

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SCOTT SEHORN, *Applicant*

vs.

DAVE & BUSTER'S, INC.;
ACE AMERICAN INSURANCE COMPANY, ADMINISTERED BY ESIS, *Defendants*

Adjudication Number: ADJ10717582
Marina Del Rey District Office

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

Defendant seeks reconsideration of the January 3, 2023 Amended Findings of Fact and Order (F&A), wherein the workers' compensation administrative law judge (WCJ) determined, in relevant part, that there is no legal basis to strike the reports and deposition transcript of Agreed Medical Evaluator (AME) Tye Ouzounian, M.D., that Dr. Ouzounian did not violate Administrative Director Rule 35.5(f), and that there was no denial of defendant's due process right to depose Dr. Ouzounian.¹

Defendant contends its due process rights were denied when it was unable to depose Dr. Ouzounian, that the WCJ erred in excluding the July 5, 2022 report of Jeffrey Desantis, M.D., and that it will suffer irreparable harm and substantial prejudice if it is not permitted to submit a position statement to the regular physician.

Defendant has also filed a Request to file a Supplemental Petition, and a Supplemental Petition for Reconsideration on February 27, 2023 (Supplemental Petition). We have granted the request pursuant to WCAB Rule 10964, and have reviewed the Supplemental Petition herein. (Cal. Code Regs., tit. 8, § 10964.)

¹ Commissioner Sweeney, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be dismissed as untimely, and denied on the merits.

We have considered the Petition for Reconsideration, the Supplemental Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will dismiss the Petition to the extent it seeks reconsideration, and deny it to the extent it seeks removal.

We first address the issue of timeliness. The WCJ's Report observes that because the January 3, 2023 F&A was served via email, the defendant's time to file a Petition for Reconsideration was limited to the twenty days allowed under Labor Code section 5903.² However, we note that pursuant to WCAB Rule 10605, "when a document is served by mail, fax, *e-mail* or any method other than personal service, the period of time for exercising or performing any right or duty to act or respond shall be extended by...(1) five calendar days from the date of service, if the place of address and the place of mailing of the party, attorney or other agent of record being served is within California." (Cal. Code Regs., tit. 8, § 10605(a), emphasis added.) Here, the F&A was served via email, conferring on defendant an additional five days to exercise its right to petition for reconsideration. Accordingly, we conclude that defendant's Petition filed on January 27, 2023 was timely.

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

² All further statutory references are to the Labor Code unless otherwise stated.

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, interlocutory orders regarding evidence, discovery, trial setting, venue, or similar issues. 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, § 10955(a); 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, § 10955(a).)

Here, the F&A does not contain a final order and does not determine any substantive right or liability, nor does it decide a threshold issue fundamental to the claim for benefits. Accordingly, we will dismiss the Petition to the extent it seeks reconsideration.

Considering the Petition as Petition for Removal, defendant avers that it was error for the WCJ not to exclude the reporting of AME Dr. Ouzounian from evidence. (Petition, at 11:17.) However, we agree with the WCJ’s observation that Rule 35.5(f), which provides timelines for medical evaluator depositions, does not specify a specific remedy for a failure of compliance, or provide a specific basis for a motion to strike the physician’s underlying reports. (Report, at p. 6.) We further observe that, “in most cases the specific provisions of the Labor Code and of our rules relating to discovery will provide adequate tools to the practitioner, and that he should not be encouraged to go beyond them in search of other remedies,” but in those cases where the Labor Code and our rules do not provide a sufficient remedy, “the trial judge has, and should exercise[,] the authority conferred on him by § [10330] of our rules to issue such interlocutory orders relating to discovery as he determines are necessary to insure the full and fair adjudication of the matter before him, to expedite litigation and to safeguard against unfair surprise.” (*Hardesty v. Mccord & Holdren* (1976) 41 Cal.Comp.Cases 111, 114 [1976 Cal. Wrk. Comp. LEXIS 2406] (Appeals Bd. panel decision).) While the WCJ retains the discretion to exclude specified evidence upon a showing of good cause, here we discern no abuse of discretion in the WCJ’s decision to allow the reporting of Dr. Ouzounian to remain in evidence. Moreover, we agree with the WCJ’s observation that defendant retains the right to challenge the reporting of Dr. Ouzounian with any physicians

that review the reporting, or in subsequent proceedings before the WCAB. Accordingly, we discern no irreparable harm in the WCJ's order denying the motion to strike Dr. Ouzounian's reporting from the evidentiary record. (F&A, Findings of Fact No. 3.)

Defendant further contends that the WCJ abused her discretion in ordering that the parties refrain from submitting advocacy letters or other communication with the regular physician appointed pursuant to section 5701. (Petition, at 13:10.) However, as the WCJ notes, WCAB Rule 10410(d) provides that "all correspondence concerning the examination by and the reports of a physician appointed by a workers' compensation judge or the Appeals Board pursuant to Labor Code sections 5701, 5703.5, 5706 or 5906 shall be made, respectively, through the workers' compensation judge." (Cal. Code Regs., tit. 8, § 10410(d).) Thus, the WCJ retains the discretion to determine the communications from the parties that will be permitted to be submitted to the regular physician. Here, following our review of the record occasioned by defendant's Petition, we discern no abuse of discretion on the part of the WCJ. We further note that the F&A specifically provides for the parties' right to seek deposition or supplemental reporting or clarification from the regular physician upon petition to the Court. (F&A, Order, p. 3.) Accordingly, we are persuaded that defendant has not sustained its burden of establishing irreparable harm or substantial prejudice, or 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).)

In summary, because the F&A contains no final orders or threshold decisions, we will dismiss the Petition insofar as it seeks reconsideration, and because the Petition fails to establish irreparable harm or undue prejudice and that reconsideration would not be an adequate remedy, we will deny the petitions insofar as it seeks removal.

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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 28, 2023

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

**SCOTT SEHORN
BERKOWITZ AND COHEN
BERNAL AND ROBINS
ESIS**

SAR/abs

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