

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

**MANUEL RAMIREZ, *Applicant***

**vs.**

**VONS, permissibly self-insured, adjusted by ALBERTSONS HOLDINGS, INC.,  
*Defendants***

**Adjudication Number: ADJ15505678  
San Francisco District Office**

**OPINION AND ORDER  
DENYING PETITION  
FOR RECONSIDERATION**

Defendant seeks reconsideration or in the alternative removal of the Findings and Orders (F&O) issued by the arbitrator on July 26, 2021. By the F&O, the arbitrator reserved jurisdiction regarding applicant's level of permanent disability pending receipt of additional evidence from the agreed medical evaluator (AME) or treating physician. The parties were ordered to further develop the record and provide the arbitrator with this evidence.

Defendant contends that applicant failed to rebut the scheduled rating of his injury and the arbitrator abused his discretion by ordering development of the record regarding permanent disability.

We received an answer from applicant. The arbitrator filed a Report and Recommendation of Arbitrator on Petition for Reconsideration (Report) recommending that we deny the Petition.

We have considered the allegations of defendant's Petition for Reconsideration/Removal, applicant's answer and the arbitrator's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will deny defendant's Petition as one seeking reconsideration.

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 (AOE/COE), 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>1</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 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 arbitrator's decision includes a finding regarding injury AOE/COE. This is a threshold issue fundamental to the claim for benefits. Accordingly, the arbitrator's decision is a final order subject to reconsideration rather than removal.

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...." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, 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 Labor Code 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.* 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.) Defendant's Petition was timely filed on August 10, 2021.<sup>2</sup> Our failure to act was due to a procedural error and our time to act on defendant's Petition was tolled.

Although the decision contains a finding that is final, defendant is only challenging an

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

<sup>2</sup> Defendant filed an Amended Petition acknowledging that initially its Petition was erroneously filed with the 2<sup>nd</sup> floor of the Workers' Compensation Appeals Board rather than the 9<sup>th</sup> floor. We will treat defendant's Petition as timely filed.

interlocutory finding/order in the decision regarding whether the arbitrator improperly ordered development of the record before determining applicant's level of permanent disability.

All parties agree that applicant's workers' compensation claim is subject to the jurisdiction of the Southern California UFCW and Food Employers Alternative Dispute Resolution Program. Section 3201.5 permits employers in specific industries to establish an alternative dispute resolution program (also known as "carve-outs") in lieu of adjudicating claims before the Appeals Board.

A party in a carve-out case may seek reconsideration from the Appeals Board of a "final order, decision, or award." (Lab. Code, § 3201.5(a)(1), emphasis added.) 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*, 211 Cal.App.3d at p. 1180 ("[t]he term ['final'] does not include intermediate procedural orders or discovery orders"); *Kaiser Foundation Hospitals (Kramer), supra*, 82 Cal.App.3d 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.

Pursuant to the express language of section 3201.5(a)(1), defendant may only seek review from the Appeals Board of a final decision by the arbitrator. (See e.g., *Hayes v. Anderson & Howard Electric* (April 13, 2018, ADJ8145474) [2018 Cal. Wrk. Comp. P.D. LEXIS 150] [no statutory authority for the Appeals Board to remove a carve-out case to itself].)<sup>3</sup> The arbitrator's order to develop the record is an interlocutory decision regarding discovery and the evidence, and

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<sup>3</sup> Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

is not subject to review by the Appeals Board. Consequently, we do not have jurisdiction to address defendant's contentions regarding this order.

Therefore, we will deny defendant's Petition.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the Findings and Order issued by the arbitrator on July 26, 2021 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

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

I CONCUR,

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

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



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

**November 10, 2022**

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

**GORDON EDELSTEIN KREPACK GRANT FELTON & GOLDSTEIN  
MANUEL RAMIREZ  
PHILIP A. MARK, ARBITRATOR  
PRINDLE GOETZ BARNES & REINHOLTZ**

*AI/pc*

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