

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

ZOEY MEIDINGER, *Applicant*

vs.

**MOUNTAIN MIKE'S PIZZA;
EMPLOYERS ASSURANCE SAN FRANCISCO, *Defendants***

**Adjudication Number: ADJ13788787
Stockton District Office**

**OPINION AND ORDER DISMISSING
PETITION FOR RECONSIDERATION AND
ORDER GRANTING REMOVAL AND
NOTICE OF INTENTION TO IMPOSE SANCTIONS AND
REASONABLE EXPENSES
(Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10561)**

Defendant seeks reconsideration and/or removal of the minute order taking this matter off calendar (OTOC) issued by a workers' compensation administrative law judge (WCJ) on December 21, 2023.

Defendant contends that at the mandatory settlement conference (MSC) on December 19, 2023, the WCJ denied its Petition for Credit (Lab. Code, § 3861) (credit petition), but thereafter refused to issue the order denying its credit petition and took this matter off calendar; that applicant failed to produce evidence of employer negligence and therefore failed to meet her burden to defeat the credit petition; that further discovery is therefore unnecessary to establish defendant's right to a credit; and, therefore the WCJ's order denying the credit petition and continuing this matter for further discovery violates defendant's rights under Labor Code¹ section 3861.

Applicant did not file an answer to the Petition for Reconsideration and/or Removal. The WCJ filed a Report and Recommendation on Petition for Reconsideration/Removal (Report), wherein it is recommended that the petition be treated as a removal as the OTOC is a non-final,

¹ All further references are to the Labor Code unless otherwise noted.

interlocutory order, and that removal be denied as the WCJ issued the matter continued for further discovery on the credit petition but has not issued any order on that petition.

We have reviewed the record in this matter, the allegations in the Petition for Reconsideration and/or Removal, and the contents of the Report. We dismiss the Petition for Reconsideration as the OTOC is a non-final order. **Based on our review of the record and the Report, we grant the Petition for Removal in order to issue a Notice of Intention to Impose Sanctions and Reasonable Expenses against attorney Juan Bustos, the law firm of Tobin Lucks LLP, and Employers Assurance San Francisco, jointly and severally, pursuant to Labor Code section 5813 and WCAB Rule 10561 (Cal. Code Regs., tit. 8, § 10561).** At this time, we will not make any final decision on the merits as to the Petition for Removal.

I.

A petition for writ of review may only be sought from a final order, decision, or award of the Appeals Board. (Lab. Code, §§ 5900, 5901, 5950; *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1255 (“*Hikida*”); *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1074 (“*Maranian*”); *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180 (“*Rymer*”); *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534–535 (“*Safeway*”); *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45.) Interim orders are not final orders because they do not finally determine questions of the parties’ substantive rights or liabilities, nor do they finally determine a threshold issue basic to the employee’s right to benefits. (*Maranian, supra*, 81 Cal.App.4th at p. 1075; *Rymer, supra*, 211 Cal.App.3d at 1180; *Kramer, supra*, 82 Cal.App.3d at 45; see *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (“Gaona”)* (2016) 5 Cal.App.5th 658, 660.)

Here, the WCJ issued the OTOC, which is an interim procedural order taking the matter – the credit petition – off calendar. The OTOC is therefore not a final order finally determining any substantive right or liability of any party, nor finally determining any threshold issue basic to applicant’s right to benefits. We therefore dismiss the Petition for Reconsideration as the OTOC is not a final order and therefore not subject to reconsideration.

II.

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).)

The Appeals Board may institute its own motion to determine whether the imposition of sanctions is warranted against a party and/or the party's attorney. (Lab. Code, § 5813(b).) The Appeals Board has the authority to order a party's attorney to pay "reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad-faith actions or tactics . . ." (Lab. Code, § 5813(a).) In addition, the Appeals Board, "in its sole discretion, may order additional sanctions not to exceed two thousand five hundred dollars (\$2,500.00) to be transmitted to the General Fund." (Lab. Code, § 5813(a).) "Before issuing such an order, the alleged offending party or attorney must be given notice and an opportunity to be heard." (Cal. Code Regs., tit. 8, § 10421(a).)

We therefore grant removal in order to issue a Notice of Intention to Impose Sanctions (NIT) against attorney Juan Bustos, the law firm of Tobin Lucks LLP and Employers Assurance San Francisco, jointly and severally, pursuant to Labor Code section 5813 and WCAB Rule 10421. At this time, we will not make any final decision on the merits as to the Petition for Removal.

Section 5813 sanctions must be based on, ". . . bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Lab. Code, § 5813(a).) Generally, such actions or tactics include those "result from a willful failure to comply with a statutory or regulatory obligation, that result from a willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board, or that are done for an improper motive or are indisputably without merit." (Cal. Code Regs., tit. 8, § 10421(b).) Specifically, bad faith actions or tactics "shall include but are not limited to . . ."

(2) Filing a pleading, petition or legal document unless there is some reasonable justification for filing the document.

...

(5) Executing a declaration or verification to any petition, pleading, or other document filed with the Workers' Compensation Appeals Board:

(A) that:

- (i) contains false or substantially false statements of fact;
- (ii) contains statements of fact that are substantially misleading;
- (iii) contains substantial misrepresentations of fact;
- (iv) contains statements of fact that are made without any reasonable basis or with reckless indifference as to their truth or falsity;
- (v) contains statements of fact that are literally true, but are intentionally presented in a manner reasonably calculated to deceive; and/or
- (vi) conceals or substantially conceals material facts; and

(B) where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct.

(6) Bringing a claim, conducting a defense, or asserting a position:

(A) that is:

- (i) indisputably without merit;
- (ii) done solely or primarily for the purpose of harassing or maliciously injuring any person; and/or
- (iii) done solely or primarily for the purpose of causing unnecessary delay or a needless increase in the cost of litigation; and

(B) where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct.

...

(8) Asserting a position that misstates or substantially misstates the law, and where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct.

(Cal. Code Regs., tit. 8, § 10421(b)(2), (5), (6), (8).)

Defendant *repeatedly* contends that the WCJ denied its credit petition despite applicant's failure to meet its burden of proof and refused to issue an order denying the credit petition thereby denying defendant its right to reconsideration and/or appellate review, without due process of law.

(Petition for Reconsideration and/or Removal, pp. 1-5.) These contentions are a misstatement of the proceedings, which are not in any way ambiguous. (OTOC, Comments [“WCJ granted A/A’s request for OTOC for further discovery over Defendant’s objection.”]; Report, pp. 1-2.) In fact, there can be no dispute on the record in this case that the WCJ issued *no order* – one way or the other – related to defendant’s credit petition. The record is crystal clear that no hearing was set on the credit petition, no evidence was taken, and no determination of the credit petition was made by the WCJ. Instead, the record is perfectly clear that the WCJ sustained applicant’s objection to setting the credit petition for trial and took the credit petition off calendar pending further discovery on the issues raised by defendant’s credit petition. (*Ibid.*)

In addition, defendant cannot claim ignorance or a misunderstanding that the OTOC simply took the credit petition off calendar rather than denying that petition entirely. Prior to filing the pending petition, defendant attempted to insert an order denying the credit petition on the minute order (which it had been ordered to serve). (OTOC, Notice pursuant to Cal. Code Regs., tit. 8, § 10629.) Upon receipt, the WCJ crossed out and inserted the actual order made: “Language included by the defendant in the Comment Section was lined out as not representative of what was Ordered at the MSC, specifically the matter was ordered off calendar for further discovery, no action was taken on the defendant’s Petition for Third Party Credit.” (Report, p. 2.)

Consequently, it appears that defendant’s verified Petition for Reconsideration and/or Removal may have been filed in bad faith in violation of Labor Code section 5813 as it may have been filed “to disrupt or delay the proceedings;” and/or filed “for an improper motive;” and/or may be based on contentions that “are indisputably without merit.” (Cal. Code Regs., tit. 8, § 10421(b), (b)(6)(A)(i)-(iii).)

Defendant’s verified pleading may contain “false or substantially false statements of fact” (Cal. Code Regs., tit. 8, § 10421(b)(5)(A)(i)); and/or “statements of fact that are substantially misleading” (Cal. Code Regs., tit. 8, § 10421(b)(5)(A)(ii)); and/or “substantial misrepresentations of fact” (Cal. Code Regs., tit. 8, § 10421(b)(5)(A)(iii)); and/or “statements of fact that are made without any reasonable basis or with reckless indifference as to their truth or falsity” (Cal. Code Regs., tit. 8, § 10421(b)(5)(A)(iv)); and/or filed a verified pleading that may “[c]onceals or substantially conceals material facts” (Cal. Code Regs., tit. 8, § 10421(b)(5)(A)(v)).

Finally, defendant’s verified pleading may be “[a]sserting a position that misstates or substantially misstates the law...” by arguing that an order taking a matter off calendar to allow the

parties to conduct discovery on the issues related to that matter, i.e., in order *to ensure* due process when the matter does go to trial, is somehow the equivalent of denying that matter *without* due process. (Cal. Code Regs., tit. 8, § 10421(b)(8).) This is not just a simple misapprehension of what constitutes due process but appears to be a willful and logical inversion of the WCJ's order to force defendant's preferred outcome on its credit petition – with no consideration for the misrepresentations of fact that such a strategy requires, for the delay in the proceedings that such a strategy causes, or for the violation to *applicant's* right to due process that this strategy inherently requests. Certainly, without reasonable justification, this would constitute the sort of bad faith action or tactic utilized for an “improper purpose” that is provided for in Labor Code section 5813 and WCAB Rule 10421.

“In no event shall the Workers' Compensation Appeals Board impose a monetary sanction pursuant to Labor Code section 5813 where the one subject to the sanction acted with reasonable justification or other circumstances make imposition of the sanction unjust.” (Cal. Code Regs., tit. 8, § 10421(a).) There appears to be no reasonable excuse for defendant's contentions and misrepresentations. (Cal. Code Regs., tit. 8, § 10421(b)(5)(B), (b)(6)(B), (8).)

Accordingly, we intend to impose sanctions against attorney Juan Bustos, the law firm of Tobin Lucks LLP, and Employers Assurance San Francisco, jointly and severally, in an amount up to \$2,500.00 and reasonable expenses pursuant to section 5813 and WCAB Rule 10561, unless they serve and file, within 10 days of service of this Notice, written objection in which good cause is demonstrated as to why sanctions should not be imposed.

For the foregoing reasons,

IT IS ORDERED that Petition for Reconsideration of minute order taking matter off calendar issued by a workers' compensation administrative law judge on December 21, 2023 is **DISMISSED**.

IT IS FURTHER ORDERED that defendant's Petition for Removal of minute order taking matter off calendar issued by a workers' compensation administrative law judge on December 21, 2023 is **GRANTED**.

NOTICE IS HEREBY GIVEN that pursuant to Labor Code section 5813 and WCAB Rule 10421 (Cal. Code Regs., tit. 8, § 10421), and absent written objection in which good cause to the contrary is demonstrated, the Workers' Compensation Appeals Board will order attorney Juan Bustos, the law firm of Tobin Lucks LLP, and Employers Assurance San Francisco, jointly and severally, to pay sanctions up to \$2,500.00 to the General Fund and reasonable expenses to applicant. **Written objection shall be e-filed in the Electronic Adjudication Management System (EAMS) within ten (10) days after service of this Notice** (plus an additional five (5) days for mailing [Cal. Code Regs., tit. 8, §§ 10507, 10508]). This means that the written objection shall not be filed at the Oakland District Office or at any district office.

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 6, 2024

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

**ZOEY MEIDINGER
PACIFIC ATTORNEY GROUP
EMPLOYERS ASSURANCE SAN FRANCISCO
TOBIN LUCKS
WORK COMP RESOLUTIONS, INC.**

AJF/abs

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