

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

SHARON LIVESEY, *Applicant*

vs.

COSTCO WHOLESALE; HELMSMAN MANAGEMENT, *Defendants*

**Adjudication Number: ADJ14242058
San Luis Obispo District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

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

Defendant seeks reconsideration of the Orders issued by the workers' compensation administrative law judge (WCJ) on November 10, 2021. By the Orders, the WCJ found that defendant has presented no physician evidence of impairment for the original stipulation and there is no substantial evidence of permanent disability. It was ordered that the February 11, 2021 Stipulations with Request for Award was set aside and vacated per Labor Code¹ section 5803. (Lab. Code, § 5803.) It was also ordered that the Medical Unit provide an orthopedic panel.

Defendant contends that the WCJ exceeded his power by setting aside the Award and there is no evidence to justify the Orders.

We received an answer from applicant. The WCJ issued a Report and Recommendation of Workers' Compensation Judge on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of defendant's Petition for Reconsideration, 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 vacate our previous order granting reconsideration and dismiss the Petition as one seeking reconsideration. We will grant the Petition as one seeking removal, rescind the Orders and return this matter to the trial level for further proceedings consistent with this opinion.

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

FACTUAL BACKGROUND

Applicant claims injury to the right knee and left wrist on June 21, 2020 while employed as a cashier assistant by Costco Wholesale.

On February 11, 2021, a WCJ at the Van Nuys district office issued an award pursuant to Stipulations with Request for Award submitted by the parties. It was stipulated that applicant had sustained 0% permanent disability with a need for medical treatment. (Stipulations with Request for Award, February 4, 2021, p. 6.) Other stipulations included the following: “PARTIES AGREE TO SETTLE BASED ON THE REPORT OF DR. LEPP DATED 11/12/2020.” (*Id.* at p. 7.) Attached to the agreement was a “QME WAIVER” signed by applicant stating that she had “discussed [her] options with Helmsman Management Services” and did not wish to proceed with the QME process. (*Id.* at p. 10.)

Applicant subsequently became represented by counsel. By and through her attorney, applicant filed a petition to reopen her claim on April 5, 2021. Applicant’s attorney also petitioned to change venue from Van Nuys to San Luis Obispo, which was ordered on May 12, 2021.

On May 24, 2021, applicant filed a petition to set aside the 0% Stipulated Award. Defendant filed an objection to applicant’s petition.

The matter proceeded to a “trial” on November 10, 2021. No formal minutes of hearing or summary of evidence were prepared in relation to this hearing. The minutes of hearing state in handwriting: “Good cause appearing a formal order will issue setting aside prior stipulation based upon lack of substantial evidence.” (Minutes of Hearing, November 10, 2021.) No evidence was admitted into the record or testimony taken.

The WCJ issued the Orders as outlined above.

DISCUSSION

I.

Defendant sought reconsideration of the Orders. 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 we will vacate our previous Opinion and Order Granting Petition for Reconsideration. Defendant’s Petition will be dismissed as one seeking reconsideration.

II.

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corp. (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, § 10787.) “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.)

Further, 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].) A fair hearing is “. . . one of ‘the rudiments of fair play’ assured to every litigant . . .” (*Id.* at p. 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, “the commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law.” (*Id.* at p. 577.) 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. I.A.C. (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].)

The Orders in this matter were issued without creation of an evidentiary record. We are unable to address whether the WCJ's decision is supported by substantial evidence in the absence of a record.

As a point of clarification, our disposition here reinstates the February 11, 2021 award. Further proceedings with respect to that award must be conducted at the trial level in the first instance. Upon return of this matter to the trial level, we recommend the trier of fact create a complete evidentiary record regarding the parties' dispute and issue a new decision. Either party may then challenge that decision by seeking reconsideration or removal as appropriate depending on the nature of the decision rendered. We make no comment on the dispute between the parties and defer determination of the dispute to the trier of fact in the first instance.

Therefore, we will dismiss the Petition as one seeking reconsideration, grant it as one seeking removal, rescind the Orders and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Opinion and Order Granting Petition for Reconsideration issued by the Workers' Compensation Appeals Board on January 31, 2022 is **VACATED**.

IT IS FURTHER ORDERED that defendant's Petition for Reconsideration of the Orders issued by the WCJ on November 10, 2021 is **DISMISSED**.

IT IS FURTHER ORDERED defendant's Petition for Removal of the Orders issued by the WCJ on November 10, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Orders issued by the WCJ on November 10, 2021 are **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/ KATHERINE A. ZALEWSKI, CHAIR

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCUR NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 14, 2022

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

**EMPLOYER DEFENSE GROUP
SHARON LIVESEY
SPATAFORE & GRANT**

AI/pc

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