WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MIRNA CABADA, *Applicant*

vs.

FAMILY RANCH, INC.; ARCH INSURANCE COMPANY, administered by SEDGWICK, *Defendants*

Adjudication Number: ADJ11417486
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL

Applicant seeks removal in response to the workers' compensation administrative law judge's (WCJ) November 3, 2021 Minutes of Hearing (MOH) and Order converting the matter to a mandatory settlement conference (MSC) and setting the matter for hearing (Order). Applicant contends that she will be significantly prejudiced and/or will suffer irreparable harm if the matter proceeds to an MSC rather than an Expedited Hearing and that the WCJ should have issued an order in response to a previous notice of intention (NIT) regarding medical treatment.

We did not receive an Answer from defendant. The WCJ issued a Report and Recommendation on the 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, affirm the Order, except that we will amend it to clarify how the parties should proceed, and return this matter to the WCJ for further proceedings.

FACTUAL BACKGROUND

On June 28, 2021, applicant filed a Declaration of Readiness to Proceed to Expedited Hearing (DOR). In the DOR, applicant contends she is entitled to receive medical treatment with

a provider outside of defendant's Medical Provider Network (MPN). A hearing was held on July 28, 2021. While it is unclear from the MOH what transpired at that hearing, the Expedited Hearing was continued to September 27, 2021.

At the September 27, 2021 hearing, the MOH state, in relevant part, "Defendant did not appear at 2:45 call time until 3:10 to resolve issue of [Primary Treating Physician]. [Notice of Intention] re: Order to allow applicant to treat outside of the MPN for denial of care to issue." The WCJ issued a Notice of Intent to Issue Award of Medical Treatment Outside Employer's Medical Provider Network (NIT) on September 28, 2021. The NIT states, in relevant part:

> NOTICE IS HEREBY GIVEN of intention to issue Order of Medical Treatment allowing applicant MIRNA CABADA to designate as her primary treating physician and obtain medical treatment, pursuant to Labor Code section 4600, outside of the Employer, FAMILY RANCH, INC.'s medical provider network.
>
> (September 28, 2021 NIT, p. 1)

On October 6, 2021, applicant filed a Declaration of Readiness to Proceed to Expedited Hearing. In her DOR, applicant contends that defendant failed to authorize medical treatment outside of its Medical Provider Network[1]. (DOR, p. 7) Defendant filed an objection to the DOR on various grounds.

The matter was set for Expedited Hearing on November 3, 2021 before a different WCJ. The MOH state, in relevant part:

> COMMENT/DISCUSSION/MOTION
>
> This matter is to be converted to a mandatory settlement conference. Prior to the next hearing the parties will forward copies of applicant's brain scans to Dr. Franc for his review and supplemental report as well as any other medical reports which may have not been sent to him yet. Parties will e-file printouts of defendant's medical provider network physicians within applicable radius of applicant's home and work at time of injury. Defendant will obtain confirmation through its medical access assistant as to which physicians within its medical provider network are available and willing to act as applicant's primary treating physician.

[1] Applicant also contends defendant violated the September 28, 2021 NIT.

ORDER(S)
This matter will be continued to a mandatory settlement conference before the undersigned.

(November 3, 2021 MOH, p. 2)

No evidence was admitted and no testimony was taken on the matter at the November 3, 2021 hearing. An MSC is set for February 28, 2022. Applicant seeks removal of the Order.

DISCUSSION

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 substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); *Cortez, supra*; *Kleemann, supra*.) Additionally, 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).) As discussed below, we conclude that the Order will not result in significant prejudice or irreparable harm, and that reconsideration will be an adequate remedy, and that therefore, we will affirm it, except that we will amend it as discussed herein.

WCAB Rule 10349 provides in relevant part that: "The Workers' Compensation Appeals Board may issue a notice of intention for any proper purpose …; [i]f an objection is filed within the time provided, the Workers' Compensation Appeals Board, in its discretion may … [i]ssue an order consistent with the notice of intention together with an opinion on decision; or … [s]et the matter for hearing." (Cal. Code Regs., tit. 8, § 10349.) Here, in the petition for removal, applicant contends that defendant failed to object to the NIT and that defendant should be bound by the NIT. However the WCJ did not issue an Order following the issuance of the NIT, and the NIT on its face is not self-executing. While we are sympathetic to applicant's frustration, there is no obligation for a WCJ to issue an order after an NIT, even if the other party fails to timely object. Therefore, the NIT that the WCJ issued is not binding on defendant as applicant contends. Unfortunately, as discussed below, due to the lack of a record, we are precluded from issuing an order as requested by applicant.

The statutory and regulatory duties of a WCJ include the issuance of a decision that complies with Labor Code section 5313.[2] An adequate and complete record is necessary to understand the basis for the WCJ's decision and the WCJ shall ". . . make and file findings upon all facts involved in the controversy[.]" (Lab. Code, § 5313; *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [2001 Cal.Wrk.Comp. LEXIS 4947] (Appeals Bd. en banc)[3] (*Hamilton*).) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at 475.) The purpose of this requirement is to enable "the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]" (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

The Appeals Board's record of proceedings is maintained in the adjudication file and consists of: the pleadings, minutes of hearing and summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits marked but not received in evidence, notices, petitions, briefs, findings, orders, decisions, and awards, and the arbitrator's file, if any. . . . Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings. (Cal. Code Regs., tit. 8, § 10544.)

Here, no documents or testimony were admitted into evidence. In the absence of an evidentiary record, we are unable to issue an order in response to the NIT as requested by applicant in the petition for removal.

Additionally, for the same reason, we are unable to evaluate the basis for the WCJ's orders under the section entitled "Comment/Discussion/Motion." However, since defendant did not object to the WCJ's orders, we will amend that section as follows:

COMMENT/DISCUSSION/MOTION

> This matter is to be converted to a mandatory settlement conference.
> Defendant agrees that prior to the next hearing it will: (1) forward copies of applicant's brain scans to Dr. Franc for his review and supplemental report as well as any other medical reports that may have not been sent to him yet; (2) e-file

[2] All statutory references not otherwise identified are to the Labor Code.

[3] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd*. (*Garcia*) (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].)

> printouts of defendant's medical provider network physicians within applicable radius of applicant's home and work at time of injury; and (3) obtain confirmation through its medical access assistant as to which physicians within its medical provider network are available and willing to act as applicant's primary treating physician.

Next, we turn to the issue of applicant's right to an expeditious hearing as a matter of due process. All parties in workers' compensation proceedings retain their fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd*. (2000) 82 Cal.App.4th 151, 157-158, [65 Cal.Comp.Cases 805].) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572,

> [The] commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law. (*Id.* at 577.)

The lack of a hearing prevents either party from exercising their right to call witnesses, cross-examine witnesses and/or introduce evidence in support of their positions or in rebuttal of the opposing parties' evidence. "The improper restriction on the right to present evidence in rebuttal is a deprivation of the constitutional guaranty of due process of law." (*Rucker, supra*, at 157 citing *Pence v. Industrial Acc. Com.* (1965) 63 Cal.2d 48, 50-51.) Here, we urge the parties to proceed expeditiously. Upon return, we recommend that the WCJ convert the mandatory settlement conference to an expedited hearing as sought by applicant, if scheduling allows, we further recommend that the hearing be moved to an earlier date.

Accordingly, we grant applicant's petition, rescind the November 3, 2021 Order, and return the matter to the WCJ for further proceedings consistent with this decision. Upon return to the WCJ, and we strongly suggest that the upcoming February 28, 2022 hearing be converted to an expedited hearing. While we understand the District Office's constraints with scheduling matters due to the current volume of matters set for hearing, we urge the WCJ to set this hearing for a sooner date if possible given the serious nature of the issue of medical treatment.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal of the November 3, 2021 Order converting the hearing to an MSC is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, the November 3, 2021 Order converting the hearing to an MSC is **AFFIRMED** except that it is **AMENDED** as follows:

COMMENT/DISCUSSION/MOTION

This matter is to be converted to a mandatory settlement conference.
Defendant agrees that prior to the next hearing it will: (1) forward copies of applicant's brain scans to Dr. Franc for his review and supplemental report as well as any other medical reports that may have not been sent to him yet; (2) e-file printouts of defendant's medical provider network physicians within applicable radius of applicant's home and work at time of injury; and (3) obtain confirmation through its medical access assistant as to which physicians within its medical provider network are available and willing to act as applicant's primary treating physician.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 26, 2022

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

MIRNA CABADA
LAW OFFICES OF FERNANDO E. VARGAS
GLENN L. SILVERII & ASSOCIATES

HAV/ara

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