

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

DARREN BENNETT, *Applicant*

vs.

**EAST FREMANTLE; WEST COAST EAGLES; MELBOURNE; SAN DIEGO
CHARGERS; TRAVELERS INDEMNITY COMPANY, successor to the interest by
merger to GULF INSURANCE COMPANY; CALIFORNIA INSURANCE GUARANTEE
ASSOCIATION for LEGION INSURANCE, in liquidation; MINNESOTA VIKINGS, self-
insured, and adjusted by GALLAGHER BASSETT, *Defendants***

**Adjudication Number: ADJ10274932
Santa Ana District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

We have considered the allegations of the Petition for Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and based upon the WCJ's analysis of the merits of the petitioner's arguments in the WCJ's report, and for the reasons stated below, we will grant reconsideration, amend the WCJ's decision to admit the reports of Robert Afra, M.D., and Jens Dimmick, M.D., and otherwise affirm the May 31, 2022 Findings and Order.

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 findings regarding threshold issues. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains findings that are 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.

Nevertheless, we will grant the petition for the sole purpose of admitting the medical reports of Doctors Afra and Dimmick. The reports of treating physicians are generally admissible. (Lab. Code, § 4061; *Mission Linen Supply Co. v. Workers' Comp. Appeals Bd.* (2000) 65 Cal.Comp.Cases 947 (writ den.).) Moreover, while we agree with the WCJ that these reports are not substantial medical evidence and that a regular physician should be appointed if the parties cannot or will not agree to an agreed medical examiner (AME), whether or not a medical report is

substantial evidence is a determination regarding the weight of the evidence, not its admissibility.
(Cal. Code Regs., tit. 8, § 10682(c).)

For the foregoing reasons,

IT IS ORDERED that reconsideration of the May 31, 2022 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the May 31, 2022 Findings and Order is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

7. The reporting of Robert Afra, M.D., is admitted into evidence but does not constitute substantial medical evidence.

* * *

11. The reporting of Jens Dimmick (Exhibits 2 & 3) are admissible but do not constitute substantial medical evidence. Exhibits 4 through 8 are not admissible.

* * *

ORDERS

* * *

(b) Exhibits 2 and 3 are admitted. Exhibits 4, 5, 6, 7, 8, F, G, H, and K are excluded.

(c) Exhibits 17, 18, B, C, and I are admitted. Exhibits D and E are excluded.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 26, 2022

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

**DARREN BENNETT
GLENN, STUCKEY & PARTNERS
SEYFARTH SHAW
DIMACULANGAN & ASSOCIATES
GUILFORD, SARVAS & CARBONARA**

PAG/pc

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