

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

VICTOR PRADO, *Applicant*

vs.

**MCMINN EQUIPMENT RENTAL LEASING, INC.;
THE HARTFORD, *Defendants***

**Adjudication Number: ADJ16681249
Bakersfield District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Applicant seeks reconsideration of the October 15, 2024 Findings, Award, and Order (FA&O) wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that applicant sustained injury to various body parts while employed by defendant on July 28, 2022 as a heavy equipment operator; and that applicant was entitled to temporary disability at a weekly rate of \$1,125.55 from July 29, 2022 through August 11, 2022 and from September 19, 2022 through May 11, 2023 and permanent disability at a weekly rate of \$290.00 from May 11, 2023 through August 28, 2024. The WCJ found that the record was "not sufficiently developed" to establish that applicant was "entitled to additional temporary disability" from "May 12, 2023 through March 19, 2024." (FA&O, p. 2.) The parties were therefore ordered by the WCJ to request clarification from panel Qualified Medical Evaluator (QME), Dr. Lawrence Richman, on applicant's temporary work restrictions for the period from May 12, 2023 through March 19, 2024.

Applicant contends that the WCJ erred in finding that "Dr. Richman did not provide work restrictions." (Petition for Reconsideration (Petition), p. 3.) Applicant further contends that applicant is entitled to further temporary disability on two bases: 1) Dr. Richman found applicant "temporarily partially disabled" through March 19, 2024 on a "neurologic basis" and 2) Dr. Richman provided work restrictions precluding applicant from "working at heights or on scaffolds or ladders" for which defendant failed to "provide an offer of alternate or modified work." (*Id.*)

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.

We have considered the Petition and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny the Petition.

FACTS

Applicant, while employed by defendant as a heavy equipment operator on July 28, 2022, sustained an industrial injury to the head, neck, left shoulder, bilateral hands, bilateral wrists, and fingers.

At the time of the injury, applicant was earning an average weekly wage of \$1,688.33, which equates to a weekly temporary disability rate of \$1,125.55, and weekly permanent disability rate of \$290.00.

The parties retained Dr. Steven Brouman as the orthopedic panel QME and Dr. Lawrence Richman as the neurological panel QME.

According to Dr. Brouman, applicant reached maximum medical improvement for his injuries to the cervical spine, left shoulder, and bilateral wrists and hands on April 12, 2023. He was “temporarily totally disabled” from the July 28, 2022 injury until April 12, 2023 when he reached maximum medical improvement. (Joint Exhibit 2, p. 11.) Permanent work restrictions included no repetitive bending, twisting, or torquing of the neck to the “extremes of motion,” no lifting over 25 pounds, no repetitive work at or above shoulder level, and five-minute breaks from repetitive work with the hands and wrists on an hourly basis. (*Ibid.*, at p. 16.)

According to Dr. Richman, applicant reached maximum medical improvement for his posttraumatic head syndrome, headaches, and vertigo on March 19, 2024. (Joint Exhibit 1, p. 24.) Permanent work restrictions for applicant’s disequilibrium included no working at heights or on scaffolds or ladders. (*Ibid.*) Dr. Richman noted that applicant would have been “temporarily and partially disabled through the present on a neurologic basis.” (*Ibid.*)

Based upon Dr. Brouman’s findings, applicant was paid temporary total disability from July 28, 2022 through April 11, 2023 and temporary partial disability from April 23, 2023 through March 19, 2024.

DISCUSSION

I.

Preliminarily, former Labor Code section 5909¹ 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 November 20, 2024, and 60 days from the date of transmission is January 19, 2025, which is a Sunday. (See Cal. Code Regs., tit. 8, § 10600(b).)² The next business day that is 60 days from the date of transmission is January 21, 2025, which is a Tuesday. This decision was issued by or on January 21, 2025, 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

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

² WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:
Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

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 constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on November 20, 2024, and the case was transmitted to the Appeals Board on November 20, 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 November 20, 2024.

II.

We also 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. (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].) 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 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.

Here, the October 15, 2024 FA&O addresses both threshold and interlocutory issues, and applicant properly filed a Petition for Reconsideration. However, applicant's Petition only challenges the WCJ's decision regarding the need for further clarification from Dr. Richman on the issue of temporary work restrictions for the period from March 12, 2023 through March 19, 2024, which is an interlocutory 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 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, for the reasons discussed below, 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 applicant.

III.

Turning now to the merits of the Petition, applicant argues that further clarification from Dr. Richman is unnecessary since Dr. Richman already found applicant "temporarily partially disabled" through March 19, 2024 on a "neurologic basis" and defendant failed to provide "an offer of alternate or modified work" despite Dr. Richman's recommendations for permanent work restrictions of no "working at heights or on scaffolds or ladders." (Petition, p. 3.)

Although it is true that work restrictions were discussed, we agree with the WCJ that Dr. Richman's findings are "an incomplete opinion" given that there is "no documentary evidence" which proves that applicant was required to work on scaffolds or ladders. (Report, p. 7.) Further,

assuming arguendo that applicant was required to work on scaffolds or ladders, it is unclear to what extent as Dr. Richman did not specify the height or elevation required by defendant as a part of applicant's job duties. (Joint Exhibit 1, p. 2.) We agree with the WCJ that Dr. Richman similarly failed to provide specificity in terms of height and/or elevation with respect to applicant's work restrictions. As such, we believe that further clarification from Dr. Richman is necessary.

Clarification is particularly important given that the Appeals Board has held in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc.), that a decision "must be based on admitted evidence in the record" (*Id.* at p. 478.) and must be supported by substantial evidence. (§§ 5903, 5952, subd. (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. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) This "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) Additionally, the WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where additional discovery may be necessary. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].)

As a final point, given that applicant has been left waiting on his entitlement to the additional temporary disability benefits for some time now, it is recommended that the parties move expeditiously to obtain the supplemental report from Dr. Richman as soon as practicable.

Accordingly, we deny applicant's Petition for Reconsideration of the October 15, 2024 Findings, Award, and Order.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the October 15, 2024 Findings, Award, and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 17, 2025

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

**VICTOR PRADO
LAW OFFICE OF JOSEPH PLUTA
TESTAN LAW**

RL/cs

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