

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

JOSHUA SHIFRIN, *Applicant*

vs.

DEPARTMENT OF FORESTRY, legally uninsured, *Defendants*

**Adjudication Numbers: ADJ12076053, ADJ12728915
Sacramento District Office**

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

We have considered the allegations of defendant's Petition for Reconsideration of the Amended Joint Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 12, 2020, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will dismiss the Petition to the extent it seeks reconsideration, grant the Petition to the extent it seeks removal and amend the F&O to add an order deferring the issue of the statute of limitations. The F&O will otherwise be affirmed.

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.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers’ Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).)

Defendant contends that the WCJ applied the incorrect legal standard to find that applicant’s specific injury claim (ADJ12728915) is not barred by the statute of limitations. Whether this claim was barred by the statute of limitations was identified as an issue to be addressed at trial. (Minutes of Hearing, Summary of Evidence and Order of Consolidation, August 18, 2020, p. 2.) Although the WCJ discussed the issue in the Opinion on Decision, the F&O does not contain a finding of fact or order regarding this issue. The Opinion on Decision provides the rationale for the F&O, but the actual findings of fact and orders must be contained in the F&O.

Therefore, we will grant removal solely to amend the F&O to include an order that the issue of whether the specific injury claim is barred by the statute of limitations is deferred. We are otherwise not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

Therefore, we will dismiss the Petition as one seeking reconsideration, grant the Petition

as one seeking removal and amend the F&O as outlined herein.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Amended Joint Findings and Order issued by the WCJ on November 12, 2020 is **DISMISSED**.

IT IS FURTHER ORDERED that defendant's Petition for Removal of the Amended Joint Findings and Order issued by the WCJ on November 12, 2020 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Amended Joint Findings and Order issued by the WCJ on November 12, 2020 is **AFFIRMED** except that it is **AMENDED** to add the following:

ORDERS

* * *

The issue of whether the August 7, 2016 injury claim is barred by the statute of limitations is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 5, 2021

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

**JOSHUA SHIFRIN
STATE COMPENSATION INSURANCE FUND
WHITING COTTER & HURLIMANN**

AI/pc

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