

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

SHANE BAZZELL, *Applicant*

vs.

**TEXAS RANGERS; ACE AMERICAN INSURANCE CO.,
administered by SEDGWICK CMS, *Defendants***

**Adjudication Number: ADJ11109473
Anaheim District Office**

**OPINION AND ORDER
DISMISSING PETITION FOR
RECONSIDERATION,
GRANTING PETITION FOR REMOVAL,
AND DECISION AFTER REMOVAL**

Defendant Ace American Insurance Co. seeks reconsideration of the Minute Order (Order) issued by the workers' compensation administrative law judge (WCJ) on May 6, 2021. By the Order, the WCJ denied defendant's Petition to Dismiss Inactive Case.

Defendant contends that the Order violated its right to due process and was improperly issued without consideration of any evidence.

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

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record and for the reasons discussed below, we will dismiss the petition to the extent it seeks reconsideration and grant it to the extent it seeks removal. The Order will be rescinded and the matter returned to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Applicant claims injury to multiple body parts while employed as a professional athlete through March 10, 2006 by defendant.

On January 13, 2021, defendant filed a Petition to Dismiss Inactive Case alleging that the claim was subject to dismissal for lack of prosecution. Applicant, by and through his attorney, filed an objection to defendant's Petition dated February 1, 2021 stating that applicant is currently incarcerated in Missouri.

The WCJ issued the disputed Order at a status conference. The comments in the Minutes of Hearing state: "Hanna Brophy's Petition for Dismissal of Case is hereby denied, as the applicant is incarcerated. He has a release date of either 7/21/2021 (per the family) or 8/5/2023 (per Mississippi DOC website)."¹ (Minutes of Hearing, May 6, 2021.) No evidence or testimony was taken at the hearing.

DISCUSSION

I.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.)² 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 issue. The decision

¹ The WCJ notes in her Report that the reference to Mississippi instead of Missouri may have been a scrivener's error. (Report, June 10, 2021, p. 3.)

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

does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a “final” decision and the petition will be dismissed to the extent it seeks reconsideration.

II.

The WCJ in her Report states that defendant’s Petition should be denied because it was not verified by defendant, nor was the proof of service signed by defendant’s staff. Section 5902 requires that a petition for reconsideration be verified. (Lab. Code, § 5902; see also Cal. Code Regs., tit. 8, former § 10450(e), now § 10510(d) (eff. Jan. 1, 2020); *Lucena v. Diablo Auto Body* (2000) 65 Cal.Comp.Cases 1425 (Significant Panel Decision) [where a petition for reconsideration is not verified as required by section 5902, the petition may be dismissed if the petitioner has been given notice of the defect (either by the WCJ’s report or by the respondent’s answer) unless, within a reasonable time, the petitioner either: (1) cures the defect by filing a verification; or (2) files an explanation that establishes a compelling reason for the lack of verification and the record establishes that the respondents are not prejudiced by the lack of verification].)

Defendant’s Petition is being dismissed to the extent it seeks reconsideration per the discussion above. Defendant is warned that failure to verify a petition in the future may subject its pleading to summary dismissal or denial per WCAB Rule 10510(d).

III.

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.)

The Order in this matter was 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.

Upon return of this matter to the trial level, we recommend the trier of fact create a complete evidentiary record regarding this dispute and issue a new decision. Either party may then 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 dismiss the Petition as one seeking reconsideration, grant removal, 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 is **DISMISSED** and the Petition for Removal is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Minute Order of May 6, 2021 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 22, 2021

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

**HANNA BROPHY MACLEAN MCALEER & JENSEN LLP
LEVITON DIAZ & GINOCCHIO
SHANE BAZZELL**

AI/pc

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