

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

JORGE NAVA, *Applicant*

vs.

**SAN MIGUEL PRODUCE;
ZENITH INSURANCE CO., *Defendants***

**Adjudication Numbers: ADJ10608420; ADJ10608421
Oxnard District Office**

**OPINION AND ORDERS
DISMISSING PETITION FOR RECONSIDERATION
AND DENYING PETITION FOR REMOVAL**

Zenith Insurance Company (defendant) seeks removal or, in the alternative, reconsideration of the minute order issued by the workers' compensation administrative law judge (WCJ) on November 18, 2020. As relevant herein, the WCJ resubmitted the case but allowed a supplemental report if it were generated within 30 days. Subsequently, on December 1, 2020, the WCJ issued an "Order Vacating Submission and Referral to the Disability Evaluation Unit" (Order and Referral to DEU). The WCJ found good cause and vacated the submission of the matter on November 18, 2020, and referred the matter to the DEU.¹

Defendant contends that the WCJ's decision to reverse his order vacating submission dated October 12, 2020, and instead resubmitting the matter for decision on November 18, 2020, violated its right to due process.

Applicant did not file an answer. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that we deny the petition in its entirety.

¹ We recognize that defendant filed its Petition on December 8, 2020, after the WCJ vacated the minute order on December 1, 2020. Thus, the Petition is technically subject to dismissal. In order to provide guidance to the parties, we have addressed the merits and deny the Petition. Additionally, we note that there may be a potential *Hamilton* issue related to the Order and Referral to DEU. (See *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Board en banc). The WCJ has not explained nor identified what is meant by "good cause."

We have considered the allegations of the Petition, the Order and Referral to DEU, and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and for the reasons discussed below, we will dismiss reconsideration and deny removal.

FACTUAL BACKGROUND

Applicant, while employed on August 3, 2016 (ADJ10608420), and September 1, 2016 (ADJ10608421), as a laborer, by San Miguel Produce, sustained injury arising out of and in the course of employment (AOE/COE) to his lumbar spine. (Minutes of Hearing (MOH), September 9, 2020, pp. 2:15-17, 3:18-21.)

At trial on September 9, 2020, the WCJ consolidated ADJ10608420 and ADJ10608421. (MOH, *supra*, p. 2:6-8.) The parties, as relevant herein, raised the issue of permanent disability for the WCJ's consideration. (*Id.* at pp. 3:9, 4:14.) The WCJ allowed the parties to file trial briefs on September 23, 2020, on an unrelated issue, at which point the cases stood submitted. (*Id.* at p. 6:13-16.)

On October 12, 2020, the WCJ issued an "Order Vacating Submission and Setting Case on Calendar to Discuss Further Ordering Development of the Medical Record" (October 2020 Order). In this order, the WCJ concluded that the parties did not develop the medical record on the issue of permanent disability benefits. The WCJ ordered the parties to obtain a supplemental medical report or testimony from Dr. Rosenberg, the primary treating physician, or panel Qualified Medical Evaluator (QME) Dr. Stammire. In particular, the WCJ wanted the range of motion (ROM) method for rating permanent disability. Lastly, if the parties were unable to resolve the matter after the supplemental reports and/or testimony, either party could file a declaration of readiness to place the matter on calendar for a determination of the issue, including whether the matter will be resubmitted for decision. The WCJ also set the case for a status conference. (Order, October 12, 2020.)

On November 18, 2020, the WCJ held a status conference. In the comments of the MOH, it is stated that, "WCJ will resubmit case as of today. Will consider medical reports generated in next 30 days in light of order vacating on 10/12/20."² (MOH, November 18, 2020.)

² According to defendant, the following arguments were made at the November 18, 2020 status conference: Mr. Kinsler [applicant's attorney] argued that the report from Dr. Rosenberg dated December 6, 2018, had already provided the judge with the range of motion measurements that he was requesting. (Petition, *supra*, p. 3:14-17.) Defense counsel allegedly pointed out to the WCJ that there had been a discussion about developing the record with a supplemental report from Dr. Stammire. According to the Petition, defense counsel informed the WCJ that defendants had contacted Dr. Stammire's office and were attempting to schedule his deposition or re-evaluation. The

On December 1, 2020, the WCJ issued the Order and Referral to DEU. The WCJ provided the following rationale:

Pursuant to the Court's authority and continuing jurisdiction per Labor Code Section 5803, and GOOD CAUSE appearing therein, submission of this matter is hereby vacated and the matter is being referred to the Disability Evaluation Unit. The formal permanent disability rating will be served on the parties, who shall have seven (7) days from the date of service plus five (5) for mailing to object to the rating and request cross-examination of the disability evaluator. If no such request is timely made the matter will be taken under submission by further Order.

On December 8, 2020, defendant filed its Petition for Removal or, in the alternative, Reconsideration.

DISCUSSION

I.

Defendant filed a petition seeking removal or, in the alternative, reconsideration. 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 banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship, and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) 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.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the WCAB may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

WCJ stated that he had mistakenly vacated the submission in the first place but would allow a supplemental report from Dr. Stammire if it could be generated within 30 days. (*Id.* at pp. 3:14-4:2.) We note that there is a potential *Hamilton* issue. There is no record of what unfolded at the November 18, 2020 status conference.

The Order and Referral to DEU here did not include a finding on a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is not a final order and subject to removal rather than reconsideration. Accordingly, we dismiss defendant's petition for 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, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) 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)(1)-(2); 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 Order and Referral to DEU did two things: it vacated the November 18, 2020 minute order, rendering it moot (See Cal. Code Regs., tit. 8, § 10966), and referred the matter to the DEU for a formal permanent disability rating. At this time, the case is unsubmitted, and defendant's next step is to address the DEU's rating. The WCJ has not taken any further action with respect to the DEU's rating, so there is no evidence that defendant has suffered irreparable harm. Accordingly, defendant has not satisfied the irreparable harm element for removal.

However, we note that the WCJ opened the evidentiary door when he allowed the parties to obtain a supplemental report from QME Dr. Stammire. The WCJ invited the parties to develop the record twice: on October 12, 2020, and November 18, 2020. Thus, it would appear reasonable and prudent for the WCJ to hold a status conference to consider Dr. Stammire's supplemental report, assuming that defendant will be able to obtain one in a timely manner.

Accordingly, we dismiss reconsideration and deny removal.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **DISMISSED**.

IT IS FURTHER ORDERED that defendant's Petition for Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 8, 2021

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

**JORGE NAVA
LAW OFFICES OF PAUL KINSLER
CHERNOW & LIEB
ZENITH INSURANCE COMPANY**

SS/abs

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