

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

KATHLEEN PHILLIPS, *Applicant*

vs.

**SHORENSTEIN HAYS-NEDERLANDER THEATRES, LLC;
STATE NATIONAL INSURANCE COMPANY, INC.,
administered by MEADOWBROOK INSURANCE, *Defendants***

**Adjudication Number: ADJ11629114
San Francisco District Office**

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

Defendant seeks reconsideration of the June 28, 2022 Findings and Order wherein the workers' compensation administrative law judge (WCJ) found, based on the parties' stipulations, that applicant, while employed as a dresser on December 27, 2017, sustained industrial injury to her hips. As relevant here, the WCJ further found that the reports of panel qualified medical examiner (PQME) John Wellborn, M.D., do not constitute substantial medical evidence. Based on this finding, the WCJ ordered Dr. Wellborn's reports stricken from the record and Dr. Wellborn removed and disqualified as PQME.

Defendant contends that the WCJ erred in finding Dr. Wellborn's reports lack substantiality.

Applicant filed an Answer. The WCJ issued a Report & Recommendation on Reconsideration (Report), recommending that the petition be denied.

We have considered the Petition for Reconsideration, the Answer, the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant reconsideration, rescind the June 28, 2022 Findings and Order, substitute it with new Findings of Fact that affirms the finding that Dr. Wellborn's reports are not substantial medical

evidence and omits the striking of Dr. Wellborn's medical reports from the record and his disqualification as PQME.

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 the threshold issues of employment and injury arising out of and occurring in the course of employment (AOE/COE). Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains findings that are final, the defendant is only challenging an interlocutory finding/order in the decision related to the admissibility of 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, § 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, 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.

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).) Moreover, there has been no finding of grounds for replacement of the PQME pursuant to Labor Code section 4062.3 or Administrative Director (AD) Rule 31.5 and the WCJ has not cited any legal authority for disqualifying him. Therefore, while we agree with the WCJ that Dr. Wellborn's reports are not substantial medical evidence, that the WCJ may assign the reports whatever weight she deems appropriate, and that the WCJ has the discretion to appointment a regular physician pursuant to Labor Code section 5701 if the parties cannot or will not agree to an agreed medical examiner (AME), Dr. Wellborn's reports, which were admitted at the February 7, 2022 trial, must remain part of the record and there are presently no legal grounds for disqualification or replacement of the PQME.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the June 28, 2022 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 28, 2022 Findings and Order is **RESCINDED** and **SUBSTITUTED** with a new Findings and Order, as provided below.

FINDINGS OF FACT

1. Kathleen Phillips, while employed on December 27, 2017, as a dresser, at San Francisco, California, by Shorenstein Hays - Nederlander Theatres, LLC, sustained injury arising out of and in the course of her employment to her hips.
2. At the time of the injury, the employer's workers' compensation carrier was State National Insurance Company, Inc.
3. At the time of the injury, the employee's earnings were \$1,198.55 per week, warranting indemnity rates of \$799.03 for temporary disability and \$290.00 for permanent disability, subject to proof.
4. The carrier/employer has paid compensation as follows: temporary disability at the weekly rate of \$799.03 for the following two periods: April 1, 2018 to June 29, 2019, July 23, 2019 to September 30, 2019, for a total of \$59,927.25.

5. The reports of PQME Dr. Wellborn do not constitute substantial medical evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 16, 2022

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

**KATHLEEN PHILLIPS
LAW OFFICE OF AMANDA POE
GILSON DAUB**

PAG/abs

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