

**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**FIDEL FLORES, *Applicant***

**vs.**

**BARRETT BUSINESS SERVICES, INC.; CHUBB INSURANCE;  
administered by CORVEL, *Defendants***

**Adjudication Number: ADJ12603668  
Los Angeles District Office**

**OPINION AND ORDER  
DISMISSING PETITION FOR  
RECONSIDERATION  
AND DENYING PETITION  
FOR REMOVAL**

We have considered the allegations of the Petition for Reconsideration. Based on our review of the record, and based upon the WCJ's analysis of the merits of petitioner's arguments in the WCJ's Opinion on Decision, we will dismiss the petition to the extent it seeks reconsideration, treat the petition as one seeking removal, and deny removal.

Preliminarily, we note that 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. (*Shipley, supra*, 7 Cal.App.4th 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]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the Appeals Board failed to act on petitioner's timely petition within 60 days of its filing. Therefore, considering that the Appeals Board's failure to act on the petition was in error, we find that our time to act on the petition was tolled.

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; *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. (*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 August 17, 2021 Findings and Order issued by the workers' compensation administrative law judge (WCJ) is solely an intermediate procedural order. It does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a "final" decision and the petition will be dismissed to the extent it seeks reconsideration.

We will also deny removal. 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 substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) Here, based upon the WCJ's analysis

of the merits of petitioner'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.

Although defendant obtained Panel 7396392 using a flawed method by failing to submit the required documentation pursuant to Rule 30(b), applicant did not object to Panel 7396392 on that basis. Rather than object, applicant attempted to request a replacement panel, went through the strike process of Panel 2641970, scheduled an appointment with the wrong doctor, and was not responsive to defendant's attempt to confer. It was only after defendant filed a Declaration of Readiness to Proceed (DOR) that applicant first raised the objection to the missing documentation in the request for Panel 7396392. Based on these facts, we agree that applicant waived the objection to Panel 7396392.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DISMISSED** and the Petition for Removal is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

I CONCUR,

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

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



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

**JANUARY 7, 2022**

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

**FIDEL FLORES  
GARRETT LAW GROUP  
GOLDBERG SEGALLA**

**PAG/pc**

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