

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

ANGEL BENITEZ, *Applicant*

vs.

**JV CONTRACTING; CAL AG RESOURCES, INC.;
CALIFORNIA FARM MANAGEMENT, INC.;
STATE COMPENSATION INSURANCE FUND;
and PACIFIC CLAIMS MANAGEMENT, *Defendants***

**Adjudication Number: ADJ12030313
Fresno District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Applicant seeks removal in response to an order of dismissal issued by the workers' compensation administrative law judge (WCJ) on March 11, 2021, wherein the WCJ issued an order dismissing defendants Cal AG Resources and Pacific Claims Management without prejudice. Although the WCJ also dismissed defendant Pacific Claims Management, applicant only seeks removal in response to the order dismissing defendant Cal AG Resources.¹ The WCJ also issued an order dismissing defendant State Compensation Insurance Fund (SCIF) for lack of coverage.

We received an answer from defendant.

We received a Report and Recommendation on Petition for Removal (Report) from the WCJ recommending that we deny removal.

We have considered the allegations of the Petition, the answer, and the contents of the Report.

¹ As discussed herein, the WCJ issued the orders at a single hearing and due to the lack of record, we are unable to examine the dismissals separately.

Based on our review of the record, and for the reasons discussed herein, as our decision after reconsideration, we will rescind the March 11, 2021 Orders, and return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his eye on December 20, 2018, while employed by defendant as a farmer.

On March 11, 2021, the parties proceeded to a status conference. According to the minutes, the WCJ issued an order taking the matter off calendar, stating: “Party dismissals issued over applicant’s objection.” (March 11, 2021 minutes.²)

On March 11, 2021, the WCJ issued an order dismissing, without prejudice, defendants Cal AG Resources and Pacific Claims Management.

On March 11, 2021, the WCJ issued an order dismissing defendant SCIF for lack of coverage.

On March 11, 2021, applicant filed this petition for removal.

DISCUSSION

As a preliminary matter, 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 banc³)). 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, § 5904.⁴) Alternatively, non-final decisions may later be challenged by a petition

² Pursuant to the Appeals Board’s March 18, 2020 en banc decision, the requirement for service by the WCAB by mail, pursuant to WCAB Rule 10628, is currently suspended and service may be made electronically with or without parties’ consent. (March 18, 2020 In Re: COVID-19 State of Emergency En Banc (Misc. No. 260); Cal. Code Regs., tit. 8, former § 10500, now § 10628 (eff. Jan. 1, 2020).) However, the decision did not state that the WCAB may designate a party to serve a final decision, order or award. (Cal. Code Regs., tit. 8, former § 10500, now § 10628 (eff. Jan. 1, 2020); Cal. Code Regs., tit. 8, § 10629 (eff. Jan. 1, 2020).) Because we rescind the Orders on other grounds, we do not further consider the issue of service.

³ En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, former § 10341, now § 10325(a) (eff. Jan. 1, 2020); *City of Long Beach v. Workers’ Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].)

⁴ All further statutory references are to the Labor Code, unless otherwise noted.

for reconsideration once a final decision issues. Here, defendant SCIF has been dismissed for lack of coverage, which is a final order because they are no longer a party. As compared to the dismissals of defendants Cal AG Resources and Pacific Claims Management, which are likely non-final orders because they were dismissed without prejudice. Thus, this case involves both final and non-final orders and so the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue.

We note that a petition for reconsideration is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that “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 the applicant’s petition for reconsideration because it had not acted on the petition within the statutory time limits of section 5909. This occurred because the Appeals Board 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.*) Like the Court in *Shipley*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Id.*) In this case, the Appeals Board failed to act on the Petition for Reconsideration within 60 days of its filing through no fault of the parties. Therefore, we find that our time to act on applicant’s petition was tolled.

The statutory and regulatory duties of a WCJ include the issuance of a decision that complies with section 5313. An adequate and complete record is necessary to understand the basis for the WCJ’s decision and the WCJ shall “. . . make and file findings upon all facts involved in the controversy[.]” (Lab. Code, § 5313; *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*).)

The WCJ is “charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton, supra*, at 475-476; see Lab. Code, § 5313 and *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-22 (Appeals Bd. en banc) (*Blackledge*).) A WCJ’s decision must be based on admitted evidence (*Hamilton, supra*, at 476), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952 (d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals*

Bd. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500] (*Garza*); *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]). The purpose of this requirement is to enable “the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]” (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).)

The Appeals Board’s record of proceedings is maintained in the adjudication file and includes: the pleadings, minutes of hearing, summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits identified but not received in evidence, notices, petitions, briefs, findings, orders, decisions, and awards, and the arbitrator’s file, if any. “Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings.” (Cal. Code Regs., tit. 8, former § 10750, now § 10803 (eff. Jan. 1, 2020).)

We appreciate the complexity of the issues herein and it may be possible that some defendants were properly dismissed. However, in the absence of an evidentiary record we are unable to evaluate the basis of the WCJ’s Orders. Therefore, we must return this matter to the trial level for further proceedings.

Accordingly, we rescind the March 11, 2021 Orders and return the matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 11, 2021 Order dismissing party defendants Cal AG Resources and Pacific Claims Management without prejudice is **RESCINDED**.

IT IS FURTHER ORDERED, that the March 11, 2021 Order of dismissal of State Compensation Insurance Fund for lack of coverage is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 24, 2021

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

**ANGEL BENITEZ
LAW OFFICES OF ROBERT OZERAN
LAW OFFICES OF JANE WOODCOCK
OFFICE OF THE DIRECTOR-LEGAL UNIT
STATE COMPENSATION INSURANCE FUND
UEBTF**

JB/abs

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