

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

**ERIN RUST, *Applicant***

**vs.**

**LOS ANGELES UNIFIED SCHOOL DISTRICT, permissibly self-insured,  
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ11922504  
Van Nuys District Office**

**OPINION AND ORDERS  
DISMISSING PETITION FOR RECONSIDERATION,  
GRANTING PETITION FOR REMOVAL  
AND DECISION AFTER REMOVAL**

On March 21, 2023, a workers' compensation administrative law judge (WCJ) issued a Finding and Order (F&O) ordering the parties to obtain additional Qualified Medical Evaluator (QME) panels in internal medicine and psychiatry or to agree to QMEs in these specialties.

In its Petition for Reconsideration, defendant, Los Angeles Unified School District, contends that its due process rights were violated and that the WCJ's decision is not supported by substantial evidence.

We received an Answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied.

We have reviewed the record, defendant's Petition, applicant's Answer, and the contents of the WCJ's Report with respect thereto.

For the reasons discussed below, we will dismiss defendant's petition for reconsideration, grant the petition as a petition for removal, rescind the F&O, and return this matter to the trial level for further proceedings consistent with this opinion.

**DISCUSSION**

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) 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 (*Rymer*); *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (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 limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the March 21, 2023 F&O is a pre-trial discovery order addressing the procurement of additional medical-legal evidence. (*Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1818 (Appeals Bd. en banc)<sup>1</sup>; *Irannejad v. County of Los Angeles/LAC-USC Medical Center* (November 23, 2021, ADJ9313954, ADJ9313956) [2021 Cal. Wrk. Comp. P.D. LEXIS 362].) The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a “final” decision. We will, therefore, dismiss defendant's petition for reconsideration and treat the petition as a petition for removal.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd. (Cortez)* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd. (Kleemann)* (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, § 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).)

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<sup>1</sup> 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.* (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].)

Parties to a workers' compensation proceeding retain the 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].) A fair hearing is "one of 'the rudiments of fair play' assured to every litigant...." (*Id.* at p. 158.) As stated by the Supreme Court of California 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 p. 577.) 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].)

Here, the WCJ issued the order for additional QME panels in internal medicine and psychiatry without providing defendant with the opportunity to offer evidence in rebuttal or to otherwise object. (F&O, March 21, 2023; see also Answer, pp. 2:25-27, 3:1-2.) The WCJ therefore decided the matter in violation of defendant's right to due process and a fair hearing, which caused defendant substantial prejudice and irreparable harm that reconsideration cannot cure. Thus, we conclude that removal is warranted and will return this matter to the trial level for the WCJ to create an evidentiary record regarding the issue of the disputed QME panels and to provide each party with an opportunity to submit evidence regarding this issue.

Additionally, Labor Code section 5313<sup>2</sup> requires the WCJ to "make and file findings upon all facts involved in the controversy and [make and file] an award, order, or decision stating the determination as to the rights of the parties...[and include] a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313.) The WCJ's decision "must be based on admitted evidence in the record" (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Bd. en banc)), and the decision must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) In *Hamilton*, we held that the record of proceedings must contain, at a minimum, "the issues submitted for decision, the

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<sup>2</sup> All statutory references hereinafter are to the Labor Code unless otherwise indicated.

admissions and stipulations of the parties, and the admitted evidence.” (*Hamilton, supra*, at p. 475.)

Here, there is no record upon which to address the WCJ’s decision to order the additional QME panels in internal medicine and psychiatry. Without an evidentiary record, we are unable to determine whether the WCJ’s decision is supported by substantial evidence. Therefore, we also return this matter to the trial level for the WCJ to prepare a proper record of the proceedings in accordance with section 5313 and *Hamilton*.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Finding and Order issued on March 21, 2023 is **DISMISSED**.

**IT IS FURTHER ORDERED** that the Petition for Removal of the Finding and Order issued on March 21, 2023 is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Removal of the Workers' Compensation Appeals Board, that the Finding and Order issued on March 21, 2023 is **RESCINDED** and this matter **RETURNED** to the trial level for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**



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

**JUNE 1, 2023**

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

**ERIN RUST  
SPARAGNA & SPARAGNA  
BLACK AND ROSE**

**AH/cs**

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