

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

ANGEL MARIN LOEZA, *Applicant*

vs.

**ELITECARE BUILDING SERVICES;
COMPWEST INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ14029847
Santa Ana District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration of the Findings and Orders (F&O) issued on November 2, 2022, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

The WCJ found, in pertinent part, that applicant was employed on an unspecified date with defendant when he claims to have sustained industrial to his eyes. The WCJ vacated submission of this matter in order to develop the record further because the qualified medical evaluator (QME)'s opinion lacked substantial evidence. The WCJ further ordered that multiple exhibits were disallowed into evidence and expressly found that "Defendant is not allowed to cross examine QME Lazar for AOE/COE purposes."

Defendant contends that the WCJ erred in excluding the proffered exhibits from evidence and limiting defendant's right to cross examine the QME.

We have not received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration, we will affirm the November 2, 2022 F&O, except that we will

amend the F&O to find that the issue of whether there was good cause for defendant to request a cross-examination of QME Lazar prior to proceeding to trial on April 21, 2022 is moot (Finding of Fact 2).

FACTS

Per the WCJ's Report:

On 12/24/2020, applicant filed an application for adjudication alleging a cumulative trauma injury for the period of 11/01/2017 through 11/09/2020 to his eyes, nervous system and body system. (EAMS Doc ID: 34987300). Defendant denied applicant's claims due to lack of substantial medical evidence on 2/18/2021. (Defendant Exhibit D). On 3/5/2021 applicant was evaluated by QME David Lazar. (Applicant Exhibit 1). Six months later, applicant filed a Declaration of Readiness to Proceed for a Priority Conference for the issue of AOE/COE. (EAMS Doc ID: 38278150). A review of the case record does not indicate that defendant filed an objection. At the 11/4/2021 Priority Conference a continuance was granted as the WCJ noted that defense counsel "just came on to file." (EAMS DOC ID 74850903). At the 1/27/2022 Priority Conference, the WCJ granted applicant's request for trial over defendant's opposition as defendant wanted to obtain a supplemental report from the PQME to address apportionment, to which the WCJ noted was not needed to address AOE/COE. (EAMS DOC ID 75127833).

On 4/21/2022, this matter proceeded to day 1 of trial on the issues of injury arising out of and in the course of employment, date of injury pursuant to Labor Code section 5412, Statute of Limitations pursuant to Labor code section 5402, Post Termination Defense pursuant to Labor Code section 3600(a)(10), whether there is good case for defendant to request a cross examination after the matter had been set for trial, and whether QME Lazar needs to review prior records. (MOH/SOE 4/21/2022). On the second day of trial, at the June 9, 2022, defendant requested to introduce additional evidence, Exhibits H and I, to which were objected to by applicant and marked for identification by this WCJ. (6/9/2022 MOH/SOE). Trial was submitted after the third day of trial on September 7, 2022. (MOH/SOE 9/7/2022). On November 2, 2022, this WCJ issued a Findings and Orders disallowing the cross examination of QME Lazar for "the purposes of AOE/COE," disallowing Defendant Exhibits A, H & I. The court also found that QME Lazar's reporting lacked substantial medical evidence due to failure to review records and that the record needed to be developed. (11/2/2022 Findings and Orders). On November 16, 2022, defendant filed a Petition for Removal for the court's denying defendant's request to cross examine the PQME, disallowing Exhibits A and H and not addressing defendant's assertion that records were not served on defendant.

(WCJ's Report, pp. 1-2.)

DISCUSSION

If a decision includes resolution of a “threshold” issue, then it is a “final” decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (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 timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision 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 WCJ’s decision includes a finding regarding a threshold issue of employment. Accordingly, the WCJ’s decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

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*.) 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, 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.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is "... one of 'the rudiments of fair play' assured to every litigant . . ." (*Id.* at 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, "[The] commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law." (*Id.* at 577.)

A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal. Comp. Cases 584]; *Rucker, supra*, at 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4 703, 710 [57 Cal.Comp.Cases 230].)

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete. (Citations.)" (*McDuffie, supra*, 67 Cal.Comp.Cases at 141.)

For the reasons discussed in the WCJ's Report, we agree with the WCJ regarding the orders excluding evidence. However, in his Report, the WCJ concludes that defendant waived its right to challenge the order precluding defendant from cross-examining the QME by not seeking removal

and instead proceeding with trial. This is incorrect, as a party does not waive a challenge to an interlocutory order by not filing a petition for removal, and an interlocutory order can be a basis to challenge a final finding in a petition for reconsideration. In addition, on April 21, 2022, the specific issue that the parties listed at trial was “Whether there is good cause for defendant to request a cross-examination of QME Lazar prior to proceeding to AOE/COE trial?” Yet, the WCJ found that “Defendant is not allowed to cross examine QME Lazar for AOE/COE purposes,” with no limitation as to time.

Once the WCJ vacates submission for development of the record, both parties are permitted additional discovery on the issue of industrial injury. Perhaps the facts of a future case may warrant an order limiting the scope of such discovery. Here, the facts do not warrant such an order and would intrude upon defendant’s right of due process to cross-examine the QME.

Accordingly, as our Decision After Reconsideration, we affirm the November 2, 2022 F&O, except that we amend the F&O to find that the issue of whether there was good cause for defendant to request a cross-examination of QME Lazar prior to proceeding to trial on April 21, 2022 is moot (Finding of Fact 2).

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Orders issued on November 2, 2022, by the WCJ is **AFFIRMED, EXCEPT THAT** Finding of Fact number 2 is **AMENDED** as follows:

FINDINGS OF FACT

2. The issue of whether there was good cause for defendant to request a cross-examination of QME Lazar prior to proceeding to trial on April 21, 2022 is moot.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 18, 2026

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

**ANGEL MARIN LOEZA
ORACLE LAW FIRM
MINTY LAW CORPORATION**

EDL/mt

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