

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

**MICHAEL JOHNSON, *Applicant***

**vs.**

**EARLY STRIDES CHILD DEVELOPMENT;  
FARMERS INSURANCE EXCHANGE, et al, *Defendants***

**KOMBERG CHIROPRACTIC; TRI-CITY HEALTH GROUP, INC.;  
TRI-COUNTY MEDICAL GROUP, INC.; COMPREHENSIVE ORTHOPEDIC CARE  
CENTER, P.C.; *Lien Claimants***

**Adjudication Number: SAU12385777  
Long Beach District Office**

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

Lien claimant Comprehensive Orthopedic Care Center, P.C. (CCOC) seeks reconsideration of the “Order Granting Petition for Joinder of Lien Claimant Comprehensive Orthopedic Care Center, P.C.” (Joinder Order), issued on December 22, 2022 by a workers’ compensation administrative law judge (WCJ).<sup>1</sup> The Joinder Order joined CCOC into this consolidated action.<sup>2</sup>

CCOC contends that the Joinder Order was issued in violation of its right to due process because CCOC was not served with the Joinder Petition; that the WCJ was required by WCAB Rule 10382, subdivision (d) (Cal. Code Regs., tit. 8, § 10382(d)), to wait 10 days for any party to

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<sup>1</sup> The Joinder Order was issued after defendant carriers’ December 13, 2022 “Petition for Joinder of Lien Claimant Comprehensive Orthopedic Care Center, P.C.” (Joinder Petition). Defendant carriers (carriers) include Farmers Insurance Exchange, Liberty Mutual Insurance Group, AmTrust North America, Zurich American Insurance, Zurich North America, The Hartford, Insurance Company of the West, Everest National Insurance Company, and American Claims Management.

<sup>2</sup> This consolidated action was commenced to determine “the common issues of law and fact related to whether the listed liens are subject to the automatic stay provision of Labor Code Section 4615(a) based on Edward Komberg D.C. being an officer, director, or having de facto control of Komberg Chiropractic Inc., Tri-City Health Group Inc., and Tri-County Medical Group...” (Order of Consolidation, Designation of Master File, and Notice of Hearing, July 15, 2022, p. 1.)

object to the Joinder Petitioner; that defendants failed to allege a prima facie case that COCC is controlled by Edward Kromberg, D.C. under Labor Code<sup>3</sup> section 139.21, subdivision (a)(3) (section 139.21.(a)(3)) and *Villanueva v. Teva Foods* (2019) 84 Cal.Comp.Cases 198 (2019 Cal.Wrk.Comp. LEXIS 13; that it has been denied its right to due process on its lien claims since the Joinder Order issued because defendants have instituted a delay or “de facto stay of payment” on COCC lien claims pending resolution of this consolidated matter; that defendants’ decision to institute a delay or “de facto stay of payment” on its liens violates section 4615 as there has been no final order of stay pursuant to that section; and, that defendants should be sanctioned for instituting a delay or “de facto stay of payment” on its liens.

Carriers filed an Answer to Petition for Reconsideration (Answer), responding in pertinent part that Innovative Medical Management (IMM) has been the sole representative of COCC for lien collection and lien representation in their workers’ compensation matters; that service on a lien claimant representative is proper pursuant to WCAB Rule 10625, subdivision (a) (Cal. Code Regs., tit. 8, § 10625(d)); that the Joinder Order is not a final order and therefore not subject to reconsideration under sections 5900 to 5903; and, that the Joinder Petition stated prima facie grounds to join CCOC, and that the Declaration of Scott Rosenzweig, M.D., attached to the Petition for Reconsideration supports those grounds.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition for Reconsideration be denied because it was not timely filed pursuant to section 5903; that reconsideration is not appropriate because an order of consolidation is not a final order subject to reconsideration under section 5900 and *Erhahon (Doreen) v. Kaiser Found. Hosp.* (2021) 86 Cal.Comp.Cases 739, 742 (2021 Cal.Wrk.Comp. P.D. LEXIS 150) (*Erhahon*); and the Joinder Petition did state prima facie grounds to join COCC into these consolidated proceedings.

We have reviewed the record in these consolidated proceedings, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. Based on our review of the record, we dismiss the Petition for Reconsideration and treat the petition as one for removal. We grant removal, and it is our decision after removal to rescind the Joinder Order as void ab initio and return this matter to the trial level for further proceedings consistent with this decision and WCAB Rule 10382.

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

## 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....” (*Shipley v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493]; see *Rea v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635 fn. 22 [70 Cal.Comp.Cases 312] [“irregularity which deprives reconsideration under the statutory scheme denies due process”].) In *Shipley, supra*, 7 Cal.App.4th at pp. 1107-1108, applicant sought a writ of review of a decision of the Appeals Board denying his petition for reconsideration by operation of law (Lab. Code, § 5909). The Court there granted a writ of review, stating that while the “language [section 5909] appears mandatory and jurisdictional, the time periods must be based on a presumption that a claimant’s file will be available to the board; any other result deprives a claimant of due process and the right to a review by the board.” (*Shipley, supra*, 7 Cal.App.4th at pp. 1107-1108.)

In *Shipley*, the Court of Appeal reversed the Appeals Board, holding that the time to act on the petition was tolled during the period the file was misplaced and unavailable to the Appeals Board. (*Shipley, supra*, 7 Cal.App.4th at p. 1007.) The Court emphasized that “Shipley’s file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control.” (*Shipley, supra*, 7 Cal.App.4th at p. 1007.) “Shipley’s right to reconsideration by the board is likewise statutorily provided and cannot be denied him without due process. Any other result offends not only elementary due process principles but common sensibilities. Shipley is entitled to the board’s review of his petition and its decision on its merits.” (*Id.*, at p. 1108.)<sup>4</sup>

We note that timely petitions for reconsideration filed *and received* by the Appeals Board are “acted upon within 60 days from the date of filing” pursuant to section 5909, by either denying or granting the petition. The exception to this rule are those petitions *not received* by the Appeals Board within 60 days due to irregularities outside the petitioner’s control. (*Rea v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635, fn. 22, emphasis added [“Irregularity which

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<sup>4</sup> The Court also stated that the fundamental principles of substantial justice (Cal. Const., art. XIV, § 4), and the policies enunciated by Labor Code section 3202 “to construe the act liberally ‘with the purpose of extending their benefits for the protection of person injured in the course of their employment,’” compelled its finding that the time to act on applicant’s petition was tolled during the period that the file was misplaced. (*Id.*, at p. 1107.)

deprives reconsideration under the statutory scheme denies due process...”].) Pursuant to the holding in *Shipley* allowing tolling of the 60-day time period in section 5909, the Appeals Board acts to grant or deny such petitions for reconsideration within 60 days of receipt of any such petition. This approach is consistent with the California appellate courts, which have consistently followed *Shipley*’s lead when weighing the statutory mandate of 60 days against the parties’ constitutional due process right to a true and complete judicial review by the Appeals Board.<sup>5</sup>

In this case, CIGA’s Petition for Reconsideration was filed on February 6, 2023, but due to an administrative irregularity, the petition was unavailable to the Appeals Board until after 60 days from the time of filing. The administrative irregularity which caused the Petition for Reconsideration to be unavailable to the Appeals Board was not the fault of either party. Thus, pursuant to *Shipley*, the time within which the Appeals Board was to act on the Petition for Reconsideration was tolled until the petition became available to the Appeals Board. This decision is timely filed within 60 days of the Appeals Board’s receipt of the petition.

## II.

A petition for reconsideration is only properly taken from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) “An order, decision, or award of the WCAB or workers’ compensation judge is final for purposes of a petition for reconsideration where it determines any substantive right or liability of those involved in the case.” (*Rymer v. Hagler* (1989) 211 Cal. App. 3d 1171, 1180; see *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal. App. 3d 528, 534–535 [45 Cal.Comp.Cases 410].) In other words, an order is final when it determines a “threshold” issue fundamental to the claim for benefits. (*Maranian v.*

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<sup>5</sup> See e.g., *Hubbard v. Workers Compensation Appeals Bd. of California* (1993) 58 Cal.Comp.Cases 739 [writ of review granted to annul Appeals Board’s denial of petition for reconsideration by operation of law (Lab. Code, § 5909)]; *Bailey v. Workers Compensation Appeals Bd. of California* (1994) 59 Cal.Comp.Cases 350 (writ den.); *Entertainment by J & J, Inc. v. Workers’ Comp. Appeals Bd. (Bernstein)* (2017) 82 Cal.Comp.Cases 384 (writ den.). Five California District Courts of Appeal have recently denied or dismissed writs at the request of the Appeals Board (citing *Shipley*) where the petition for reconsideration was deemed denied under section 5909, in order for the Appeals Board to consider the merits: *Kaiser Foundation Health Plan v. Workers’ Compensation Appeals Board and Julie Santucci* (2021) (A163107) 1st DCA, Div. 4; *Employers Insurance Group v. Workers’ Comp. Appeals Bd. et al. (Hafezi)* (2020) (B305322) (SAU8706806) 2nd DCA, Div. 3; *Frontline Medical Associates Inc. v. Workers’ Comp. Appeals Bd. and Liberty Mutual Insurance Group et al. (Lopez/Sablan)* (2022) (B317006) 2nd DCA, Div. 7; *Reach Air Medical Services, LLC et al. v. Workers’ Compensation Appeals Board et al. (Lomeli)* (2022) (C095051) 3rd DCA; *Ace American Insurance Company v. Workers’ Compensation Appeals Board and David Valdez* (C094627) (2021) 3rd DCA; *Carlos Piro v. Workers’ Compensation Appeals Board and County of San Bernardino* (2021) (E076962) 4th DCA, Div. 2; *Great Divide Insurance Company v. Workers’ Compensation Appeals Board et al. (Melendez Banegas)* (2021) (F083019) 5th DCA.

*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. (*Maranian, supra*, 81 Cal.App.4th at p. 1075; *Rymer, supra*, 211 Cal.App.3d at p. 1180.)

An order joining a party to any matter is an interlocutory, procedural order and is not a final order subject to reconsideration. Accordingly, we dismiss the Petition for Reconsideration as improper. However, a joinder order may be subject to removal, and we therefore treat the petition as one for removal.

### III.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal. App. 4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal. App. 4th 274, 281, 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*.) In addition, 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).)

Carriers and the WCJ both point out that the Petition for Reconsideration was not timely filed. Section 5903 states that a petition for reconsideration must be filed "[a]t any time within 20 days after the service of any final order..." (Lab. Code, § 5903.)<sup>6</sup> The Petition for Reconsideration was filed on February 6, 2023 seeking reconsideration of the Joinder Order, which was issued and served on COCC's lien representative, IMM on December 22, 2022. Therefore, even giving COCC the additional 5 days for mail-service (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)), the Petition for Reconsideration was filed well after the time limit prescribed by section 5903.<sup>7</sup>

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<sup>6</sup> The time limit for filing a petition for reconsideration is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73].)

<sup>7</sup> COCC contends that neither COCC nor Scott Rosenzweig, M.D., was served with the Joinder Order, and that COCC only received notice that it has been joined into these consolidated proceedings when insurance carriers started refusing to settle claims because of the Joinder Order. (Petition for Reconsideration, p. 3.) COCC also contends that

However, we need not reach the question of whether the petition was timely filed because the Joinder Order was issued in violation of the 10-day waiting period in WCAB Rule 10382 (Cal. Code Regs., tit. 8, § 10382), which renders the Joinder order void ab initio, i.e., the Joinder Order had no legal effect from the beginning. WCAB Rule 10382 states in pertinent part:

The Appeals Board or a workers' compensation judge may order the joinder of additional parties not named in the Application for Adjudication of Claim, whose presence is necessary for the full adjudication of the case. *A party shall not be joined until 10 days after service of either a petition for joinder by a party or a notice of intention to order joinder issued by a workers' compensation judge, unless the party to be joined waives its right to this notice period.*

...

*(d) If an objection is received within 10 days of service of a petition for joinder or a notice of intention to order joinder, the workers' compensation judge shall consider the objection before joining the party and, if requested in the objection, shall provide the objector the opportunity to be heard before ordering joinder. (Cal. Code Regs., tit. 8, § 10382.)*

Here, the Joinder Petition was served on December 13, 2022, and the Joinder Order was issued on December 22, 2022, i.e., 9 days after service of the Joinder Petition. The Joinder Order was issued prematurely and thus, void ab initio. CCOC was entitled to the full 10-day notice of joinder period to submit an objection and/or request the opportunity to be heard on the issues presented. Indeed, all 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].) This includes lien claimants. (*Fox v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196, 1205 [57 Cal.Comp.Cases 149] ["It is obviously beneficial to industrially injured employees to have the rights of those providing them with professional services adequately observed and protected."])

CCOC was denied proper notice of joinder and was therefore denied the right to object and/or request a hearing under WCAB Rule 10382. CCOC obviously objects to the joinder and

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it was not served with the Joinder Petition. (Petition for Reconsideration, p. 3.) However, IMM, the lien representative for COCC was served with both the Joinder Order and the Joinder Petition. (Proof of Service, Joinder Petition, p. 3.) Because of our disposition, we do not reach the question of whether service on a lien representative appearing in one or more lien cases on behalf of a lien claimant is sufficient service for purposes of due process in a consolidated proceeding such as the above captioned matter. **We note, though, that best practice would appear to necessitate service on the lien claimant and/or the agent for service of process listed by COCC with the California Secretary of State.**

therefore, this violation of due process has caused CCOC substantial prejudice. Reconsideration would not cure the violation because of the potential cost in terms of time and money that any party erroneously joined in litigation might incur.

Moreover, we cannot determine the merits of the joinder issues raised by CCOC on the current record. An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; Cal. Code Regs., tit. 8, § 10787; *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc).) Section 5313 requires that together with findings of fact, orders, and/or awards, a WCJ "shall" serve "a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313; see *Blackledge v. Bank of America, ACE American Insurance Company (Blackledge)* (2010) 75 Cal.Comp.Cases 613, 621-22.) 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." (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

Here, there was no hearing and thus no minutes of hearing and summary of evidence recording stipulations, defining the issues, and identifying the evidence related to the potential joinder of CCOC. In addition, the WCJ issued the Joinder Order without an opinion on decision. As a result, there is no meaningful opportunity to review the WCJ's decision to join CCOC.

More significantly, 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. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) As there has been no hearing, we could not interpose our own findings without violating the parties' rights to due process. (*Gangwish, supra*, 89 Cal.App.4th at p. 1295 citing *Rucker, supra*, 82 Cal.App.4th at pp. 157-158.)

We note, however, that the carriers have a right to defend claims asserted by COCC. Indeed, the carriers hold the affirmative burden of proof to establish fraud in their defense of any COCC lien claim. (Lab. Code, § 5705.) At least one Appellate Court found that a workers'

compensation defendant has the constitutional right to petition the Workers' Compensation Appeals Board to consolidate and "stay processing of workers' compensation bills and lien claims" based on allegations of illegal business practices. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464 [71 Cal.Comp.Cases 210] (*Premier*) [Anti-SLAPP motion filed by carriers granted against lien claimants who filed a complaint alleging conspiracy by carriers to contest, delay, and avoid payment of their bills and liens.])<sup>8</sup> Thus, should an order joining CCOC to these consolidated proceedings ultimately issue, such an order would not be some sort of de facto stay of lien claims under section 4615. Rather, it would represent a necessary step for defendants to attempt to meet their burden of proof to establish fraud in their defense of any COCC lien claim. Again, all parties in workers' compensation proceedings are entitled to due process.

We also note that COCC has yet to prove entitlement to recover on any of the claims involved in these consolidated proceedings. Therefore, it appears COCC has no vested property right in those claims to be infringed upon. (See *Erhahon ([D]oreen) v. Kaiser Found. Hosp.* (2021) 86 Cal.Comp.Cases 739 [2021 Cal.Wrk.Comp. P.D. LEXIS 150] citing *Landmark Med. Mgmt. v. Workers' Comp. Appeals Bd. (Ortiz)* (2016) 81 Cal.Comp.Cases 220, 221 [2016 Cal. Wrk. Comp. LEXIS 9].)

Accordingly, based on the violation of COCC's right to due process, we grant removal. It is our decision after removal to rescind the Joinder Order as void ab initio and return this matter to the WCJ to conduct further proceedings consistent with this decision and with WCAB Rule 10382.

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<sup>8</sup> In *Premier*, lien claimants filed a complaint against defendants who petitioned for and were granted consolidation and stay of lien claims in order to determine common issues of illegal billing practices. (*Premier, supra*, 136 Cal.App.4th at p. 469–470.) "The gravamen of the [lien claimant's] complaint is that after Premier submitted plaintiff physicians' bills to defendants for payment, and filed liens in numerous workers' compensation cases before the WCAB, defendants collectively conspired to contest, delay, and avoid payment of these bills and liens." (*Id.*, at p. 470.) The Court in *Premier* granted defendants anti-SLAPP (strategic lawsuit against public participation) motion.



For the foregoing reasons,

**IT IS ORDERED** that lien claimant's petition for reconsideration of the Order Granting Petition for Joinder of Lien Claimant Comprehensive Orthopedic Care Center, P.C. issued on December 22, 2022 by a workers' compensation administrative law judge is **DISMISSED**.

**IT IS FURTHER ORDERED** that lien claimant's petition for removal of the Order Granting Petition for Joinder of Lien Claimant Comprehensive Orthopedic Care Center, P.C., issued on December 22, 2022 by a workers' compensation administrative law judge is **GRANTED**.

**IT IS FURTHER ORDERED** as the decision after of the Workers' Compensation Appeals Board that the Order Granting Petition for Joinder of Lien Claimant Comprehensive Orthopedic Care Center, P.C. issued on December 22, 2022 by a workers' compensation administrative law judge is **RESCINDED** as void ab initio and this matter is **RETURNED** to the trial level for further proceedings consistent with this decision and WCAB Rule 10382.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

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

**/s/ NATALIE PALUGYAI, COMMISSIONER**



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

**May 5, 2023**

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

**COMPREHENSIVE ORTHOPEDIC CARE CENTER, P.C.  
NELSON HARDIMAN, LLP  
MOKRI VANIS & JONES, LLP  
LAW OFFICE OF PACHECO & NEACH**

**AJF/abs**

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