

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

XOCHITL ABARCA, *Applicant*

vs.

**DEPARTMENT OF SOCIAL SERVICES/IHSS, legally uninsured,
adjusted by YORK RISK SERVICES GROUP, *Defendants***

**Adjudication Numbers: ADJ1586718; ADJ3616179
San Francisco District Office**

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

Defendant seeks removal in response to the order issued by the Workers' Compensation Administrative Law Judge (WCJ), dated November 3, 2022, closing discovery and setting the matter for trial.¹ Defendant contends it acted diligently in scheduling applicant's reevaluation with the defendant's vocational expert.

We have received an Answer from applicant. The WCJ filed a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Removal (Petition) and the contents of the report of the WCJ with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant the Petition for Removal, rescind the WCJ's order, and return this matter to the WCJ for further proceedings and decision.

BACKGROUND

On October 5, 2022, applicant filed a Declaration of Readiness to Proceed (DOR) to trial on issues including "rehabilitation/SJDB."

¹ Commissioners Lowe and Sweeney, who previously served on the panel hearing petitions filed in this case, no longer serve on the Appeals Board. Other panelists have been substituted in their place.

On November 2, 2022, defendant filed its Objection to Declaration of Readiness to Proceed, averring applicant's DOR was received October 11, 2022. (Objection to DOR, dated October 12, 2022, at 1:21.) Defendant further stated it had scheduled a vocational rehabilitation evaluation with its expert, noticed on October 7, 2022, and scheduled for November 17, 2022. (*Id.* at 1:24.)

The parties proceeded to Mandatory Settlement Conference on November 3, 2022, at which time the defendant objected to the matter proceeding to trial, asserting "the defendant...needs to have its own vocational rehabilitation expert to do an updated report to address new evaluator findings." (Pre-trial Conference Statement, dated November 3, 2022, at p. 4.) Noting that there was no timely objection to applicant's DOR, the WCJ set the matter for trial over defense objection and ordered the closure of discovery (Order). (*Id.* at p. 6.)

Defendant's Petition avers that present counsel was substituted in on June 10, 2022. (Petition, at 3:9.) Defense counsel contacted the defense vocational rehabilitation expert Emily Tincher on September 8, 2022, inquiring as to the disposition of the previously scheduled vocational evaluation of applicant on August 24, 2022. Upon learning the reevaluation did not take place, defense counsel rescheduled the reevaluation for November 17, 2022, and provided notice to applicant of the appointment by letter dated October 7, 2022. (*Id.* at 3:16.)

Defendant's Petition further avers that while applicant's DOR was dated October 5, 2022, it was not received by defendant until October 11, 2022, and that defense counsel prepared a prompt objection that, due to clerical error, was not filed until November 2, 2022. Defendant contends its dilatory objection was the result of inadvertence, and that the order setting the matter for trial and closing discovery deprives defendant of its due process rights. (*Id.* at 4:17.)

Applicant's Answer, dated November 23, 2022, contends the reevaluation of applicant by defense expert Ms. Tincher was previously scheduled to occur on April 25, 2022, but was cancelled by defendant without explanation. (Answer, at 2:10.) Applicant obtained a supplemental report dated August 17, 2022 from her own vocational expert Jeff Malmuth and promptly served the report on defendant. Applicant received another supplemental report from Mr. Malmuth, dated September 14, 2022, and again served the report on defendant. (*Id.* at 3:9.) Applicant contends the closure of discovery was appropriate because defendant "failed to conduct any vocational discovery for over three months since coming aboard," and because defendant failed to timely file an objection to applicant's DOR. (*Id.* at 4:3, 4:21.)

The WCJ's Report observes that defendant's Objection to applicant's DOR was untimely, and that defendant failed to act with alacrity in scheduling its own vocational expert reevaluation, waiting two months after the unsuccessful August 24, 2022 reevaluation date to serve notice of a new appointment. (Report, at p. 4.) The WCJ observes that the defendant's notice of the rescheduled defense vocational expert reevaluation was only transmitted following the filing of applicant's DOR. The Report also points out that defendant has not established why a reevaluation by their expert is necessary. (*Ibid.*)

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 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).)

All parties to a workers' compensation proceeding retain the 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].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].) "[I]f the denial of due process prevents a party from having a fair hearing, the denial of due process is reversible per se." (*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789, 806 [59 Cal.Comp.Cases 461].)

Defendant contends that it will be denied due process if it is denied the opportunity to obtain supplemental vocational reporting regarding applicant's current condition and to respond to the new reporting of applicant's vocational expert. (Petition, at 5:1.)

We observe that following the most recent reporting issued by Qualified Medical Evaluator (QME) Dr. Fujinaka on May 24, 2022, applicant solicited additional reporting from her vocational rehabilitation expert Mr. Malmuth, who authored two reports dated August 17, 2022 and September 14, 2022. Following service of this last vocational expert report, applicant waited 21 days before filing her DOR requesting MSC. (Answer, at 3:9).

Defendant provided notice to applicant on October 7, 2022 that it had set a reevaluation date with the defense vocational expert for November 17, 2022. This notice was transmitted prior to defendant's receipt of applicant's DOR on October 11, 2022. (Petition, at 3:23.) Based on the above, we are persuaded that the defendant acted with reasonable diligence in scheduling its own vocational reporting on October 7, 2022, in response to the reports issued by applicant's vocational expert in August, 2022, and again in September, 2022.

We therefore conclude that the closure of discovery on November 3, 2022 substantially prejudiced defendant, as it precluded defendant from obtaining its previously scheduled expert vocational reporting despite reasonable diligence in scheduling and serving notice of the pending reevaluations. (Cal. Code Regs., tit. 8, § 10955(a).) Additionally, we do not believe that the substantial prejudice arising out of the closure of discovery can be remedied during trial proceedings, or by Petition for Reconsideration. (*Ibid.*)

We acknowledge the WCJ's concerns that defendant did not schedule the reevaluation with Ms. Tincher for more than five months after the final QME report from Dr. Fujinaka. (Report, at p. 5.) However, we believe the more salient metric by which to assess diligence starts with the supplemental reporting of applicant's vocational rehabilitation expert, who issued supplemental reporting on August 17, 2022 and again on September 14, 2022.

Accordingly, we will grant defendant's Petition, rescind the November 3, 2022 Order, and return this matter to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the Pre-trial Conference Statement Order of November 3, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Pre-trial Conference Statement Order of November 3, 2022 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 2, 2023

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

**XOCHITL ABARCA
LAW OFFICES OF JOHN C. SARMIENTO
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK**

SAR/abs

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