

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

JOSE MARTINEZ, *Applicant*

vs.

**SILICON VALLEY MONTEREY BAY COUNCIL SERVICE CENTER; NEW YORK
MARINE & GENERAL INSURANCE COMPANY, adjusted by LWP CLAIMS
SOLUTIONS, *Defendants***

**Adjudication Number: ADJ13473354
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

We have considered the allegations of defendant's Petition for Reconsideration/Removal, applicant's answer 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 for the reasons discussed below, we will deny the Petition as one seeking reconsideration.

Defendant sought reconsideration or in the alternative removal of the Findings and Award, Order Vacating Order of Submission and Opinion on Decision. 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 (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].) 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.

Here, the WCJ's decision includes a finding regarding a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

With respect to defendant's contentions regarding applicant's occupational code, we adopt and incorporate the following from the WCJ's Report:

The Finding that Applicant's Occupational Group Number is 360 is supported by the Evidence received at Trial and the Relevant Law

Insofar as defendant claims there is insufficient evidence for my finding applicant's occupational group number is 360, that claim is without merit. In my Opinion on Decision, I noted the rational for my finding as follows:

"At trial, applicant testified that on the date of injury, he was working for defendant as a district director. His job duties include being in charge of fundraising, promoting new programs, establishing new partners with community schools, working with volunteers, and providing assistance with respect to over 80 programs. He spends a lot of time driving to different places for his job. Whenever he attends an event, he needs to carry boxes of documents that are necessary in his job, and equipment and gear with respect to many, many events. He also sets up chairs for as many as 50 people. He loads boxes in and from warehouses, into cars, for distribution. He moves and distributes more than \$1 million worth of items. When he is setting up activities, the heaviest thing he would lift would be 40 to 60 pounds. He would do all of these activities almost every day. He would spend some time at his office and travel to various events. On the date of injury, he was loading boxes of popcorn into vehicles from the warehouse. He stepped on the edge of a pallet and injured his left knee. With respect to his job duties, he has a designated office in San Jose. His job is not considered an office job entirely. His job is different every day so he is not able to estimate the number of hours a day he is in his office but a daily average might be four to five hours. He has not missed any time from work because of this injury and has modified work. Dr. Piasecki is the parties' PQME in this matter. Dr. Piasecki initially evaluated him, asked applicant about continuing his work, and applicant was honest and forthright in his answers. (M.O.H.S.O.E., dated 12/17/2020, at pages 1, 5 – 6, 8)

Dr. Piasecki's 10/24/2020 report reflects applicant described his job as an office job with 50 percent of the day in the office and 50 percent of the day attending meetings and travelling to schools and community organizations to describe the work they do. The same

report further reflects that applicant stated he traveled once a week, sometimes has to travel quite a long distance, and does not have to lift, climb, squat, or kneel at work. (Defendant's Exhibit A, report of 10/24/2020 at pages 1, 5)

Occupational group number 360 is generally assigned to porters, packers, shipping clerks, conveyor tenders, and warehouse workers and entails significant lifting and carrying, significant walking, and occasional climbing at low levels. Occupational group number 212 is usually assigned to mostly professional and medical occupations, including chemist, dialysis technician and secondary school teacher and describing as work predominantly performed indoors but may require driving to locations of businesses. Applicant testified that he split his time in his office and travelling to other locations, spent a lot of time driving to different places for his job, and regularly carried boxes of documents, equipment and gear necessary to his job, and the heaviest weight he would carry is 40 to 60 pounds. He was loading boxes of popcorn into vehicles from the warehouse when he injured his knee. Based on my review of the evidence and the relevant law, I find the appropriate occupational group number is 360."

Applicant testified at trial that whenever he attends an event, he needs to carry boxes of documents that are necessary in his job, and equipment and gear with respect to many, many events. He also sets up chairs for as many as 50 people. He loads boxes in and from warehouses, into cars, for distribution. When he is setting up activities, the heaviest thing he would lift would be 40 to 60 pounds. He would do all of these activities almost every day. He was actually loading boxes of popcorn into vehicles from the warehouse when he injured his knee. I remain persuaded that based on my review of the evidence and the relevant law, the appropriate occupational group number is 360.

(Report, March 15, 2021, pp. 11-12.)

Defendant also takes issue with the WCJ's finding that the opinions of the qualified medical evaluator do not constitute substantial evidence and to further develop the record regarding several issues. This is an interlocutory decision regarding discovery and evidence. 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) Here, based upon the WCJ's analysis of the merits of defendant's arguments in the Report, 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.

Therefore, we will deny defendant's Petition.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award, Order Vacating Order of Submission and Opinion on Decision issued by the WCJ on February 11, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 4, 2021

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

**D'ANDRE LAW
JOSE MARTINEZ
URIARTE & CARR**

AI/pc

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