

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

KEVIN SULLIVAN, *Applicant*

vs.

**COMCAST AND HELMSMAN MANAGEMENT SERVICES; ACE AMERICAN
INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ11274331
Santa Rosa District Office**

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

We granted reconsideration in this matter to study the factual and legal issues.¹ This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings and Award (F&A) issued by a workers' compensation administrative law judge (WCJ) on February 18, 2022, wherein the WCJ found in relevant part that applicant's son was a total dependent under Labor Code section 3501(a) and entitled to the enhanced death benefit in Labor Code section 4703.5.

Applicant seeks reconsideration of the Opinion and Order Granting Petition for Reconsideration, issued by the Workers' Compensation Appeals Board on May 13, 2022.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. With respect to applicant's Petition for Reconsideration, based on our review of the record, the Petition seeks reconsideration of a non-final order and will be dismissed. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will affirm the F&A.

¹ Commissioner Lowe who was on the panel that granted reconsideration no longer serves on the Appeals Board. Another panelist was assigned in her place.

I.

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, our 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 applicant’s Petition for Reconsideration will be dismissed.

II.

Labor Code Section 3501 states in relevant part that:

- (a) ... a child of any age found by any trier of fact ... administrative, regulatory or judicial, to be physically or mentally incapacitated from earning, shall be conclusively presumed to be wholly dependent for support upon a deceased employee-parent with whom that child is living at the time of injury resulting in death of the parent.

As set forth by applicant in his Answer regarding the testimony at trial:

There were five (5) witnesses at trial. Aunt Tracy Sullivan has personal knowledge about the care of Sean because she was actively involved with Sean's care.

Sherry Sullivan, Sean's stepmother, had actual knowledge of where Sean lived because Sean lived in her house.

Alanna Tsvislavsky is Sean's sister and lives in Southern California. She became active in Sean's day to day care upon the death of her father.

Bonnie Sullivan is Sean's mother and lives in the Los Angeles area. She did not have an active role in Sean's 2017 care until after Kevin's death.

Devon Stoddard is employed by Catholic Charities. "She did not have any interaction with Sean Sullivan. Having reviewed the records, in her opinion, the first part of the records were filled out by Miguel (another employee of Catholic Charities) and were signed by Sean. (Testimony of Devon Stoddard, MOH, 11/23/21, p. 3, line 3-6.)

The first part of the Catholic Charity records was filled out by a person with no personal knowledge of the facts therein. The Defendants insist that this form, stating that Sean had been homeless from July to October proves that Sean was not living with his father.

The family's narrative about Sean's visit to the homeless shelter is compelling. During the fires in Sonoma County in the middle of October, 2017, all of the testimony puts Sean with Kevin and Sherry during the evacuation. This was a difficult time for everyone in Sonoma County and must have been doubly hard for Kevin and Sherry, being with Sean 24/7.

The family sought help for Sean in regard to his housing.

"Sean was briefly in a homeless shelter when Kevin was trying to obtain assistance from the County of Sonoma and was told that that would only be available if Sean was homeless." (Alanna Tsvislavsky, MOH, 6128121, p. 6, line 38-40)

"She did not know what agency they were hoping would provide benefits if they were able to establish Sean as being homeless. She's not aware of whether any benefits were applied for. She did not know that it was a County agency, and they were looking for a group home which was subsidized by the County of Sonoma." (Alanna Tsvislavsky, MOH, 6128121, p. 8, line 16-21.)

From the evidence, it appears that this picture of Sean's living situation in the Catholic Charity's intake was crafted to assist Sean in finding alternate housing, away from Kevin and Sherry's home. The attempt was unsuccessful because of Sean's behavioral issues and he returned to live with his father.

The second half of records of Catholic Charities regarding the period of Sean's stay are business records and, most likely, accurate. The record of Sean being kicked out of the shelter for his behavior is also business record. All else in their

record is second or third hand hearsay and should carry little weight as to the truth of the matter.

* * *

In this case, there is conflict of when Sean spent a week in the homeless shelter. Does it change the outcome if it was July, as witnesses thought and testified but that does not materially change the facts in this case.

The Catholic Charities' records show that Sean was expelled from the program on October 27, 2017. He, therefore, could not have been in that shelter on the day of his father's accident a week later. The testimony by Aunt Tracy should then be given great weight as to where Sean was that night. (Testimony of Tracy Sullivan, MOH, 11/23/21, p. 7, lines 34- 36.)

The Defendants also appear to argue that if Sean was not home the night before his father's accident, that means he was not "living" with him on the date of injury. Such a holding would not serve the spirit nor language of the statute. The Defendant's citing of Sherry Sullivan's testimony that Sean was not home the night before Kevin's accident proves, rather than disproves, that Sean was living with his father at the time of the accident.

Sean Sullivan lived with his father from January 2017 until his death and he left that home when his sister moved him out. " ... Sean moved into his dad's new house in Northern California. That was the home that her father lived in at the time of his death. He moved into that house in December of 2016 or January of 2017. After her dad died, she helped Sean move out and move all kinds of junk, including records, a guitar, clothes, pens and papers." (Alanna Tsivislavsky, MOH, 6/28/2021, p. 6, lines 23-28.)

The WCAB is not bound by the statutory or common law rules of evidence, and a WCJ's decision cannot be overturned merely because it relied on evidence not admissible under the common law or statutory rules of evidence as proof of any fact in dispute. (Lab. Code, §§ 5708, 5709; see *French v. Rishell* (1953) 40 Cal.2d 477, 481 [18 Cal.Comp.Cases 82, 84]; see also, e.g., *Bland v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 324, 330 [35 Cal.Comp.Cases 513].) However, "[t]he admissibility of hearsay evidence . . . is limited to situations 'when it is best calculated to ascertain the substantial rights of the parties [citation]. A material finding based entirely upon hearsay testimony of an incompetent witness is insufficient. It has no probative force and is not calculated to ascertain the substantial rights of the parties[para.] '...[Any] award made must have for its basis a firm foundation of fact.' (Italics added.) (*Berzin v. Industrial Acc. Com.*, 125 Cal.App. 522, 526 [14 Pac. (2d) 97]; *London Guar. & Acc. Co., Ltd. v. Industrial Acc. Com.*, 202 Cal. 239 [259 Pac. 1096, 54 A.L.R. 1392]; see *Skip Fordyce v. Workers' Comp. Appeals*

Bd. (Barry) (1983) 149 Cal.App.3d 915, 926–927 [48 Cal.Comp.Cases 904, 912].) We have given the WCJ’s credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ’s credibility determinations. (*Id.*; *Bracken v. Workers’ Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 254-256 [54 Cal.Comp.Cases 349].) Here, our review of the record shows that testimony by multiple witnesses supported the WCJ’s conclusion that applicant’s son was a total dependent under Labor Code section 3501(a) and that therefore he was entitled to the enhanced death benefit in Labor Code section 4703.5, and we will not disturb it.

Accordingly, we dismiss applicant’s Petition for Reconsideration, and we affirm the F&A.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration Opinion and Order Granting Petition for Reconsideration, issued by the Workers' Compensation Appeals Board on May 13, 2022 is **DISMISSED**.

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by a WCJ on February 18, 2022 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 8, 2022

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

**ALANNA TSIVISLAVSKY
LEWIS BRISBOIS
MEECHAN ROSENTHAL & KARPILOW**

AS/pc

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

1. Decedent: Kevin Sullivan
2. Occupation: Head-end technician
3. Age at time of injury: 63 years
4. Date of injury: 11/6/2017
5. Date of death: 11/12/2017
6. Body parts injured: various, resulting in death
7. Manner of injury: Motor vehicle accident
8. Identity of Petitioner: Defendant. Defendant filed a timely and verified Petition for Reconsideration, seeking review of this court's Findings and Award dated 2/18/2022. Defendant asserts that the court erred in finding decedent's son Sean Sullivan was entitled to an enhanced death benefit under Labor Code § 4703.5(a). More specifically, the Defendant asserts that the court erred in finding that the decedent's son Sean Sullivan was "living with" his father Kevin Sullivan at the time of Kevin Sullivan's injury.

**II
FACTS**

Kevin Sullivan had an adult son, Sean Sullivan, when he was severely injured in a motor vehicle accident on November 6, 2017, which accident took his life on November 12, 2017. Sean Sullivan has been diagnosed as suffering from a constellation of mental disabilities including schizophrenia (Applicant's Exhibit 7 (document not paginated)), psychosis (Joint Exhibit J4 at pg. 8 - 9), paranoia (Joint Exhibit J4 at pg. 10) epilepsy (Applicant's Exhibit 7), mental retardation (Joint Exhibit J4 at pg. 11 - 12), autism (Joint Exhibit J4 at pg. 17) and depression (Applicant's Exhibit 7). On August 8, 2020, Sean was found to be disabled by the Social Security Administration. (See Applicant's Exhibit 1). It appears to be undisputed that Sean falls within the class of people described in Labor Code § 3501(a) as having been found by an administrative trier of fact to be mentally incapacitated from earning.

The disputed issue in this case is whether or not Sean Sullivan was living with his father at the time of his accident. The court first heard testimony from Sean Sullivan's sister and guardian ad litem Allana Louise Sullivan Tsivislansky, who testified that after living with his mother Bonnie Sullivan in Southern California, Sean moved into their father's household in December 2016 or January 2017. (Minutes of Hearing and Summary of Evidence dated June 28, 2021 at pg 7:38 - 41) ("June MOH"). She also testified that Sean stayed in a homeless shelter for a few days prior to the accident. (June MOH at pg. 43 - 44) The purpose of that stay was to help obtain assistance from the County of Sonoma. (June MOH at pg. 7:45-8:2) The undersigned found that testimony to be credible.

This was followed by testimony from Sean's stepmother Sherrie Sullivan that after moving from Southern to Northern California, Sean lived with her and Sean's father, as well as Sean's younger sister, in their house in Sonoma. (June MOH pg. 10:1-3). In fact, she specifically remembered Sean living with her during the 2017 fires, which took place in October 2017, shortly before Kevin Sullivan's accident. (June MOH pg. 10:18) Having Sean around was stressful and from time to time he would stay with his Aunt Tracy. (June MOH pg. 10: 27 -28). The court notes that there are some slight inaccuracies in the timeline Sherrie Sullivan described: she testified that Sean was briefly in a homeless shelter in July 2017 (June MOH 10: 12), whereas the records establish that he was at the homeless shelter from October 19, 2017 until October 27, 2017. (Defense Exhibit G, Catholic Charities records at pg. 6 and 3 7). Notwithstanding, the court found Sherrie's testimony as to the issue of whether or not Sean was living with her and Kevin to be credible.

The second day of testimony began with Devon Stoddard, who authenticated the Catholic Charities records mentioned above. The court notes another discrepancy in those records, to wit, they state that Sean Sullivan had been homeless since July 2017, which appears to this court to be inaccurate. (Defense Exhibit G at pg. 18) The testimony received by the court indicated that prior to his brief residency in the homeless shelter, he was living with Kevin and Sherrie Sullivan.

The court next heard from Bonnie Sullivan, Sean's mother. The court felt that her testimony was of limited use as to the issues in this case, as she was not particularly well acquainted with Sean's situation after he left Southern California at the end of 2016/beginning of 2017.

Finally, the court heard from Sean's Aunt Tracy Sullivan, who corroborated the prior testimony that Sean lived with Kevin and Sherrie, and that he would stay with Tracy 4 or 5 days each month. (Minutes of Hearing and Summary of Evidence dated November 23, 2021 at pg. 7:13) ("November MOH").

III DISCUSSION

The defendant essentially contends that the court incorrectly weighed the evidence. As noted above, and as described by defendant in its Petition for Reconsideration, there are some discrepancies in the evidence. However, the court assessed the testimony of the witnesses to be credible as to the central issue of where Sean was living at the time of the accident. It is basically incontrovertible that Sean was ejected from the Catholic Charities homeless shelter on October 27, 2017. Kevin Sullivan's motor vehicle accident occurred on November 6, 2017. The court was persuaded by the testimony that following his ejection, he returned to Kevin and Sherrie Sullivan's house, where he had been living since early 2017. That being the case, he qualifies for the enhanced death benefit described in Labor Code § 4703.5(a).

The court did not apply liberal construction under Labor Code § 3202 at any point in its assessment of the evidence.

IV RECOMMENDATION

The court recommends that the Petition for Reconsideration be denied.

04/04/2022
JASON E. SCHAUMBERG
Workers' Compensation Judge