

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

3
4 **MIKE REIS,**

5 *Applicant,*

6 **vs.**

7 **SILVAS OIL COMPANY, INC.;**
8 **EMPLOYERS INSURANCE OF WAUSAU,**
9 **administered by LIBERTY MUTUAL**
10 **INSURANCE COMPANY,**

11 *Defendants.*

Case Nos. ADJ8484771
ADJ6747914
(Fresno District Office)

OPINION AND ORDERS
DISMISSING PETITION FOR
RECONSIDERATION; GRANTING
REMOVAL AND DECISION
AFTER REMOVAL

12 Defendant seeks reconsideration, and in the alternative removal, of the Order issued by the
13 workers' compensation administrative law judge (WCJ) in the April 30, 2014 pretrial conference
14 statement ordering the claims adjuster to appear personally at an expedited hearing scheduled for
15 May 13, 2014. Defendant contends that the WCJ erred in ordering the claims adjuster to appear to testify
16 at the expedited hearing on the issue of a December 10, 2013 utilization review determination that did
17 not certify a carpal tunnel surgery request. Applicant's counsel listed the claims adjuster as a witness.

18 Applicant filed an Answer. The WCJ prepared a Report and Recommendation on Petition for
19 Reconsideration (Report) recommending we treat defendant's petition as a Petition for Removal, as the
20 order for the claims adjuster to appear was not a final order. The WCJ recommended we deny removal.

21 We have considered the allegations in the Petition for Reconsideration, and in the alternative
22 Removal, the Answer, and the contents of the Report. Based on our review of the record, we will dismiss
23 the petition as a petition for reconsideration. We will treat the petition as a petition for removal, grant
24 removal, and rescind the WCJ's order that the claims adjuster appear at the expedited hearing.

25 In the course of reviewing the adjudication file in the Electronic Adjudication Management
26 System, it was discovered that subsequent to the filing of subject petition the trial WCJ proceeded with
27 the expedited hearing on May 13, 2014, and issued a decision on June 18, 2014. The trial WCJ did not

1 have jurisdiction to act while the case was pending before the Appeals Board on a petition for
2 reconsideration. Therefore, we vacate the WCJ's Findings of Fact and Order issued on June 18, 2014,
3 return this matter to the WCJ for further proceedings consistent with this opinion and a new decision
4 from which any aggrieved party may seek timely reconsideration.

5 BACKGROUND

6 Applicant, while employed on May 13, 2009 (ADJ6747914), sustained injury arising out of and
7 in the course of employment to his head, neck, left shoulder, hips and psyche, and for the period ending
8 December 19, 2011(ADJ8484771), sustained injury arising out of and in the course of employment to his
9 bilateral wrists and right shoulder. The matter came up for status conference on a request for carpal
10 tunnel surgery in the cumulative trauma claim. At the conference, the case was set for expedited hearing
11 and the WCJ ordered the claims adjuster to appear at that hearing. The expedited hearing was set for
12 May 13, 2014.

13 Defendant filed a Petition for Reconsideration and in the alternative Petition for Removal on
14 May 2, 2014.

15 The expedited hearing took place on May 13, 2014, the claims adjuster did not appear, and the
16 WCJ submitted the issue of carpal tunnel surgery authorization for decision. The WCJ issued Findings
17 of Fact and Order on June 18, 2014, while this case was pending before us.

18 DISCUSSION

19 We first address whether defendant's petition was appropriate as a petition for removal or for
20 reconsideration.

21 Reconsideration may only be had of a final order, decision or award. (Lab. Code, §§ 5900 (a),
22 5902.) An order which does not dispose of the substantive rights or liabilities of those involved in the
23 case is not a final order. (*Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104
24 Cal.App.3d 528 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.*
25 *(Kramer)* (1978) 82 Cal.App.3d 39 [43 Cal.Comp.Cases 661].) Interim procedural orders are not final
26 orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65 Cal.Comp.Cases
27 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Hansen v. Workers' Comp. Appeals Bd.*

1 (1988) 53 Cal.Comp.Cases 193 (writ den.); *Jablonski v. Workers' Comp. Appeals Bd.* (1987) 52
2 Cal.Comp.Cases 399 (writ den.).) Here, the order to produce the claims adjuster to testify at an
3 expedited hearing is not a final order, so we dismiss defendant's petition as a petition for
4 reconsideration.

5 We turn next to consideration of defendant's petition as a petition for removal. Removal is
6 discretionary and is generally employed only as an extraordinary remedy which must be denied absent a
7 showing of substantial prejudice or irreparable harm, or that reconsideration will not be an adequate
8 remedy after issuance of a final order, decision or award. (Cal. Code Regs., tit. 8, § 10843(a); *Castro v.*
9 *Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 1460 (writ den.); *Swedlow, Inc. v. Workers'*
10 *Comp. Appeals Bd. (Smith)* (1985) 48 Cal.Comp.Cases 476 (writ den.).)

11 Based upon our review of the record, on the facts before us, we are persuaded that substantial
12 prejudice or irreparable harm will result if removal is not granted. Here, the parties appeared before the
13 WCJ at a status conference on April 30, 2014. The matter was set for an expedited hearing, and the WCJ
14 ordered the claims adjuster to appear. While in some circumstances there may be good cause to order a
15 claims adjuster to appear at a hearing, we see no good cause here to force the adjuster to travel from the
16 insurance company's offices in Portland, Oregon to testify in Fresno. Based on the facts before us, it
17 does not appear that the issue of whether the utilization review denial was justified was within the
18 knowledge of the adjuster. Thus, we grant removal.

19 We now consider the expedited hearing on May 13, 2014, and the Findings of Fact and Order of
20 June 18, 2014. WCAB Rule 10859 allows a WCJ to amend, modify or rescind an order within 15 days
21 of the filing of a petition for reconsideration. (Cal. Code Regs., tit. 8, §10859.) However, once the 15
22 days have elapsed, jurisdiction transfers to the Appeals Board and the trial court has no authority to take
23 any action.

24 Here, the WCJ failed to exercise any of the options provided by WCAB Rule 10859, yet
25 conducted a hearing, admitted evidence, took the matter under submission, and issued Findings of Fact
26 and an Order. As reflected in the Minutes of Hearing, the WCJ reasoned that although defendant's
27 petition was filed in the alternative, i.e. reconsideration or removal, the issue was not a final order and

1 was subject to removal. Since a petition for removal does not automatically divest the trial court of
2 jurisdiction, the WCJ determined that he had authority to proceed with the expedited hearing.
3 (MOH/SOE 2:1-10) The WCJ ignored the fact that defendant had filed a Petition for Reconsideration,
4 divesting the trial court of jurisdiction 15 days after it was filed. Thus, the jurisdictional determination is
5 exclusively within the power of the Appeals Board. Therefore, we vacate the Findings of Fact and Order
6 of June 18, 2014, and return the matter to the WCJ for further proceedings consistent with this opinion
7 and a new decision.

8 When the matter is returned to the WCJ, an expedited hearing should be scheduled where the
9 parties can submit evidence unless, after inquiry from the WCJ, the parties stipulate to waive hearing,
10 and agree to submit the matter without appearing. (See Lab. Code, § 5700.) Once the matter has been
11 submitted, the WCJ shall issue a new decision from which any aggrieved party may seek timely
12 reconsideration.

13 For the foregoing reasons,

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

15 **IT IS FURTHER ORDERED** that defendant's Petition for Removal is **GRANTED** and as the
16 Decision After Removal of the Workers' Compensation Appeals Board, the Order of April 30, 2014, by
17 the WCJ ordering the adjuster to appear at expedited hearing is **RESCINDED**.

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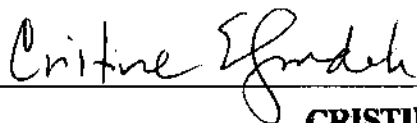
1 IT IS FURTHER ORDERED that the Findings of Fact and Order of June 18, 2014, is
2 VACATED, and this matter is RETURNED to the WCJ for further proceedings consistent with this
3 opinion and a new decision from which any aggrieved party may seek timely reconsideration.

4 WORKERS' COMPENSATION APPEALS BOARD

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7 RONNIE G. CAPLANE

8 I CONCUR,

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DEPUTY

12 CRISTINE E. GONDAK

13
14 

15 KATHERINE ZALEWSKI



16
17 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

18 JUL 01 2014

19
20 SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR
21 ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

22 BRADFORD & BARTHEL
23 KEELING GROVE LAW OFFICES
24 MIKE REIS

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27 AH:mm

REIS, Mike