WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHRISTIAN ALEXANDER RIVERA, *Applicant*

vs.

SAN BERNARDINO MOUNTAINS COMMUNITY HOSPITAL DISTRICT; CYPRESS INSURANCE COMPANY administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Number: ADJ17520173
Pomona District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks removal of the Findings and Order (F&O) issued on July 31, 2026. The workers' compensation administrative law judge (WCJ) found, in relevant part, that while employed on March 24, 2023, as a certified nurse assistant by defendant, applicant sustained injury arising out of and in the course of employment (AOE/COE) to the left ankle, and claims to have sustained injury AOE/COE to the knees and legs; and that insufficient good cause exists to support the remote appearance of witness Cynthia Bush. The WCJ ordered Ms. Bush to appear at the next trial date to provide in person testimony.

Applicant contends that his due process right to a fair hearing was violated when the witness was not permitted to testify remotely pursuant to WCAB Rule 10817 (Cal. Code Regs., tit. 8, § 10817) and that the Opinion did not provide a meaningful basis for denial of remote testimony.

Defendant did not file an answer. The WCJ issued a Report and Recommendation on Removal (Report).

We have considered the allegations of the Petition and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and for the reasons stated below, we will treat the Petition as one seeking reconsideration and grant the Petition, and as our Decision

After Reconsideration, we will affirm the F&O, except that we will amend it to find that the virtual appearance by Ms. Bush is permitted (Finding of Fact 6, Order).

FACTS

Applicant, while employed on March 24, 2023, as a certified nurse assistant by defendant sustained an injury to the left ankle and claims to have sustained injury to the knees and legs.

On March 9, 2026, applicant filed a Declaration of Readiness to Proceed (DOR) requesting an Expedited Hearing on the issue of temporary disability. The matter was scheduled for trial on April 8, 2026.

On March 31, 2026, applicant filed a "Petition for Remote Trial Via Courtcall." The petition requested that all parties and the witness be allowed to appear remotely for trial on the scheduled date and any continued trial date. There was no response from either defendant or the WCJ.

On April 8, 2026, the parties appeared, completed the Pre-Trial Conference Statement (PTCS), and continued the trial.

On May 18, 2026, trial went forward. The primary issue for trial was "to dispute average weekly wage, specifically post-injury wage increase due to injured worker's current position as a registered nurse working for the same employer." (Minutes of Hearing/Summary of Evidence (MOH/SOE, 05/18/2026, 2:15-18.) Additionally, a secondary issue was listed as:

> Applicant counsel intends to petition for the virtual appearance of Cynthia Bush for day two of trial. The witness has not yet been subpoenaed. The secondary issue will be on good cause of a virtual appearance and will take place on day two of trial. Ms. Bush may appear virtually to address the issue of her good cause virtual appearance. If it is determined no good cause exists, Ms. Bush will be ordered to appear for trial.

(*Id.* at 2:21-25.)

Applicant and defendant's human resources director testified.

On July 7, 2026, trial continued with Ms. Bush appearing via video conference. The minutes note that she is appearing solely to address the issue of a good cause virtual appearance. (MOH/SOE, 07/07/2026, 2:8-10.) She testified that she is director of the skilled nursing facility at Mountains Community Hospital and is a registered nurse as well. (*Id*. at 2:16-18.) The facility is the only health care facility in a 20 mile radius for the surrounding community. (*Id*. at 2:20-22.) She lives and works about an hour and a half from Pomona. (*Id*. at 2:23.) She is not allowed to

work remotely and is the only one that holds her position. She would have to take a whole day off to attend an in person trial. (*Id*. at 3:1-3.) She works Monday through Friday due to requirements for having a director of nursing on site. (*Id.* 3:6-8.)

She was asked whether she was within 75 miles from the Pomona courthouse but was not sure. (*Id*. at 3:14-16.) The court then noted that she began typing and was told to testify from her personal knowledge. She has taken time off in the last year and the hospital supervisor and clinical coordinator covered for her. (*Id*. at 3: 21-23.) She confirmed that there were no other personal limitations including health or childcare that would prevent her from attending in person. (*Id*. at 4:1-4.) She confirmed that she had reliable internet connection. (*Id*. at 4:4-5.)

The matter was submitted solely regarding the issue of the virtual appearance request of the witness. (*Id*. at 1:21-22.)

On July 31, 2026, the WCJ issued the F&O finding that applicant had not demonstrated good cause for Ms. Bush to testify via teleconference and ordered her to appear. In the Opinion the WCJ stated:

> The Court has assessed several factors, including but not limited to the parties' consent, geographic considerations, health considerations, procedural considerations, technological considerations and beyond. Having carefully weighed these factors, it is determined there is insufficient good cause for a virtual appearance.

Applicant filed his Petition from this order contending that the Opinion is at odds with the holding with the en banc decision *Perez v. Chicago Dogs* (2025) 90 Cal.Comp.Cases 830 (Appeals Board en banc) (*Chicago Dogs*).

The WCJ issued a Report relying on California Code of Civil Procedure section 2025.250(a) as providing a rubric for the reasonable distance that a witness would travel to provide testimony and that Ms. Bush's home close to her place of work was under the 75 mile threshold for location of a deposition. He took judicial notice that her workplace was 57 miles from Pomona and that she testified that she lived close to work. He also made a credibility assessment that her testimony regarding the unavailability of another hospital employee to act in her absence while she testified was not believable. Also, he was reluctant to allow remote testimony because there was a momentary issue with the internet during her testimony and his observation that she attempted to look something up while testifying. The WCJ also opines that in this case, his taking

of testimony to determine good cause to allow the witness to testify after a motion by applicant was made, satisfied due process concerns outlined in *Chicago Dogs*.

DISCUSSION

I.

Petitions for reconsideration filed on or after July 14, 2026 are subject to Labor Code section 5909, which states 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 Labor Code 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 in Events 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 19, 2026 and 60 days from the date of transmission is Sunday, October 18, 2026. The next business day that is 60 days from the date of transmission is Monday, October 19, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, October 19, 2026, so that we have timely acted on the Petition as required by Labor Code section 5909(a).

Labor Code 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

[1] 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.

parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report shall be notice of transmission.

Here, according to the proof of service for the Report, the Report was served on August 19, 2026, and the case was transmitted to the Appeals Board on August 19, 2026. 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 19, 2026.

II.

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 included findings regarding threshold issues as to the existence of an employment relationship between applicant and defendant, and that applicant sustained injury arising out of and in the course of employment to the left ankle.

Although the decision contains finding that are final, petitioner is only challenging the interlocutory finding that the witness must appear in person to testify at trial. 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).)

In this case, based upon our review of the record, and for the reasons discussed below, we are persuaded that significant 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.

III.

In our recent en banc decision in *Chicago Dogs*, *supra*, 90 Cal.Comp.Cases __ , a case which involved a virtual appearance by defendant's witness for testimony, we outlined the following legal principles.

As a matter of due process, 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].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].) 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 pp. 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.4th 703, 710 [57 Cal.Comp.Cases 230].) As stated by the Court of Appeal:

> A denial of due process to a party ordinarily compels annulment of the Board's decision only if it is reasonably probable that, absent the procedural error, the party would have attained a more favorable result. However, if the denial of due process prevents a party from having a fair hearing, the denial of due process is reversible per se.

(*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd*. (*Pinkney*) (1994) 26 Cal.App.4th 789, 806 [59 Cal.Comp.Cases 461], citations omitted.)

It is the policy of the law to favor, whenever possible, a hearing on the merits. (*Fox v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196, 1205 [57 Cal.Comp.Cases 149]; see also *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478 [243 Cal. Rptr. 902] ("when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default.") This is particularly true in workers' compensation cases, where there is a constitutional mandate "to accomplish substantial justice in all cases." (Cal. Const., art. XIV, § 4.)

In *Chicago Dogs*, *supra*, 90 Cal.Comp.Cases 830, we held that:

> we preliminarily conclude that the due process right to a fair hearing and a determination based on the merits is <u>good cause</u> to allow the electronic testimony of the witness. Therefore, when a witness is unable to appear in person, as a matter of due process, a request to testify electronically should be readily permitted.

(*Id*. at p. 840.)

Due process means the opportunity to be heard. We reiterate that because access to proceedings is paramount as a matter of due process, ***the opportunity to be heard is good cause***, and requests should be readily permitted. Moreover, the Appeals Board strongly encourages all parties in the practice of law, including both the bench and the bar, that requests for professional courtesy should be liberally granted whenever possible. (See Cal. Rules of Court, rule 9.7, [Amending the attorney's oath to include: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."].) Thus, and to the extent that applicant's request could be construed as requesting courtesy of the court, the WCJ should grant the request whenever possible.

Labor Code section 5708 states in relevant part that:

> *All hearings* and investigations before the appeals board or a workers' compensation judge *are governed* by this division and *by the rules of practice and*

> *procedures adopted by the appeals board*. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, *which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division*.

(Lab. Code, § 5708.)

Here, while the WCJ complied with *Chicago Dogs* by creating a record to support his decision to deny remote testimony, he did not apply the right standard as set forth by us in Chicago Dogs, because as explained above, *the standard is due process*. The Appeals Board is not bound by the Code of Civil Procedure, and while it may be helpful for a WCJ to consider such principles, the analysis is not applicable in this context. (See Lab. Code, § 5708; *Chicago Dogs*, *supra*.) As outlined in *Chicago Dogs*, remote testimony should be granted where possible to achieve access to proceedings. Here, nowhere does the record note that defendant objected to the remote testimony in the first place. Though there was no stipulation and it was listed as an issue, there appears to be no prejudice to defendant's right to cross examine. Moreover, it is understandable that a witness would not want to use a full day of sick or vacation leave to travel to the district office, only to testify for a short period of time at a trial on a very limited issue such as earning capacity. Likewise, at this point she has not been subpoenaed as a witness so her appearance at this trial is akin to a courtesy. Thus, we see no basis for denying the witness the opportunity to testify virtually.

Accordingly, we will rescind the order and find that a virtual appearance is permitted (Finding of Fact 6, Order). We otherwise affirm the F&O.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal/Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Order issued on July 31, 2026 by WCJ is **AFFIRMED** but it is **AMENDED** as follows:

FINDINGS OF FACT

6. Good cause exists to allow the remote appearance of witness Cynthia Bush at any continued trial date.

IT IS FURTHER ORDERED that the Order issued on July 31, 2026 is set aside.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ PAUL F. KELLY COMMISSIONER

/s/ CRAIG L. SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 19, 2026

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

CHRISTIAN ALEXANDER RIVERA
PEREZ LAW, PC
VARON, ST. CLAIR & JELENSKY
EMPLOYMENT DEVELOPMENT DEPARTMENT

TF/md

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