

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

DESTINIE HOSS, *Applicant*

vs.

**PRIME HEALTHCARE FOUNDATION/ALVARADO HOSPITAL;
SAFETY NATIONAL CASUALTY CORPORATION,
administered by AMERICAN CLAIMS MANAGEMENT, *Defendants***

**Adjudication Numbers: ADJ14328080; ADJ14838275
San Diego District Office**

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the August 19, 2022 Order Denying Petition to Dismiss (Order) issued by a workers' compensation administrative law judge (WCJ) wherein the WCJ denied defendant's Petition to Dismiss both of applicant's claims.

Defendant contends that the claims should be dismissed as they have not been activated for hearing in over a year, applicant has failed to attend several depositions and hearings, and applicant's attorney failed to issue an objection to the Petition to Dismiss.

We have not received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration (Petition), the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, and for the reasons discussed in the WCJ's Report, we affirm the Order.

We find it relevant here to discuss the distinction between a petition for reconsideration and a petition for removal. A petition for reconsideration is taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order is defined as one that determines "any substantive right or liability of those involved in the case" or a "threshold" issue

fundamental to a claim for benefits. (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (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]; *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Threshold issues include, but are not limited to, injury AOE/COE, jurisdiction, the existence of an employment relationship, and statute of limitations. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian, supra*, at 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, and other similar issues.

In the instant case, the August 19, 2022 Order Denying Petition to Dismiss is a non-final order. As such, we will treat the Petition as one for removal rather than reconsideration.

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 can show that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a).) The petitioner must also demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (*Id.*) In the instant case, 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 defendant.

Turning to the issue of dismissal, WCAB Rule 10550(a) provides for administrative dismissal of inactive cases not activated for hearing within one year after the filing of the Application for Adjudication of Claim or the entry of an order taking off calendar, after notice and opportunity to be heard. (Cal. Code Regs. § 10550(a).) Although WCAB Rule 10550(a) authorizes

dismissal of inactive cases upon demonstration of the above conditions, dismissal is discretionary, not mandatory. (*Roth v. Workers' Comp. Appeals Bd.* (1971) 20 Cal.App.3d 452 [36 Cal.Comp.Cases 604].) There is a strong public policy favoring disposition of cases on their merits rather than on procedural grounds. (*Bland v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.App.3d 324 [35 Cal.Comp.Cases 513]; *Marino v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 485 [67 Cal.Comp.Cases 1273]; *Moore v. Waste Management* (2014) 2014 Cal.Wrk.Comp.P.D. LEXIS 621 (panel decision).) Moreover, in determining whether to dismiss a case for lack of prosecution, the WCJ may balance the equities of the respective parties. (*Gutierrez v. Ramirez AG Service* (2010) Cal. Wrk. Comp. P.D. LEXIS 410.)

Further, WCAB Rule 10550(b) provides that at least 30 days before filing of the Petition to Dismiss, defendant must “send a letter to the applicant, and if represented, to the applicant’s attorney or non-attorney representative stating defendant’s intention to file a ‘Petition to Dismiss Inactive Case’ 30 days after the date of that letter, unless the applicant or applicant’s attorney or non-attorney representative objects in writing, demonstrating good cause for not dismissing the case.” (Cal. Code Regs. § 10550(b).)

In the instant case, defendant failed to serve applicant with a copy of the letter indicating defendant’s intention to seek dismissal of the claim in contravention to WCAB Rule 10550(b). Defendant served only applicant’s attorney and American Claims Management. As indicated by the WCJ, failure to serve notice to applicant not only makes defendant’s Petition to Dismiss defective, but “violates applicant’s right to due process.” (Report, p. 3.)

Further, it appears that after defendant’s July 14, 2022 filing of the Petition for Dismissal, both cases were reactivated for hearing, as confirmed by Minutes of Hearing dated January 10, 2022, April 5, 2022, and July 18, 2022. As such, the one-year period outlined under WCAB Rule 10550(a) restarted as of July 18, 2022. Dismissal pursuant to WCAB Rule 10550(a) is therefore a moot issue.

Defendant argues that the WCJ exceeded his authority in denying defendant’s Petition for Dismissal since applicant failed to personally attend the January 10, 2022, April 5, 2022, and July 18, 2022 hearings in contravention to WCAB Rules. It appears, however, that applicant’s attorney attended in her place, and pursuant to WCAB Rule 10752:

- (a) Each applicant and defendant shall appear or have an attorney or non-attorney representative appear at all hearings pertaining to the case in chief. Neither a

lien conference nor a lien trial is a hearing pertaining to the case in chief.

- (b) Each required party shall have a person available with settlement authority at all hearings.

(Cal. Code Regs. § 10752.)

The clear language of WCAB Rule 10752, makes no requirement that applicant appear alongside her attorney at hearings. The rule plainly states that either applicant or applicant's attorney shall appear at hearings.

Accordingly, we affirm the Order.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the August 19, 2022 Order Denying Petition to Dismiss is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 16, 2024

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

**DESTINIE HOSS
LAW OFFICES OF ROBERT OZERAN
MICHAEL SULLIVAN & ASSOCIATES**

RL/cs

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