WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA DIAZ HERNANDEZ, ***Applicant***

vs.

KENDALL FARMS; ZENITH INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ19811349
San Diego District Office

OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION DENYING PETITION FOR REMOVAL

Defendant seeks reconsideration of the Order vacating and rescinding an order dismissing case, issued by the workers' compensation administrative law judge (WCJ) on August 25, 2026.

Defendant contends that because applicant's first petition for reconsideration was untimely, the WCJ lacked jurisdiction to rescind the order under the language of WCAB Rule 10961 (Cal. Code Regs., tit. 8, § 10961).

We have not received an Answer from applicant.

The WCJ issued a Report and Recommendation (Report) treating the Petition as a Petition for Removal and recommending that the Petition be denied.

We have considered the allegations in the Petition and the contents of the Report with respect thereto.

Based on our review of the record, and for the reasons discussed below, the Petition seeks reconsideration of a non-final order and will be dismissed. We will treat the Petition as one for removal, and we will deny it as a petition for removal.

BACKGROUND

The following factual background is set forth in the WCJ's Report:

> In the case at hand, on January 13, 2026, Petitioner filed a Petition to Dismiss Case. This initial petition was denied as petitioner failed to serve the applicant at their correct address. On May 11, 2026, Petitioner filed another Petition to dismiss. A Notice of Intent issued on May 11, 2026. On July 13, 2026, petitioner asked for the final Order of Dismissal. On July 15, 2026, based on the representation that no objection had been served to petitioner or this Court, a final Order of Dismissal issued without prejudice. On August 13, 2026,

> applicant by and through her attorney of record filed an objection to the Order of Dismissal stating that the applicant has been receiving treatment and wishes to continue pursuing her case. In addition to such objection, applicant by and through her attorney of record filed a Petition for Reconsideration. From the Petition for Reconsideration, this [WCJ] issued the Order Vacating and Rescinding the Dismissal and set the matter for status to discuss applicant's objection and move the matter towards resolution on the issue of whether or not the Order Dismissing should remain or be set-aside.

(Report, p. 2.)

DISCUSSION

I.

Petitions for reconsideration filed on or after July 14, 2026 are subject to Labor Code section[1] 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 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 September 15, 2026 and 60 days from the date of transmission is Saturday, November 14, 2026. The next business day that is 60 days from the date of transmission is Monday, November 16, 2026. (See

[1] All statutory references are to the Labor Code unless otherwise stated.

Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, November 16, 2026, 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 shall be notice of transmission.

Here, according to the proof of service for the Report, the Report was served on September 15, 2026, and the case was transmitted to the Appeals Board on September 15, 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 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 September 15, 2026.

II.

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" or determines a "threshold" issue that is fundamental to the 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 [43 Cal.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, the following: injury AOE/COE, 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].)

[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.

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 ("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"); *Kramer*, *supra*, 81 Cal.App.4th 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, or similar issues.

The Order vacating dismissal does not determine any substantive right or liability and does not determine a threshold issue. Thus, it is not a "final" decision, defendant's petition for reconsideration will be dismissed, and we will apply the removal standard to our review. (See *Gaona*, *supra*, 5 Cal.App.5th 658.)

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); *Cortez*, *supra*, 136 Cal.App.4th 596; *Kleemann*, *supra*, 127 Cal.App.4th 274.) Additionally, 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).)

Based upon the WCJ's analysis of the merits of petitioner's arguments, 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. As the WCJ notes, the matter is set for a status conference on the issues raised.

We note that the recent en banc[3] decision issued by the Appeals Board in *Ledezma v. Kareem Cart Commissary and Mfg*. (2024) 89 Cal.Comp.Cases 549 (Appeals Bd. en banc), affirmed that filing petitions for reconsideration on interlocutory orders may be considered

[3] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].)

"frivolous and filed for the purposes of delay in violation of section 5813 and WCAB Rule 10421." (*Id*., at 555.) "The petition for removal is the method to seek review of interlocutory orders, those orders that do not rise to the level of final determinations. Examples include, but are not limited to, discovery orders, orders granting or denying continuances, requests for a trial judge to recuse himself or herself, and any other action that does not finally adjudicate the substantive rights or liabilities of the aggrieved party." (*Id*.)

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 includes, but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (*Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker*, *supra*, 82 Cal.App.4th 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].)

WCAB Rule 10966 states in relevant part that: "Before a petition for reconsideration is filed, a workers' compensation judge may . . . amend the decision for good cause under the authority and subject to the limitations set out in sections 5803 and 5804 of the Labor Code." (Cal Code Regs., tit. 8, § 10966.)

Section 5803 states that:

> The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division, and the decisions and orders of the rehabilitation unit established under Section 139.5. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.
>
> This power includes the right to review, grant or regrant, diminish, increase, or terminate, within the limits prescribed by this division, any compensation awarded, upon the grounds that the disability of the person in whose favor the award was made has either recurred, increased, diminished, or terminated.

(Lab. Code, § 5803.)

In the recent case of *Mayor v. Workers' Comp. Appeals Bd.* (2026) 20 Cal.5th 874, 891 [91 Cal.Comp.Cases 795], the Supreme Court again recognized the WCAB's fundamental jurisdiction under section 5803.

We acknowledge that the language of WCAB Rule 10961 states that in order for the WCJ to act, a petition for reconsideration must be timely. However, the determination of whether a petition for reconsideration is timely rests solely with the Appeals Board. While WCAB Rule 10966 states that a WCJ can amend a decision before a petition for reconsideration is filed, it also states that any authority to act by the WCJ is subject to sections 5903 and 5904. Thus, even if applicant's initial petition for reconsideration may have been untimely under section 5903, the WCJ's authority under section 5803 was in no way affected or limited, and any time limits imposed by our rules cannot abrogate that authority. By setting the matter for a status conference, the WCJ is properly providing the parties with due process. At the conference, the parties will have an opportunity to raise issues, and the WCJ can determine whether the matter should be set for a hearing on the merits of defendant's petition to dismiss. Therefore, defendant has failed to demonstrate that it will suffer prejudice substantial prejudice or that 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.

Accordingly, we dismiss the Petition for reconsideration as premature to the extent that it seeks removal of an interlocutory Order, treat the Petition as one seeking removal, and deny removal.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **DISMISSED**.

IT IS FURTHER ORDERED, that defendant's Petition for Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 16, 2026

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

MARIA DIAZ HERNANDEZ
LAW OFFICE OF ISAAC MAING
CHERNOW, PINE AND WILLIAMS

JB/*pm*

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