

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

STEPHEN MCCARTY, *Applicant*

vs.

**FCI CONSTRUCTORS;
ZURICH AMERICAN INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ2919928 (ANA 0351682)
Santa Ana District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

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

Flatiron West, Inc. (FWI) and defendant FCI Constructors (FCI) each individually seek reconsideration or removal of the order taking off calendar from the hearing on September 21, 2021. FWI contends that applicant failed to file and serve the Application for Increase in Compensation Due to Serious and Willful Misconduct of FCI Constructors (the "S&W Petition") within the twelve-month statute of limitations period set forth in Labor Code section 5407,² or alternatively, that its right to due process was violated when the workers' compensation administrative law judge (WCJ) failed to hold a hearing on the jurisdictional issue. Similarly, defendant FCI contends that the WCJ must first determine whether the S&W petition was timely commenced pursuant to section 5407 requirements before proceeding with joinder of parties, or alternatively, that it is significantly prejudiced by the decision of the WCJ to not allow a hearing on the statute of limitations defense and obtain a dismissal of the S&W claim if appropriate.

We have received two Answers from applicant, responding separately to the two petitions. The WCJ prepared two Reports and Recommendations on Petition for Reconsideration or Removal ("FCI Report" and "FWI Report"), recommending that the petitions be denied.

¹ Commissioner Sweeney, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

² All further statutory references are to the Labor Code unless otherwise noted.

We have considered the allegations of the Petitions for Reconsideration and Removal and the contents of the reports of the WCJ with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's reports, we vacate our December 17, 2021 Order granting the petitions. Since the petitions seek reconsideration of a non-final order, they will be dismissed to the extent they seek reconsideration. We will treat the petitions as ones for removal, and we will deny removal.

FACTS

The parties agree that applicant suffered industrial injury to his spine, head, bilateral upper extremities, paralysis of lower extremities, psyche, bladder, and bowel, on January 18, 2001, while employed as an operator by FCI Constructors. (Pre-Trial Conference Statement for 9/21/21 hearing (PTCS), p. 2; 9/21/21 Minutes of Hearing³ (MOH), Stipulated Fact no. 1.) Zurich American Insurance Company has provided workers' compensation benefits to applicant since he was injured per a stipulated award. (PTCS, p. 2; 9/21/21 MOH, Stipulated Fact nos. 2-3.) Applicant had also filed the S&W petition.

The matter proceeded to a trial on August 1, 2017, on defendant's petition for credit. (8/1/17 MOH, p. 2.) The WCJ ruled that the S&W petition must be litigated along with the credit or prior to the credit being adjudicated as an S&W penalty could affect the issue of credit. (8/1/17 MOH, p. 4.)

On October 26, 2020, applicant filed a Petition for Joinder of HBG Constructors, Inc., Flatiron Structures Co., Flatiron West, Inc., Hochtief, FCI/Interbeton, and FCI Constructors, Inc. (Petition for Joinder). Applicant alleged in the Petition for Joinder that the Zurich-American Insurance Company Policy identified the named insured as HBG Constructors, Inc. and identified specific operations to include HGB HBG Constructors, Inc., FCI South-CA, FCI North-CA, Flatiron Structures Co. and FCI/Interbeton as covered businesses in California. Applicant further alleged in the Petition for Joinder that his former employer, FCI Constructors and/or FCI Constructors, Inc. changed its name to Flatiron West, Inc. and that Flatiron West, Inc. was acquired by Hochtief.

The only contested issue for the hearing on September 21, 2021, was the issue of joinder. (PTCS, p. 3; 9/21/21 MOH, Issue nos. 1-2.) At the hearing, FCI and FWI both asserted that the

³ There is a transcript available for this hearing but for the purposes of this opinion, we refer to the Minutes of Hearing.

WCJ should dismiss the S&W petition prior to ruling on applicant's joinder petition. (9/21/21 MOH, p. 2.) FCI and FWI contended that the S&W petition should be dismissed as it was filed outside the one-year statute of limitations for S&W claims. (9/21/21 MOH, p. 2.) At that time, the WCJ denied FWI's request for dismissal as FWI is not a party to the case and therefore lacks standing to request dismissal of the S&W petition. (9/21/21 MOH, pp. 2-3.) The WCJ also denied FCI's request for dismissal as FCI asserted in January 2020, that it may not be the correct party in interest. (9/21/21 MOH, p. 3.) Further, the WCJ also denied both requests for dismissal as the matter was set only on the issue of joinder and the statute of limitations for joinder. (9/21/21 MOH, p. 3.) At the conclusion of the hearing on September 21, 2021, the WCJ gave FCI and FWI notice and an opportunity to be heard on the issue of joinder and continued the matter to December 1, 2021. (9/21/21 MOH, p. 9.)

On October 26, 2021, the WCJ issued a nunc pro tunc order (NPT order) correcting the minutes of the hearing (reporter) dated October 21, 2021. In the nunc pro tunc order, the WCJ corrected the minutes of hearing to reflect that the WCJ denied FCI's motion to have the issue of dismissal of the S&W heard along with the joinder issues. The WCJ clarified that there was no ruling on the merits of the issue of dismissal of the S&W based on the statute of limitations. The WCJ ordered that the references to the denial of the motion to dismiss by FCI are stricken and the record was corrected to reflect the WCJ's ruling that the threshold issue of the merits of the petition to dismiss the S&W would not be heard at that trial on September 21, 2021. The WCJ ordered that the merits of the dismissal of the S&W based on the statute of limitations is deferred and off-calendar.

DISCUSSION

An applicant can be awarded an increase in compensation by one half, plus a small amount for costs and expenses, when the applicant is injured by reason of the serious and willful misconduct of the employer, or the managing representative; on the part of one of the partners or a managing representative or general superintendent if the employer is a partnership; or on the part of an executive, managing officer, or general superintendent if the employer is a corporation. (Lab. Code, § 4553.) The statute of limitations for commencing proceedings for the collection of compensation based on serious and willful misconduct of the employer is twelve months from the date of injury. (Lab. Code, § 5407.) The burden of establishing serious and willful misconduct

on the part of an employer rests on the injured employee. (*Dawson v. Industrial Acci. Com.* (1942) 54 Cal.App.2d 594, 601 [7 Cal.Comp.Cases 244]; *Ayala v. Dep't of Corr. Rehabilitation/Lancaster State Prison* [April 27, 2020, ADJ301960 , ADJ963491, ADJ1360597] 2020 Cal. Wrk. Comp. P.D. LEXIS 272, *26.)

Additionally, the Appeals Board or WCJ may provide for the joinder in the same proceeding of all persons interested therein, whether as employer, insurer, employee, dependent, creditor, or otherwise. (Lab. Code, § 5307.5(b).) The Appeals Board or WCJ may order the joinder of additional parties not named in the Application for Adjudication, whose presence is necessary for the full adjudication of the case. (Cal. Code Regs., tit. 8, § 10382.) Any person against whom any right to relief is alleged to exist may be joined as a defendant. (Cal. Code Regs., tit. 8, § 10382(b).) A party shall not be joined until 10 days after service of either a petition for joinder by a party or a notice of intention to order joinder issued by a WCJ, unless the party to be joined waives its right to this notice period. (Cal. Code Regs., tit. 8, § 10382.) If an objection is received within 10 days of service of a petition for joinder or a notice of intention to order joinder, the WCJ shall consider the objection before joining the party and, if requested in the objection, shall provide the objector the opportunity to be heard before ordering joinder. (Cal. Code Regs., tit. 8, § 10382(d).) Joinder in a workers' compensation proceeding is liberally granted. (Lab. Code, §§ 133, 3202; *Cunnington v. Viacom Bus. Network* [May 28, 2020, ADJ14426454] 2020 Cal. Wrk. Comp. P.D. LEXIS 151, *34.)

FWI and defendant FCI have both petitioned for reconsideration or removal from the September 21, 2021, hearing. In sum, FWI and FCI both contend that the WCJ must first decide the issue of whether applicant's S&W petition was timely filed within the statute of limitations before joining any additional parties. However, the WCJ has not made any order joining any parties to this case. (NPT Order.) The WCJ clarified that there was no ruling on the merits of the issue of dismissal of the S&W based on the statute of limitations. (NPT Order.) At the conclusion of the hearing on September 21, 2021, the WCJ gave FCI and FWI notice and an opportunity to be heard on the issue of joinder and continued the matter to December 1, 2021. (9/21/21 MOH, p. 9.)

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 concerns 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. As made clear in the nunc pro tunc order, there was no ruling on the merits of the issue of dismissal of the S&W based on the statute of limitations and instead it was deferred. (NPT Order.) The WCJ also has not made any order joining any parties to this case. (NPT Order.) Accordingly, it is not a “final” decision and the petitions were subject to dismissal to the extent they seek reconsideration.

Turning to the issue of whether the petitions sought removal, 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, § 10955(a); 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, § 10955(a).) Here, for the reasons stated in the WCJ's reports, we are 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. As there has not yet been any joinder of any additional parties, FCI and FWI have not suffered

substantial prejudice or irreparable harm. Further, if additional parties are joined, any party will have the opportunity to defend itself against the S&W petition. Here, the WCJ has not yet determined the issue of joinder and we will not disturb her decision to proceed on joinder before deciding the S&W petition.

Accordingly, as our decision after reconsideration we vacate the Opinion and Order Granting Petitions for Reconsideration, dismiss the Petitions for Reconsideration, and deny the Petitions for Removal.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the December 17, 2021 Opinion and Order Granting Petitions for Reconsideration is **VACATED**.

IT IS FURTHER ORDERED that the Petitions for Reconsideration are **DISMISSED**.

IT IS FURTHER ORDERED that the Petitions for Removal of the Order Taking Off Calendar on September 21, 2021 are **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 9, 2023

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

**STEPHEN MCCARTY
LAW OFFICE OF JODIE P. FILKINS
LAUGHLIN, FALBO, LEVY & MORESI
STOCKWELL, HARRIS, WOOLVERTON & HELPHREY
STINSON LLP
MESSNER REEVES LLP
DONNELL MELGOZA**

JMR/pc

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