

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

JERRY VILLEGAS PAYAN, *Applicant*

vs.

**WEST COAST AUTO SALES; N&H MOTORS;
TECHNOLOGY INSURANCE, administered by AMTRUST, *Defendants***

**Adjudication Number: ADJ14231186
Pomona District Office**

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

Applicant¹ seeks removal of the June 22, 2021 Order closing discovery and setting this matter for trial on August 23, 2021.

Applicant contends that the matter should not be set for trial until applicant has had a reasonable amount of time to complete discovery on issues related to transmission of Covid-19 and potential workplace outbreaks of Covid-19. Applicant contends that they will be prejudiced and suffer irreparable harm and that there is good cause why discovery is not complete pursuant to Labor Code section 5502(c).

The workers' compensation administrative law judge (WCJ) prepared a Report and Recommendation on Petition for Removal (Report) recommending that we deny removal. We have considered the allegations of the Petition for Removal and the contents of the report of the WCJ with respect thereto. Based on our review of the record, we will grant the Petition for Removal, rescind the WCJ's decision, and return this matter to the trial level for further proceedings and decision.

On February 9, 2021, an application was filed claiming that Mr. Payan contracted Covid-19 on July 12, 2020 while employed by West Coast Auto Sales as a salesperson. The application

¹ We note that applicant's attorney does not represent the injured worker who was deceased at the time the application was filed. From the Fee Disclosure Statement, it appears that the applicant may represent the injured worker's wife or daughter. Applicant's attorney should correct all filings to reflect the identity of the applicant or applicants that he represents.

claims that Mr. Payan died as a result of the Covid-19 infection. Initially, Preferred Employers was joined as the employer's insurer. Preferred Employers denied the case and asked to be dismissed as a party. Preferred Employers was dismissed and the correct insurer, Technology Insurance administered by AmTrust, was not joined on May 27, 2021. Pursuant to a declaration of readiness to proceed filed by the new defendant, Technology Insurance, the matter was set for a Priority Conference on July 21, 2021. At that conference, the WCJ closed discovery and set the matter for trial.

At a Priority Conference, an AOE/COE dispute may either be set for trial or set for status conferences at regular intervals. "The case shall be set for trial when discovery is complete or when the workers' compensation administrative law judge determines that the parties have had sufficient time in which to complete reasonable discovery." (Lab. Code, § 5502(c).)

In her Report, the WCJ stated that "[o]nce a defendant was named, answered, and denied the case, Applicant's counsel could have requested a panel QME." (Report, p. 3.) While counsel "could have" requested a panel QME, given that applicant's attorney was aware, after receiving defendant's answer that the correct insurer had not been joined, his delay in requesting a QME until the correct defendant was identified was reasonable. Furthermore, it is likely that the QME will not be able to opine on whether Mr. Payan contracted covid at work without information from applicant's employer about potential exposures or outbreaks. In this case, applicant did not complete discovery and did not have sufficient time to complete reasonable discovery. Therefore, the WCJ should not have set this case for trial.

We also note that if Mr. Payan contracted Covid-19 during an "outbreak" and certain other conditions are met, Labor Code section 3212.88 provides that an employee's Covid-19 infection is presumed to have arisen out of and in the course of employment. Whether or not applicant is entitled to a presumption of compensability pursuant to Labor Code section 3212.88, cases involving infectious diseases often require more complex discovery. Now that the correct identity of the insurer has been ascertained, at the very least, applicant should be allowed a reasonable time to obtain a qualified medical evaluation.

Therefore, we will grant removal, rescind the June 22, 2021 Order, and return this matter to the trial level for the case to be set for regular status conferences until discovery is complete.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the decision of June 22, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the decision of June 22, 2021 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 12, 2021

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

**JERRY VILLEGAS PAYAN
LAW OFFICES OF BERNARDO DE LA TORRE
LLARENA MURDOCK LOPEZ & AZIZAD**

MWH/oo

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