

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

VINCENT NARVAEZ, *Applicant*

vs.

**GRANITEROCK COMPANY, AMERICAN CONTRACTORS INSURANCE GROUP;
adjusted by TRISTAR RISK MANAGEMENT, CONCORD, *Defendants***

**Adjudication Number: ADJ18034522
Oakland District Office**

**OPINION AND ORDER
DISMISSING PETITION FOR
RECONSIDERATION
AND DENYING PETITION
FOR REMOVAL**

Defendant seeks reconsideration or in the alternative removal of the November 13, 2023, Order Denying Petition for Change of Venue (Order), wherein the presiding workers' compensation administrative law judge (PWCJ) denied defendant's petition for change of venue. The WCJ noted that the Notice of Application was served on Tristar per the Official Address Record, and that defendant's petition failed to show why the travel distance would be burdensome to its listed witness and failed to specify the substance of the testimony.

Defendant contends that there is a valid basis for change of venue pursuant to Labor Code¹ section 5501.6 and that there is no longer a basis for venue in Oakland.

Applicant did not file an answer. The PWCJ prepared a Report and Recommendation on Petition for Reconsideration or in the alternative Petition for Removal (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and Removal and the contents of the report of the presiding workers' compensation administrative law judge (PWCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the PWCJ's report, which we adopt and incorporate, we will dismiss the petition to the extent it seeks

¹ All statutory references not otherwise identified are to the Labor Code.

reconsideration and deny it to the extent it seeks removal because defendant has not shown significant prejudice or irreparable harm.

BACKGROUND

Applicant claimed that while employed as a ready mix driver on July 5, 2023, he sustained a specific industrial injury to his knee (patella) and lower extremities (unspecified) while climbing up a ladder.

On August 2, 2023, an Application for Adjudication of claim was filed by applicant's attorney with venue in the Oakland WCAB, the county of applicant's attorney's principal place of business pursuant to Labor Code section 5501.5 (a)(3) or (d). The same day a proof of service was filed which reflects that the application and notice of representation were served on Graniterock, Tristar Concord, the applicant, and the WCAB.

On September 1, 2023, applicant filed a dismissal of attorney.

On September 19, 2023, defendant's attorneys filed a Notice of Representation.

On October 2, 2023, defendant filed an answer denying liability.

On October 24, 2023, defendant filed an Objection to Venue pursuant to Labor Code section 5501.5 (c) or, in the alternative, Petition to Change Venue pursuant to 5501.5 (a)(1) or (2). In its Petition, defendant's state,

“Defendants [*sic*] are [*sic*] unaware of when any Notice of Adjudication, case number and venue was served or received.” (Objection To Venue Or In The Alternative, Petition to Change Venue, 10/24/2023, 1:24-1:25.)

“Defendants [*sic*] hereby object to the Oakland venue pursuant to Regulation 10488 and Labor Code 5501.5 (c). Applicant was working in Brookdale, California, which is where the alleged injury occurred. Applicant resides in Hollister, California. Venue should be with the Salinas WCAB pursuant to Labor Code 5501.5 (a)(1) or (2).” (Objection To Venue Or In The Alternative, Petition to Change Venue, 10/24/2023, 1:26-2:2.)

On November 14, 2023, the WCJ issued an Order Denying Change of Venue which states:

“IT APPEARING THAT Notice of Application was served on Tristar per the Official Address Record and defendant's Petition fails to show why the travel distance would be burdensome to its listed witness and fails to specify the substance of the testimony.

IT IS ORDERED THAT defendant's Objection to and Petition to change Venue be, and it hereby is, DENIED.” (Order, 11/14/2023.)

DISCUSSION

I.

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 the petition will be dismissed to the extent it seeks reconsideration.

We will also deny the petition to the extent it seeks 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 report, 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.

II.

Here, WCAB Rule 10488 and Labor Code section 5501.5 (c) provide for an automatic change of venue when there is a *timely objection to venue based on the location of applicant's attorney's office*. Pursuant to the above WCAB Rule, defendant had 30 days from receipt of the notice of adjudication to make its objection. The adjudication file in the Electronic Adjudication Management System (EAMS) reflects that applicant's attorney served the Application for Adjudication and Notice of Representation on defendant, on August 2, 2023.. Here, defendant made no showing as to when it received notice of the application, and in its Petition it does not challenge any finding as to Labor Code section 5501.5(c).

Labor Code section 5501.6 states:

(a) An applicant or defendant may petition the appeals board for a change of venue and a change of venue shall be granted for *good cause*. The reasons for the change of venue shall be specifically set forth in the request for change of venue.

(b) If a change of venue is requested for the convenience of witnesses, the names and addresses of these witnesses and the substance of their testimony shall be specifically set forth in the request for change of venue.

Labor Code section 5501.6 requires a showing of *good cause*, and the reasons for the change of venue must be specifically set forth.

Defendant in its Petition asserts that Labor Code section 5501.6 does not require a specific statement of the mileage that witnesses would have to travel, and that only witness names and the substance of their testimony are required. While we agree with defendant that Labor Code section 5501.6 does not require a specific statement of the mileage that witnesses would have to travel, and that only witness names and the substance of their testimony are required, we agree with the WCJ's conclusion that “. . . defendant's Petition fails to show why the travel distance would be burdensome to its listed witness and fails to specify the substance of the testimony.” (Order, 11/14/2023)

Defendant asserts in its Objection to Venue or, In the Alternative, Petition to Change Venue, that “There may be nature and extent issues which necessitate trial testimony.” (Objection

To Venue Or In The Alternative, Petition to Change Venue, 10/24/2023, 2:7.) However, as the WCJ states in his Report,

“In its Petition, it claimed there ‘**may**’ be nature and extent issues and it **anticipates** testimony from its witnesses on nature and extent. (Emphasis added). Clearly, this indicates there are no issues of nature and extent at the time when the Petition was filed. Good cause was not established under Labor Code §5501.6 and no showing of significant prejudice or irreparable harm has been shown. (Report, 12/11/2023, p. 3.)

Further, nature and extent is largely a med-legal issue, thus it is difficult if not impossible to see how an employer witness could provide information that is relevant to this analysis. Thus, here this is not applicable.

Accordingly, we dismiss the Petition for Reconsideration and deny the Petition for Removal.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DISMISSED** and the Petition for Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 29, 2024

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

**VINCENT NARVEZ
LAUGHLIN FALBO LEVY & MORESI
PACIFIC WORKERS'**

DLM/oo

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

REPORT AND RECOMMENDATION

Defendant, American Contractors Insurance Group, adjusted by Tristar Risk Management, timely filed its Petition for Reconsideration Or, In The Alternative Petition for Removal from the Order Denying Change of Venue on November 30, 2023. Defendant contends in substance that it established basis to change venue by providing the name of its witness and the substance of testimony per Labor Code §5501.6, that it is not required to establish the travel distance is burdensome to its witness, and that there is no longer valid basis for venue to remain at the Oakland district office.

Applicant dismissed his attorney on or about September 1 2023. Prior to being dismissed, his attorney filed the Application for Adjudication of Claim on or about August 2, 2023, requesting venue based on Labor Code §5501.5(a)(3) or (d). Applicant listed Tristar Concord as the Insurance Carrier. The Notice of Application was mailed to Tristar Concord on August 3, 2023.

Defendant filed its Objection to Venue or in the Alternative, Petition to Change Venue on or about October 24, 2023. Claiming it was unaware when Notice of Application was served or received, defendant objected to the choice of venue pursuant to Labor Code §5501.5(c) requesting venue be changed to Salinas. Alternatively, defendant asserted that it established good cause to change venue pursuant to Labor Code § 5501.6 where:

- Applicant dismissed his attorney and is unrepresented.
- There may be nature and extent issues necessitating trial testimony
- Defendant anticipate witness testimony from employer witness on nature and extent issues
- Requiring any witness to travel to Oakland would be unduly burdensome, especially when applicant is unrepresented (Objection to Venue, page 2 lines 4-11)

On or about November 14, 2023, Order Denying Objection and Petition to Change Venue was issued and served. The basis for denial was:

IT APPEARING THAT Notice of Application was served on Tristar per the Official Address Record and defendant's Petition fails to show why the travel distance would be burdensome to its listed witness and fails to specify the substance of the testimony.

It is recommended that the Petition for Reconsideration be dismissed as not an appeal from a final Order and that the Petition for Removal be denied.

A petition for reconsideration may only be taken 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, 413]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) 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, 650-651, 655-656].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian, supra*, 81 Cal.App.4th at p. 1075 [65 Cal.Comp.Cases at p. 655] (“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”); *Rymer, supra*, 211 Cal.App.3d at p. 1180 (“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”); *Kaiser Foundation Hospitals (Kramer), supra*, 82 Cal.App.3d at p. 45 [43 Cal.Comp.Cases at p. 665] (“[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.

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 seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ’s determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers’ Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) 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).)

An order denying change of venue is an interlocutory/procedural order which does not decide a threshold issue or substantive right or liability. Defendant is not precluded from and may still petition for change of venue under Labor Code §5501.6 if it establishes good cause.

Defendant does not establish or offer how it is or will be significantly prejudiced or suffer irreparable harm by the order denying change of venue. Defendant raises the distance the injured worker and the identified employer witness must travel to hearing and the basis for Oakland venue no longer exists since applicant is not represented by the law firm whose principal office location established venue pursuant to Labor Code §5501.5(a)(3). Defendant did not present how or why these factors result in it being significantly prejudiced or irreparably harmed.

Further, the defendant did not set forth what were the issues of nature and extent requiring the testimony of its named witness. In its Petition, it claimed there “**may**” be nature and extent issues and it **anticipates** testimony from its witness on nature and extent. (Emphasis added). Clearly, this indicates there are no issues of nature and extent at the time when the Petition was filed. Good cause was not established under Labor Code §5501.6 and no showing of significant prejudice or irreparable harm has been shown.

RECOMMENDATION

It is recommended that the Petition for Reconsideration be DISMISSED, and the Petition for Removal be DENIED.

DATE: 12/11/2023