

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

REBECCA GAGE, *Applicant*

vs.

COUNTY OF SACRAMENTO, *permissibly self-insured, Defendants*

**Adjudication Number: ADJ8010054
Sacramento District Office**

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION**

Defendant seeks reconsideration or in the alternative removal of the Minute Order (Order) issued by the workers' compensation administrative law judge (WCJ) on May 24, 2021. By the Order, the WCJ found that the Appeals Board does not have jurisdiction over compliance with the process in Labor Code¹ section 4850.4(f). (Lab. Code, § 4850.4(f).)² Defendant's request for a hearing to create a record over the question of jurisdiction was denied.

Defendant contends that benefits distributed to applicant per section 4850.4 are compensation as defined by section 3207 and therefore, compliance with the process for repayment of these benefits is within the jurisdiction of the Appeals Board. (Lab. Code, § 3207.) Defendant also contends that the Appeals Board has the authority to compel applicant to participate in the process mandated by the Labor Code even if it does not have jurisdiction to adjudicate the dispute itself.

¹ All further statutory references are to the Labor Code unless otherwise stated.

² Section 4850.4(f) states:

After final adjudication, if an employee's disability application is denied, the local agency and the employee shall arrange for the employee to repay any advanced disability pension payments received by the employee pursuant to this subdivision. The repayment plan shall take into account the employee's ability to repay the advanced disability payments received. Absent an agreement on repayment, the matter shall be submitted for a local agency administrative appeals remedy that includes an independent level of resolution to determine a reasonable repayment plan. If repayment is not made according to the repayment plan, the local agency may take reasonable steps, including litigation, to recover the payments advanced.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration or Removal in the Alternative (Report) recommending that we deny the Petition.

We have considered the allegations of defendant's Petition for Reconsideration/Removal, 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 grant the Petition as one seeking reconsideration, rescind the Order and return this matter to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Applicant sustained injury to the lumbar spine through September 14, 2011 while employed as a deputy sheriff by the County of Sacramento. (Stipulations with Request for Award, July 29, 2014.)

In 2015, applicant requested advance disability pension payments per section 4850.4. Defendant made payments, but applicant contended that the payments were unreasonably delayed and sought penalties per section 5814. (Lab. Code, § 5814.)

The issue proceeded to trial. In his August 6, 2015 Findings of Fact and Order (F&O), the WCJ determined that advances made under section 4850.4 are compensation pursuant to section 3207 and subject to penalties under section 5814.

Defendant filed a Petition for Removal of the F&O. The Appeals Board treated defendant's Petition as one seeking reconsideration since the F&O was considered a final order and granted it for study. (Opinion and Order Granting Petition for Reconsideration, October 29, 2015.) In a subsequent Opinion and Decision After Reconsideration, a split panel held that advances for a disability pension paid under section 4850.4 are not compensation and consequently not subject to the penalty provisions of section 5814. (Opinion and Decision After Reconsideration, February 18, 2016.) The F&O was rescinded and a new decision issued with the majority's finding regarding this dispute.

Applicant filed a petition for writ of review of the Opinion and Decision After Reconsideration. The Court of Appeal agreed with applicant that advance disability pension payments are compensation under section 3207 and the Appeals Board thus has jurisdiction to issue penalties per section 5814 for an unreasonable delay of payments made pursuant to section

4850.4. (*Gage v. Workers' Comp. Appeals Bd.* (2016) 6 Cal.App.5th 1128 [81 Cal.Comp.Cases 1127].) The Court annulled the Opinion and Decision After Reconsideration and remanded the matter to the Appeals Board to determine if a penalty under section 5814 was warranted. In the March 21, 2017 Opinion and Decision After Remittitur, the Appeals Board affirmed the WCJ's August 6, 2015 F&O and returned the matter to the trial level to address whether a penalty should be assessed.

A Stipulation and Award issued on August 24, 2018 indicates that the parties have resolved all penalties to date. (Stipulation and Award, August 24, 2018.)

On February 16, 2021, defendant filed a declaration of readiness to proceed (DOR) stating the disputed issue as follows:

DEFENDANT ATTEMPTING TO FULFILL RIGHTS AND OBLIGATIONS UNDER LABOR CODE SECTION 4850.4. THE PARTIES HAD A HEARING ON JANUARY 6, 2020 AND APPLICANT'S [sic] ATTORNEY CONFIRMED THEIR CONTINUED REPRESENTATION OF APPLICANT. A MEDIATION WAS SCHEDULED ON OCTOBER 15, 2020. APPLICANT DID NOT SHOW FOR THE MEDIATION AND HAS BEEN NON-RESPONSIVE. BOARD ASSISTANCE IS REQUESTED.

(Defendant's DOR, February 16, 2021, p. 2.)

Applicant filed an objection to the DOR contending that the Appeals Board does not have jurisdiction to address this issue.

The matter proceeded to a status conference on May 24, 2021. The Minute Order from the hearing states as follows:

Defendant seeks an order compelling applicant to participate in the resolution process of Labor Code section 4850.4(f). This request is denied because the WCAB does not have jurisdiction over this process, despite the Court of Appeal decision in this case that the WCAB has jurisdiction over penalties which apply resulting from failure to comply with section 4850(f). Defendant further requests that the court set a hearing over the question of jurisdiction in order to create a record, but this appears to be a pure legal question for which no record is necessary and so this request is likewise denied.

(Minute Order, May 24, 2021.)

No evidence was admitted into the record at the hearing and the matter was taken off calendar. To date, no evidence has been admitted into the record regarding this dispute.

DISCUSSION

I.

Defendant sought reconsideration or in the alternative removal of the Order. 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 (AOE/COE), 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.

In the Order, the WCJ determined that the Appeals Board does not have jurisdiction over the process in section 4850.4(f). An order determining jurisdiction is a final order subject to reconsideration. (See *Gaona, supra*; see also *Allied Signal Aerospace v. Workers’ Comp. Appeals Bd. (Wiggs)* (2019) 35 Cal.App.5th 1077, 1084-1085 [84 Cal.Comp.Cases 367].) Therefore, we will treat defendant’s Petition as one seeking reconsideration.

II.

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Furthermore, decisions of the Appeals Board 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]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ’s decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, former § 10566, now § 10787 (eff. Jan. 1, 2020).) “It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision,

the admissions and stipulations of the parties, and admitted evidence.” (*Hamilton, supra*, at p. 475.)

Additionally, all parties to a workers’ compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) Due process requires, in relevant part, that a party receive notice and an opportunity to be heard before an action adverse to its interest is taken. (*Beverly Hills Multispecialty Group, Inc. v. Workers’ Comp. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789 [59 Cal.Comp.Cases 461]; *Fortich v. Workers’ Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449 [56 Cal.Comp.Cases 537].) A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) As stated by the Court of Appeal in *Pinkney*:

A denial of due process to a party ordinarily compels annulment of the Board’s decision only if it is reasonably probable that, absent the procedural error, the party would have attained a more favorable result. However, if the denial of due process prevents a party from having a fair hearing, the denial of due process is reversible per se.

(*Pinkney, supra*, at p. 806, citations omitted.)

The disputed Order was issued without permitting defendant to create an evidentiary record because the WCJ considered the issue to be a “pure legal question.” We are unable to address whether the WCJ’s decision is supported by substantial evidence in the absence of a record and issuing a decision adverse to defendant without a fair hearing violates its right to due process. Additionally, a determination akin to summary judgment is not permitted in workers’ compensation proceedings. (See Cal. Code Regs., tit. 8, former § 10490, now § 10515 (eff. Jan. 1, 2020).)

Upon return of this matter to the trial level, we recommend the trier of fact conduct a hearing to provide both parties with an opportunity to present their arguments regarding this dispute and create an evidentiary record. The WCJ may then issue a decision based on a complete

record and either party may challenge that decision. We make no comment on the disputed issue between the parties and will defer determination of the dispute to the trier of fact in the first instance.

Therefore, we will grant reconsideration, rescind the Order and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Minute Order issued by the WCJ on May 24, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Minute Order issued by the WCJ on May 24, 2021 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 9, 2021

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

**MASTAGNI HOLSTEDT
REBECCA GAGE
TWOHY DARNEILLE & FRYE**

AI/pc

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