

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

ERIN MANWILLER, *Applicant*

vs.

**ADVANTAGE SALES AND MARKETING, LLC.;
THE HARTFORD as administered by SEDGWICK, *Defendants***

**Adjudication Number: ADJ17424976
Riverside District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the July 26, 2024 Findings and Order (F&O) wherein the workers' compensation administrative law judge (WCJ) found that applicant is to appear in person for a deposition in California, in conjunction with a scheduled evaluation with the Qualified Medical Evaluator (QME), Dr. Mohan Nair. Defendant is to pay all associated costs for the deposition including transportation, lodging, meals, lost wages, and any other incidentals.

Applicant contends that pursuant to sections 1989 and 2025.250 of the Code of Civil Procedure, she cannot be legally compelled to attend the deposition in person since the deposition location is not only in excess of 150 miles from her residence, but located in California where she is not a resident.¹ Applicant further contends that there is no good cause for an in person deposition since the deposition may be conducted virtually, as previously agreed upon by defendant, via Zoom.

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

¹ Applicant currently resides in Pennsylvania.

We have considered the Petition for Reconsideration (Petition), the contents of the Report, and have reviewed the record in this matter. Based upon our review of the record and the Report, we will grant the Petition, rescind the F&O, and substitute it with a new F&O which clarifies the WCJ's findings, but makes no substantive changes.

FACTS

Applicant claimed that while employed by defendant as a warehouse worker during the period from July 8, 2022 through October 5, 2022 she sustained an injury arising out of and in the course of employment (AOE/COE) to her psyche.

According to defendant, applicant was “an out-of-state worker hired in California to work in the cities of Hayward, CA and Oakland, CA.” (Petition to Compel In-Person Deposition, April 22, 2024, p. 4, lines 20-21.) At some point after the alleged work injury, applicant returned to Pennsylvania where she currently resides. She was a Pennsylvania resident when she filed the Application for Adjudication of Claim on March 13, 2023.

The claim was denied, and the parties proceeded with discovery. Dr. Mohan Nair was ultimately selected as the psyche panel Qualified Medical Evaluator (QME).

Defendant sent applicant a notice to appear indicating that her deposition would be conducted virtually via Zoom on June 13, 2023. The deposition was rescheduled to August 15, 2023, before being cancelled altogether.

After the cancellation, defendant sought an in-person deposition of applicant, to occur contemporaneously with a QME evaluation. Applicant was not in agreement, and on April 22, 2024, defendant filed a petition to compel applicant's deposition. Defendant offered to pay all applicable expenses including transportation, lodging, meals, and lost wages. On May 10, 2024, applicant filed an objection to the petition to compel.

On July 1, 2024, the matter proceeded to trial on the issue of whether applicant can be compelled to attend an in-person deposition in California if she resides in another state. The parties stipulated to the following:

1. Erin Manwiller [], while employed during the period July 8th, 2022 to October 5th, 2022, as a warehouse person/reset, at Hayward, California, by Advantage Sales and Marketing, claims to have sustained injury arising out of and in the course of employment to her psyche.

2. At the time of the alleged injury, the employer's workers' compensation carrier was The Hartford.

On July 26, 2024, the WCJ issued the following in an F&O:

Applicant, a 37-year-old warehouse person alleges psychiatric injury as a result of her employment with Advantage Sales and Marketing LLC during the period of July 8, 2022 to October 5, 2022. This matter proceeded to hearing on July 1, 2024 regarding the limited issue of Defendant's Petition to Compel In-Person Deposition of the Applicant. At hearing the parties acknowledged that applicant currently resides out of state. Further, the parties represented that applicant would be traveling to California to attend medical examination with Panel Qualified Medical Examiner Mohan Nair M.D. Applicant's representative argued that the deposition of applicant should proceed remotely via Zoom, and with defense counsel arguing that given the nature of applicant's claimed injury and potential exhibits to be subject of question on applicant's deposition, said deposition should proceed in person. Defendant has offered to schedule the deposition at the time when applicant is traveling to California to be examined by the QME, and to further pay and reimburse all necessary costs. Counsel further represented that the deposition would take place prior to the QME evaluation with 1 day off separating the deposition and QME evaluation, with defendant to provide transportation, lodging, per diem for meals, lost wages, etc.

In addressing this issue this WCJ takes note of the general complexities associated with claimed psychiatric injuries as well as credibility of witnesses'/applicant's testimony. These issues generally invite the necessity of in-person testimony. Whereas applicant's representative argued at the time of hearing that applicant is not psychiatrically in a position to be deposed in person, counsel further represented that applicant is not under psychiatric care at this time and that there is no medical report evidencing that applicant would have a problem attending deposition in person.

Given due consideration to the above and to all arguments raised in the pleadings/exhibits, this WCJ determines that it is reasonable for applicant to appear for deposition in person, and with defendant to take responsibility for all transportation, lodging, meals, lost wages, and other costs that may be attendant to applicant's deposition and QME evaluation.

ORDER

Applicant is to appear in person for deposition scheduled by the parties at a mutually convenient and agreed upon date, time, and location in California, and in conjunction with scheduled QME evaluation with Mohan Nair M.D.

DISCUSSION

I.

Preliminarily, former Labor Code section² 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
 - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
 - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected under the Events tab in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on August 21, 2024, and 60 days from the date of transmission is October 21, 2024. This decision is issued by or on October 21, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

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

Here, according to the proof of service, the Report was served on August 21, 2024, and the case was transmitted to the Appeals Board on August 21, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 21, 2024.

II.

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. (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 [43Cal.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. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to file a timely petition for reconsideration of a final decision bars later challenges before the WCAB or court of appeal. (See Lab. Code, § 5904.) Non-final decisions, however, may later be challenged by a petition for reconsideration once a final decision is issued.

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.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition is treated as a petition for

reconsideration since the decision resolves a threshold issue. If the petitioner disputes only the WCJ's determinations on interlocutory issues, however, the Appeals Board will evaluate the petition under the removal standard.

Here, the WCJ's decision addresses both threshold and interlocutory issues. Applicant, however, is only challenging the WCJ's decision regarding her in-person appearance for a deposition in California. This is an interlocutory discovery issue. As such, we will consider applicant's Petition under the removal standard.

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 significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) The petitioner must also 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, based upon the WCJ's analysis of the merits of the petitioner's arguments, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

III.

Turning to the merits of the Petition, we must note that in furtherance of the goal of resolving claims "expeditiously, inexpensively, and without encumbrance of any character," the Legislature has created a "complete system of workers' compensation" to compensate workers for industrial injury or disability irrespective of the fault of any party. (Cal. Const. Art. XIV, § 4.) This "complete system" includes procedures for, inter alia, subpoenas for depositions, including the issuance of notices to appear. (See Cal. Code Regs., tit. 8, §§ 10640 et seq.) Section 5710(a) provides guidance as to depositions, and it states, in relevant part, that any party to a workers compensation proceeding may depose a witness "... in the manner prescribed by law for like depositions in civil actions in the superior courts of this state under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure." (Lab. Code, § 5710(a).) We note that although section 5710(a) appears to incorporate the Civil Discovery Act, it does so permissively, and the Appeals Board is not bound by the Code of Civil Procedure with respect to parameters

concerning the conduct of depositions. (*Moran v. Bradford Bldg., Inc.* (1992) 57 Cal.Comp.Cases 273, 286.) Further, the Appeals Board is accorded generous flexibility by sections 5708 and 5709 to achieve substantial justice with relaxed rules of procedure and evidence. (Lab. Code, §§ 5708-5710; *Barr v. Workers' Comp. Appeals Bd.* (2008) 164 Cal.App.4th 173, 178-179 [73 Cal.Comp.Cases 763].)

Notwithstanding *Moran* and sections 5708 and 5709, applicant cites to sections 1989 and 2025.250 of the Code of Civil Procedure and relies upon the case of *Toyota Motor Corp. v. Super. Ct. (Stewart)* (2011) 197 Cal.App.4th 1107, 1110. Section 1989 indicates that a witness is not obliged to attend a deposition in California unless they are a resident at the time of service. (Code Civ. Proc., § 1989.) In *Stewart*, the court applied section 1989 to a products liability case wherein plaintiffs sought to depose in California persons most knowledgeable (PMK) about an alleged car defect which caused the plaintiffs' injuries. The witnesses all resided in Japan. The court ultimately held that based upon relevant case law, statutes, and legislative history, the trial court lacked the power to compel a foreign witness to attend a deposition in California.

Applicant argues that the instant case is analogous since applicant, like the Japanese citizens in *Stewart*, is not a resident of California. Unlike the witnesses in *Stewart*, however, applicant is an actual party to the case and specifically invoked the jurisdiction of the California WCAB when she filed her claim in California. Further, the *Stewart* decision makes specific reference to the Code of Civil Procedure, section 2025.010 which addresses situations such as the current case wherein the witness, who resides in one state, is to be deposed in another state. Pursuant to section 2025.010(a), "any party may obtain discovery by taking an oral deposition" "in another state of the United States."

Applicant also relies upon section 2025.250(a) of the California Code of Civil Procedure which states that a deposition cannot be conducted more than 75 miles from deponent's residence, or, if located "within the county where the action is pending," more than 150 miles from deponent's residence. (Code Civ. Proc., § 2025.250(a).) Applicant contends that an in-person deposition in California would be in excess of these geographic limitations. We note, however, that applicant failed to include additional language from the statute indicating an exception in cases where "the court [has] *order[ed]* otherwise under section 2025.260." (Code Civ. Proc., § 2025.250(a), emphasis added.) Under section 2025.260, the court may order a deposition at a place "more distant than that permitted under section 2025.250" so long as it takes into consideration "any factor

tending to show whether the interests of justice will be served by requiring the deponent's attendance at [a] more distant place.” (Code Civ. Proc., § 2025.260.) Some factors to be considered by the court include whether the moving party selected the forum, the convenience of the deponent, the number of depositions sought, expenses, and whereabouts of the deponent at the time of the deposition. (*Id.*)

In the current case, applicant filed the claim in California as that is where the claimed injury occurred. Further, as noted by the WCJ, defendant “offered to schedule the deposition at the time when applicant is traveling to California to be examined by the QME.” As such, applicant would already be in California for a QME evaluation during the time of the deposition. Additionally, given the nature of psyche claims, the parties should understand that credibility and witness testimony are crucial to determining the outcome of the relevant issues in this case and as such, should recognize that in person testimony may be more significant to the discovery process. We therefore agree with the WCJ that applicant must appear in person in California for her deposition.

IV.

As noted above, the July 26, 2024 F&O addresses both threshold and interlocutory issues. We have addressed applicant’s Petition on the interlocutory issues. With respect to the threshold issues, however, we must also provide clarity.

Based upon the format of F&O, it is unclear whether the narrative paragraphs contained therein, preceding the “Order,” serve as actual findings or simply an opinion on decision. To clear up any confusion, we will rescind the F&O and substitute it with a new F&O. The new F&O will contain findings of fact based on the parties’ stipulations at trial, including jurisdiction, date of injury, employment, and insurance coverage. We emphasize that these are threshold findings. As such, they are subject to reconsideration.

As a final point, we underscore the fact that applicant’s Petition contains several exhibits previously submitted and easily located within the record. This is a violation of WCAB Rule 10945. (Cal. Code Regs., tit. 8, § 10945.) The duplication of these records is excessive and a waste of court resources. Applicant is therefore admonished to follow the Board’s Rules of Practice and Procedure, including but not limited to WCAB Rule 10945, in all future matters.

Accordingly, we grant applicant’s Petition for Reconsideration, rescind the F&O, and substitute it with a new F&O which comports with the parties’ stipulations at trial.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the July 26, 2024 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED that as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 26, 2024 Findings and Order is **RESCINDED** and **SUBSTITUTED** with a new Findings and Order, as provided below.

FINDINGS OF FACT

1. Applicant Erin Manwiller, born [], while employed during the period July 8th, 2022 to October 5th, 2022, as a warehouse person/reset, at Hayward, California, by Advantage Sales and Marketing, claims to have sustained an injury arising out of and in the course of her employment to her psyche.
2. At the time of the alleged injury, the employer's workers' compensation carrier was The Hartford.
3. The parties have selected Dr. Mohan Nair as the panel Qualified Medical Evaluator in the current case.

ORDER:

1. Applicant is to appear in person for a deposition to be scheduled by the parties at a mutually convenient and agreed upon date, time, and location in California, and in conjunction with a scheduled QME evaluation with Dr. Mohan Nair.
2. Defendant is to pay all costs related to applicant's deposition and the QME evaluation noted in paragraph 1 above, including transportation, lodging, meals, lost wages, and any other related incidentals and costs.
3. All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 21, 2024

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

**ERIN MANWILLER
DIEFER LAW GROUP
ZWRIN, GEVORKYAN & SOGOYAN**

RL/cs

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