WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DANIEL MILBAUER, ***Applicant,*** **vs.** **EREZ BOOSTAN, an individual and dba AMERICAN RUNNER ATTORNEY SERVICE, uninsured; and UNINSURED EMPLOYERS FUND,** ***Defendants.***	**Case No. LAO 0722567** **OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION (EN BANC)**

Defendant, the Acting Director of Industrial Relations, John M. Rea, as administrator of the Uninsured Employers Fund ("UEF"), seeks reconsideration of the Opinion and Decision After Reconsideration (En Banc) issued by the Appeals Board on December 18, 2003. In that decision, the Appeals Board affirmed the Supplemental Findings and Award issued by the workers' compensation administrative law judge ("WCJ") on May 8, 2003, which had found in relevant part that applicant, Daniel Milbauer ("applicant"), sustained industrial injury on October 17, 1994, while employed by "Erez Boostan, an individual and dba American Runner Attorney Service," an uninsured employer. The Appeals Board's December 18, 2003 decision also announced several procedures intended to obtain the early and active participation of UEF either when an injured employee has difficulty in establishing the correct legal identity of the employer after good faith efforts, or when UEF objects to the correct legal identity of the employer as asserted by the employee.

In its petition for reconsideration, UEF expressly states that it "does not contest" the Appeals Board's affirmance of the WCJ's May 8, 2003 finding that the correct legal identity of applicant's employer is "Erez Boostan, an individual and dba American Runner Attorney

Service." Instead, UEF's petition asserts, in essence: (1) that it is newly aggrieved by the Appeals Board's pronouncement of new procedures affecting UEF's obligations in workers' compensation cases; (2) that, by announcing these new procedures, the Appeals Board went beyond the issue of employment, which was the sole question raised by UEF's original petition for reconsideration; (3) that, in announcing these procedures, the Appeals Board mischaracterized UEF's efforts in this case to establish the correct legal identity of applicant's employer and it failed to give UEF an opportunity to respond to the Appeals Board's concerns; and (4) that, in announcing these procedures, the Appeals Board failed to comply with the Administrative Procedures Act; it prescribed provisional joinder standards that conflict with a plain language of Labor Code sections 3716(d) and 5502(f); it violated the due process rights of employers; it impermissibly reordered UEF's discretionary priorities under the Labor Code and interfered with UEF's overall enforcement policies and responsibilities; and it improperly pronounced that UEF is liable for sanctions under Labor Code section 5813.

For the reasons that follow, we will dismiss UEF's present petition for reconsideration.

First, only persons "aggrieved" by a decision of the Appeals Board (or a WCJ) may petition for reconsideration. (Lab. Code, §§ 5900(a), 5903; *Beverly Hills Multispecialty Group v. Workers' Comp. Appeals Bd.* (*Pinkney*) (1994) 26 Cal.App.4th 789, 798 [59 Cal.Comp.Cases 461, 468].) UEF, however, is not "aggrieved" by our December 18, 2003 decision. UEF expressly states that it "does not contest" the affirmance of the WCJ's finding regarding the correct legal identity of applicant's employer. Moreover, although UEF claims that it is "newly aggrieved" by the procedures announced by our December 18, 2003 decision, these procedures were never applied in and do not relate to this case. Indeed, UEF specifically acknowledges that these procedures were announced with the intent "to change how UEF cases are handled *in the future*." (Emphasis added.) Thus, as to this case, UEF is not "aggrieved" by any part of our decision.

Second, a petition for reconsideration may be filed only from a "final" order. (Lab. Code, §§ 5900(a), 5902, 5903.) In general, a decision is "final" only if it "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, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661].) Here, although the Appeals Board's affirmance of the correct legal identity of applicant's employer constitutes a "final" order, UEF again expressly "does not contest" this determination. The procedures announced by our December 18, 2003 opinion, however, are not "final." No substantive right or liability of UEF was determined by these procedures in this case. In fact, the announced procedures were not even applied in this case.

Third, to the extent, if any, that UEF's petition is actually challenging the correct legal identity of applicant's employer, the petition is successive and must be dismissed. Where a party has filed a petition for reconsideration with the Appeals Board, but the party does not prevail on that petition for reconsideration, the party cannot attack the Appeals Board's action by filing a second petition for reconsideration; rather, the party must either be bound by the Appeals Board's action or challenge it by filing a timely petition for writ of review. (*Goodrich v. Industrial Acc. Com*. (1943) 22 Cal.2d 604, 611 [8 Cal.Comp.Cases 177, 181]; *Ramsey v. Workmen's Comp. Appeals Bd*. (1971) 18 Cal.App.3d 155, 159 [36 Cal.Comp.Cases 382, 384]; *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (*Mazzanti*) (1956) 139 Cal.App.2d 22, 25-26 [21 Cal.Comp.Cases 46, 48-49]; *Crowe Glass Co. v. Industrial Acc. Com*. (*Graham*) (1927) 84 Cal.App. 287, 293 [14 IAC 221, 223-224]; *Navarro v. A & A Farming* (2002) 67 Cal.Comp.Cases 296, 299-300 (Appeals Board en banc).)

Because we are dismissing UEF's petition for the reasons above, we will deny its request to augment the record.

For the forgoing reasons,

IT IS ORDERED that the petition for reconsideration filed by the Acting Director of

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Industrial Relations, John M. Rea, as administrator of the Uninsured Employers Fund, on January 12, 2004 be, and it is hereby, **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

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MERLE C. RABINE, Chairman

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WILLIAM K. O'BRIEN, Commissioner

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JAMES C. CUNEO, Commissioner

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JANICE JAMISON MURRAY, Commissioner

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FRANK M. BRASS, Commissioner

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A. JOHN SHIMMON, Commissioner

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RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

3/10/04

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD.

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