

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

**VICENTE ORTIZ, *Applicant***

**vs.**

**VICTOR M. MAZARIEGO;  
FIRST AMERICAN SPECIALTY INS. CO., *Defendants***

**Adjudication Number: ADJ10649985  
Los Angeles District Office**

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

First American Specialty Insurance (defendant) seeks removal or, in the alternative, reconsideration of the Order for Defendant Carrier to Provide “Cumis” Counsel; Showing of Good Cause (Order for *Cumis* Counsel) issued by the workers’ compensation administrative law judge (WCJ) on October 16, 2020. As relevant herein, the WCJ ordered defendant, based on good cause, to provide independent counsel to separately represent Victor Mazariego, the insured homeowner.

Defendant contends that it denied coverage in this matter because applicant did not meet the threshold hour-requirement to be considered a residential employee. Thus, defendant is not required to provide *Cumis* counsel for Mr. Mazareigo.

The Director of Industrial Relations as administrator of the Uninsured Employers Benefit Trust Fund (UEBTF) filed an Answer. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that we deny removal.

We have considered the allegations of the Petition, the Answer, and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and for the reasons discussed below, we will treat the Petition as one for reconsideration, grant reconsideration, rescind the Order for *Cumis* Counsel, and return the matter to the WCJ for further proceedings consistent with this decision.

## FACTUAL BACKGROUND

The following facts were taken from the Report:

Applicant, Vicente Ortiz, alleges that he was working on building maintenance at 735 E Vernon Ave when he was assaulted. Application. EAMS201168839. Petitioner/First American admits the factual allegation that applicant was working on the plumbing in a building owned by Defendant Victor Mazariego when he was attacked by a tenant. Petition for Removal 1:26-28. According to Petitioner: "It is undisputed Mr. Mazariego had a homeowner's insurance policy for 735-737 E. Vernon Ave., Los Angeles, CA 90011 from 8/26/2014 to 8/26/2015 which covers the date of injury and the injury location. As is required in all Homeowner's insurance policies in the State of California, coverage for workers' compensation for residential employees was included." Petition for Removal 2:2-6.

Yet, at the hearing on May 13, 2020, Petitioner/First American Specialty, through counsel Hanna Brophy, sought dismissal on their own behalf *only*. The basis for dismissal - that the workers' compensation policy exclusion defeats the insured's liability claim - are triable issues of fact. UEBTF objected on the basis that *Cumis* counsel should first be appointed before the dismissal could be heard. MOH 5/13/2020. EAMS72837012. Parties were asked to provide briefs on the issue. In its Brief, Petitioner/First American reiterated the factual assertions made at the hearing - that applicant was not a residential employee and that "employer is acting as a Real Estate Investor." 8-5-2020 Defense Brief 5:15-18. EAMS33347153.

The issue of whether the policy exclusion applies has not been determined. Hanna Brophy has asserted over and over again that it *does not* represent the defendant Victor Mazariego. 8-5-2020 Defense Brief 5:19-21. EAMS33347153. Petitioner/First American who admits in its Petition for Removal that Mazariego has a "homeowner's insurance policy for 735-737 E. Vernon Ave., Los Angeles, CA 90011 from 8/26/2014 to 8/26/2015 which covers the date of injury and the injury location" - has left its insured Mazariego without representation, while actively seeking to get itself dismissed.

UEBTF has asserted that it has standing to bring the *Cumis* argument for Mr. Mazariego because UEBTF is joined as a derivative party. UEBTF's Brief 6:21-28 EAMS33880537. UEBTF has exposure to the claim if Petitioner is successful in excluding defendant Mazariego from insurance coverage. UEBTF's Brief 6:21-28, 7:1-6. EAMS33880537. It has not been determined if the policy exclusion applied, yet UEBTF has been joined as if Mazariego is an uninsured employer. UEBTF argues that there is a need for separate counsel, other than Hanna Brophy, to protect Mazariego's interests to determine if he is actually insured by First American. And that by asserting that "employer is acting as a Real Estate Investor," First American/Hanna Brophy has created a conflict of interest between defendant Mazariego and defendant First American.

(Report, *supra*, pp. 2-3, italics in original.)

On October 16, 2020, the WCJ issued the Order for Cumis Counsel.

On October 30, 2020, defendant timely filed the Petition for Removal or, in the alternative, Reconsideration.

## DISCUSSION

### I.

Section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, “it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice....” (*Shiple v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shiple*, the Appeals Board denied applicant’s petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of section 5909. The Appeals Board did not act on applicant’s petition because it 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.*)

Like the Court in *Shiple*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Shiple, supra*, 7 Cal.App.4th at p. 1108.) Defendant’s Petition was timely filed on October 30, 2020. Our failure to act was due to a procedural error and our time to act on defendant’s Petition was tolled.

### II.

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 [1989 Cal. App. LEXIS 663]; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) 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, 650-651, 655-656].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian, supra*, 81 Cal.App.4th at p. 1075 (“interim orders, which do not decide

a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’”); *Rymer, supra*, 211 Cal.App.3d at p. 1180 (“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”); *Kramer, supra*, 82 Cal.App.3d at p. 45 (“[t]he term [‘final’] does not include intermediate procedural orders”).) Such interlocutory decision include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

The WCJ’s order to defendant to provide *Cumis* counsel determines a right or liability of defendant. Thus, the WCJ’s Order for *Cumis* Counsel is a final order subject to reconsideration, and we treat the Petition as one for reconsideration.

### III.

A WCJ is required to “make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.” (Lab. Code, § 5313; see also *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-22 [2010 Cal. Wrk. Comp. LEXIS 74] (Appeals Board en banc).) As required by section 5313 and explained in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Board en banc), “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (Citation omitted.) (*Id.* at p. 476.)

The WCJ’s decision “must be based on admitted evidence in the record.” (*Hamilton, supra*, at p. 476.) In *Hamilton*, we held that the record of proceeding must contain, at a minimum, “the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence.” (*Ibid.*)

The issue that we face on reconsideration is that there is an insufficient record to evaluate defendant’s Petition or the WCJ’s Order for *Cumis* Counsel. In the supplemental page of the May 13, 2020 minutes of hearing, the WCJ appears to explain the various issues and arguments before her. At issue is whether defendant should be required to provide *Cumis* counsel to

Mr. Mazariago. In its Petition, defendant argues that there is no “conflict of interest” pursuant to Civil Code 2860(b) that would justify providing Mr. Mazariago with *Cumis* counsel. Defendant argues that it denied coverage because applicant did not meet the threshold hour-requirement to be considered a residential employee, which is not a “conflict of interest” pursuant to Civ. Code section 4860(b). UEBTF argues that there is a “conflict of interest” arising from defendant’s position that Mr. Mazariago is excluded from coverage because he was engaging in a business pertaining to real estate investment and/or as a landlord renting out the property. We simply note that whether there is a “conflict of interest” pursuant to Civ. Code section 2860(b) to order *Cumis* counsel will require an analysis of the evidence in the record. At this time, there is no evidentiary record for us to review. Furthermore, we are unable to evaluate the WCJ’s “good cause” in ordering *Cumis* counsel. Thus, we are unable to evaluate defendant’s Petition or the WCJ’s Order for *Cumis* counsel.

Accordingly, we treat the Petition as one for reconsideration, grant reconsideration, rescind the Order for *Cumis* Counsel, and return the matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the October 16, 2020 Order for *Cumis* Counsel is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the October 16, 2020 Order for *Cumis* Counsel is **RESCINDED**, and that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

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

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



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

**March 1, 2021**

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

**VICENTE ORTIZ  
TELLERIA TELLERIA & LEVY  
OFFICE OF THE DIRECTOR-LEGAL UNIT (LOS ANGELES)  
UEBTF  
VICTOR MAZARIEGO  
HANNA BROPHY ET AL.**

**SS/abs**

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