice of the date, time, and format of the conference will be served separately, to be heard in the Lifesize electronic platform, in lieu of an in person appearance at the San Francisco office of the Appeals Board.

**IT IS FURTHER ORDERED** that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



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

**October 16, 2023**

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

**ANN MARIE BOERSMA  
LAW OFFICE OF RON NOLAN  
PETTIT, KOHN, INGRASSIA, LUTZ & DOLIN PC**

**JMR/ara**

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