

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

MARTIN VAN DOORN, *Applicant*

vs.

**WEST VALLEY CONSTRUCTION COMPANY, INC.; ZURICH NORTH AMERICA,
*Defendants***

**Adjudication Number: ADJ9685765
San Francisco District Office**

**OPINION AND ORDER
DISMISSING PETITION
FOR REMOVAL**

We have considered the allegations of applicant's Petition for Removal, defendant's answer (filed as an opposition to the Petition) and the contents of the report of the arbitrator with respect thereto. Based on our review of the record, the Petition is untimely and will be dismissed. If we were not dismissing the Petition as untimely, the Petition would be dismissed for lack of jurisdiction because applicant is challenging a non-final order issued in an alternative dispute resolution program (also known as "carve-outs").

There are 25 days allowed within which to file a petition for removal from a "non-final" decision that has been served by mail upon an address in California. (Cal. Code Regs., tit. 8, §§ 10605(a)(1), 10955(a).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) To be timely, however, a petition for removal must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10615(b), 10940(a).)

Applicant initially emailed his petition to the Appeals Board's emergency mailbox on March 14, 2022. This would have been timely if the Appeals Board accepted filings of petitions for removal via email. (See Cal. Code Regs., tit. 8, § 10940(b) ["No documents sent directly to the Appeals Board by fax or e-mail will be accepted for filing, unless otherwise ordered by the Appeals Board."].) Applicant's petition was not filed in the Electronic Adjustment Management

System (EAMS) until April 19, 2022.

On April 6, 2020, the Appeals Board issued our decision In Re: COVID-19 State of Emergency En Banc – No. 2 (Misc. No. 261) in response to the March 19, 2020 shelter-in-place order issued by the State of California’s Governor, Gavin Newsom, requiring all Californians to stay home with certain limited exceptions. The decision stated as follows regarding sending documents by email to the Appeals Board and the emergency mailbox:

Documents that may be emailed include, but are not limited to, correspondence relating to a petition for reconsideration that has been granted for further study by the Appeals Board. Documents sent by email should include the information required for pleadings by WCAB Rule 10520 and an email address for the sending party. (Cal. Code Regs., tit. 8, former § 10498, now § 10520 (eff. Jan. 1, 2020).) Documents sent by email should otherwise comply with the WCAB’s Rules.

Documents may be sent by email to WCABEmergencyBox@dir.ca.gov and will be responded to per the Appeals Board’s normal operating procedures.

Petitions for reconsideration, removal, or disqualification and answers should still be filed in EAMS or with the district office having venue pursuant to WCAB Rule 10940(a). (See Cal. Code Regs., tit. 8, former § 10840(a), now § 10940(a) (eff. Jan. 1, 2020).)

(In Re: COVID-19 State of Emergency En Banc – No. 2 (2020) 85 Cal.Comp.Cases 299, 301, footnote omitted, emphasis added.)

Applicant’s Petition was initially improperly filed via email only. The Petition was not filed in EAMS until April 19, 2022. This was more than 25 days after service of the arbitrator’s February 15, 2022 decision and beyond whatever extension of time, if any, applicant might have been entitled to under WCAB Rule 10600.

If we were not dismissing the Petition as untimely, we would dismiss applicant’s Petition for lack of jurisdiction. Section 3201.5(a)(1) permits a party in a carve-out case to seek reconsideration of a “*final* order, decision, or award.” (Lab. Code, § 3201.5(a)(1), emphasis added.) 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*, 211 Cal.App.3d at p. 1180 ("[t]he term ['final'] does not include intermediate procedural orders or discovery orders"); *Kaiser Foundation Hospitals (Kramer), supra*, 82 Cal.App.3d 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.

The disputed decision in this matter only involves discovery. Accordingly, this is not a final decision upon which relief from the Appeals Board may be sought. Pursuant to the express language of section 3201.5(a)(1), applicant may only seek review from the Appeals Board of a *final* decision by the arbitrator.

Consequently, the Appeals Board has no jurisdiction to address this dispute even if the Petition had been timely filed. (See *Hayes v. Anderson & Howard Electric* (April 13, 2018, ADJ8145474) [2018 Cal. Wrk. Comp. P.D. LEXIS 150] [no statutory authority for the Appeals Board to remove a carve-out case to itself].) We do not address the merits of applicant's Petition because we are dismissing it as untimely and for lack of jurisdiction.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal of the Order Denying Applicant's Request to Reopen Discovery issued by the arbitrator on February 15, 2022 is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 31, 2022

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

**COOKE & MARSHALL
FROST LAW OFFICE
MARTIN VAN DOORN
STOCKWELL HARRIS WOOLVERTON & HELPHREY**

AI/pc

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