

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

**HALAH ABDULKAREEM, *Applicant***

**vs.**

**DIMENSION DEVELOPMENT TWO, LLC (HILTON GARDEN INN);  
EVEREST NATIONAL INSURANCE, *Defendants***

**Adjudication Number: ADJ11965648  
Sacramento District Office**

**OPINION AND ORDER  
GRANTING PETITION  
FOR RECONSIDERATION  
AND DECISION  
AFTER RECONSIDERATION**

Defendant Everest National Insurance seeks removal of the Order Denying Joinder (Order) issued by the workers' compensation administrative law judge (WCJ) on April 2, 2021. By the Order, the WCJ denied defendant's Petition for Joinder to join Berkshire Hathaway Homestate Insurance (Berkshire) as a party defendant. The Petition was denied because applicant pled the claim as a specific injury, although the parties stipulated in the settlement agreement that the claim was a cumulative trauma injury.

Defendant contends that the Order improperly precludes it from pursuing contribution against Berkshire for its share of the cumulative trauma period.

We did not receive an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that we deny removal.

We have considered the allegations of defendant's Petition for Removal and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant the Petition as one seeking reconsideration, rescind the Order and issue a new decision granting defendant's Petition for Joinder. Berkshire will be ordered joined to the matter.

**FACTUAL BACKGROUND**

Applicant filed an Application for Adjudication of Claim alleging a specific injury on May

10, 2018 to her neck, right arm, right elbow, right shoulder, right leg and back while employed as a housekeeper by the Hilton Garden Inn. Everest National Insurance, adjusted by Sedgwick, filed a Notice of Representation as the defendant. The claim was accepted by defendant as compensable with benefits being provided.

David Char, M.D. evaluated applicant as the qualified medical evaluator (QME). In his September 10, 2019 report, he stated as follows in relevant part:

Considering the duration and job content of the four years of employment as a hotel housekeeper with extensive manual labor work and lack of documented preexisting condition, from the physical medicine and rehabilitation perspective the residual permanent disability is more likely than not due to cumulative industrial exposure rather than an single specific incident, with no apportionment for other causes.

(Report of David Char, M.D., September 10, 2019, p. 17.)<sup>1</sup>

In October 2020, the parties entered into a settlement agreement to resolve applicant's claim by Compromise and Release for \$20,000.00. The agreement contains the following pertinent language:

ALTHOUGH THIS INJURY WAS ALLEGED AS A SPECIFIC INJURY, THE QME, DR. CHAR, HAS OPINED THIS IS A CUMULATIVE INJURY. THE PARTIES STIPULATE THAT THIS IS A CUMULATIVE INJURY AND THERE WAS NO SPECIFIC INJURY. THE DEFENDANT RESERVES THE RIGHT TO SEEK CONTRIBUTION AGAINST ANY OTHER EMPLOYERS OR INSURERS DURING THE EXPOSURE PERIOD.

(Compromise and Release, October 16, 2020, p. 7-1.)

The WCJ issued the Order Approving the settlement on November 2, 2020.<sup>2</sup>

On March 1, 2021, defendant filed a Petition for Order of Joinder of Other Insurer Berkshire Hathaway Homestate Insurance Company. Attached to defendant's Petition was a WCIRB report reflecting insurance coverage for applicant's employer as follows: Berkshire Hathaway Homestate Insurance Company from 6/1/2016-6/1/2017 and Everest National Insurance Company from 6/1/2017-6/1/2018. The proof of service indicates this Petition was served on all

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<sup>1</sup>Dr. Char's reports became part of the evidentiary record upon approval of the Compromise and Release. (Cal. Code Regs., tit. 8, former § 10750(b), now § 10803(b) (eff. Jan. 1, 2020).) Therefore, we may review and consider the findings in his reports in rendering our decision.

<sup>2</sup> The Order Approving is dated October 30, 2020, but was not served until November 2, 2020.

parties and Berkshire. The record of proceedings do not contain an objection to defendant's Petition.

On April 2, 2021, the WCJ issued the Order denying defendant's Petition stating:

This case was filed as a specific injury occurring on May 1, 2018. The parties settled the case by Compromise and Release (C&R) on October 20, 2020, and an Order Approving C&R issued on November 2, 2020. The C&R stated applicant sustained an injury on May 1, 2018.

Based on the attachments to defendant's petition, Homestate's coverage for the employer ended June 1, 2017, and so Homestate had no coverage on the date of the injury. Defendant alleges this should have been alleged as a cumulative trauma injury but defendant cannot change the date of injury by their petition. Therefore, **IT IS ORDERED THAT** defendant's petition is denied.

(Order, April 2, 2021.)

## DISCUSSION

### I.

Defendant sought removal of the Order. 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, 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.)<sup>3</sup> 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

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<sup>3</sup> All further statutory references are to the Labor Code unless otherwise stated.

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 sole issue presented by defendant's Petition for Joinder was whether Berkshire should be joined as a party defendant. However, the Order discusses coverage during applicant's pled date of injury and whether defendant may pursue contribution for a cumulative trauma injury. These determinations appear to address threshold issues. (See *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.

## II.

Although the decision contains a finding that is final, defendant is only challenging an interlocutory order in the decision regarding whether Berkshire may be joined as a party defendant. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*)

Section 5702 states:

The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. The appeals board may thereupon make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.

(Lab. Code, § 5702.)

Pursuant to section 5702, the parties may stipulate to the facts in controversy and the trier of fact may make findings based on those stipulations. (See *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1].) Furthermore, pleadings are deemed amended to conform to the stipulations agreed to by the parties on the record or may be amended by the Appeals Board to conform to proof. (See e.g., Cal. Code Regs., tit. 8, former § 10492, now § 10517 (eff. Jan. 1, 2020).)

The Order states that defendant cannot change the date of injury through its Petition for Joinder. That is not what occurred here. The parties stipulated in their settlement agreement that applicant sustained a cumulative trauma injury, not a specific injury. Pursuant to the discussion above, the parties are permitted to stipulate to the facts in controversy and the medical evidence currently in the record supports the parties' stipulation to a cumulative trauma injury.

Consequently, the application may be deemed amended to be a cumulative trauma claim pursuant to the parties' stipulations in the approved Compromise and Release agreement.

Liability for a cumulative injury is determined under section 5500.5, which states in part:

(a) . . . liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period . . . [one year] immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first.

(Lab. Code, § 5500.5(a); see also Lab. Code, § 5412.)

Section 5500.5(e) further provides in relevant part:

At any time within one year after the appeals board has made an award for compensation benefits in connection with an occupational disease or cumulative injury, any employer held liable under the award may institute proceedings before the appeals board for the purpose of determining an apportionment of liability or right of contribution...

(Lab. Code, § 5500.5(e).)

Section 5500.5(c) permits joinder of an additional party "on the motion of any party in interest."

(Lab. Code, § 5500.5(c).)

Defendant and applicant stipulated that the injury was sustained as a result of cumulative trauma, not from a specific incident. Defendant has the right to pursue contribution against other insurer(s) that may have liability for applicant's claim during the cumulative trauma period. However, in order to do so, the other insurer Berkshire must be joined as a party to the proceedings.<sup>4</sup> We therefore agree with defendant that the WCJ erred by denying its request to join Berkshire as a party defendant.

In conclusion, we will grant reconsideration, rescind the Order and issue a new decision granting defendant's Petition for Joinder. Berkshire will be ordered joined to the matter.

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<sup>4</sup> It is acknowledged that Berkshire is not bound by the parties' stipulations and may conduct its own discovery in supplemental proceedings. (See Lab. Code, § 5500.5; *Rex Club v. Workers' Comp. Appeals Bd. (Oakley-Clyburn)* (1997) 53 Cal.App.4th 1465, 1472 [62 Cal.Comp.Cases 441].)

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the Order Denying Joinder issued by the WCJ on April 2, 2021 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Order Denying Joinder issued by the WCJ on April 2, 2021 is **RESCINDED** and the following is **SUBSTITUTED** in its place:

Pursuant to defendant's March 1, 2021 Petition for Order of Joinder of Other Insurer Berkshire Hathaway Homestate Insurance Company, there is good cause to join Berkshire Hathaway Homestate Insurance Company as a party.

**IT IS SO ORDERED** that Berkshire Hathaway Homestate Insurance Company is joined to this matter.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**I CONCUR,**

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

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



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

**JUNE 18, 2021**

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

**COLEMAN CHAVEZ & ASSOCIATES  
HALAH ABDULKAREEM  
RATTO LAW**

**AI/pc**

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