

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

**FRANCISCO BENITEZ, *Applicant***

**vs.**

**WASH & MART; COMPWEST INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ12249891  
San Diego District Office**

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

We have considered the allegations of defendant's Petition for Reconsideration and Removal and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, we will dismiss the Petition to the extent it seeks reconsideration and grant it to the extent it seeks removal solely to rescind the discovery order.

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

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, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the WCJ’s decision solely resolves an intermediate procedural or evidentiary issue or issues. The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a “final” decision and the Petition will be dismissed to the extent it seeks reconsideration.

Nevertheless, based on the WCJ’s recommendation and analysis in the Report, we will grant the Petition to the extent it seeks removal, rescind the discovery order and return this matter to the WCJ for further proceedings and decision.

It is acknowledged that the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) Decisions by the Appeals Board must be based on admitted evidence in the record. (*Hamilton v. Lockheed Corp. (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Accordingly, the trier of fact cannot make a determination that the record is deficient to address the disputed issues in the absence of an actual evidentiary record including admitted exhibits and/or witness testimony. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138, 141 (Appeals Board en banc) [“Before directing augmentation of the medical record, however, the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete”].)

Therefore, we will dismiss defendant’s Petition as one seeking reconsideration, grant the Petition as one seeking removal and amend the Minute Order as outlined herein.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration is **DISMISSED** and the Petition for Removal is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Removal of the Workers' Compensation Appeals Board that the Minute Order issued by the WCJ on January 4, 2021 is **AFFIRMED** except that it is **AMENDED** as follows:

[All of the discovery order on page 3 of the Minute Order is rescinded.]

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



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

**March 15, 2021**

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

**FRANCISCO BENITEZ  
MY INJURY HEADQUARTERS  
TROVILLION INVEISS & DEMAKIS**

*AI/pc*

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