

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

ROSARIO MONTES, *Applicant*

vs.

**WESTSIDE CHILDREN'S CENTER; STATE COMPENSATION INSURANCE FUND;
EVEREST NATIONAL INSURANCE COMPANY, administered by GALLAGHER
BASSETT SERVICES, INC.; PACIFIC EMPLOYERS INSURANCE COMPANY/ACE
AMERICAN INSURANCE COMPANY, administered by ESIS, *Defendants***

**Adjudication Numbers: ADJ11018186; ADJ7088816;
ADJ7088813; ADJ7087589; ADJ7088796
Los Angeles District Office**

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

Defendant State Compensation Insurance Fund (SCIF) seeks removal¹ in response to the Order Vacating Submission issued on May 19, 2023 by the Workers' Compensation Administrative Law Judge (WCJ). Therein, the WCJ determined there to be good cause to strike the reports of Agreed Medical Evaluator (AME) Dr. Sanders, who is no longer available for further reporting. The WCJ further ordered the submission of the case vacated for development of the record.

SCIF contends it is irreparably harmed by the WCJ's order striking the reports of the AME because future medical-legal discovery will not include the contemporaneous observations and testing reflected in the AME's reports.

We have received a Response from co-defendant Pacific Employers Insurance/ACE American Insurance, administered by ESIS (Pacific/ACE). The WCJ has prepared a Report and

¹ Commissioner Sweeney, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

Recommendation on Petition for Removal (Report), recommending we amend the Order to reflect that the AME reports will remain in evidence.

We have considered the allegations of the Petition for Removal, the Response, 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 based upon the WCJ's analysis of the merits of petitioner's arguments in the WCJ's report, we will grant the Petition for Removal, amend the WCJ's decision as recommended in the report, and otherwise affirm the decision of May 19, 2023.

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 v. Workers' Comp. Appeals Bd.*, *supra*, 136 Cal.App.4th at p. 599, fn. 5; *Kleemann v. Workers' Comp. Appeals Bd.*, *supra*, 127 Cal.App.4th at p. 280, fn. 2.) 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).)

Here, applicant and SCIF have previously selected Alan Sanders, M.D., as the AME in orthopedic medicine. However, the parties agree that AME Dr. Sanders is no longer available for additional reporting or cross-examination. The WCJ's May 19, 2023 Order states that "[b]ased on good cause found to strike the AME reports of Dr. Alan Sanders, who is unavailable for further reporting or cross-examination, and such further reporting is necessary for a complete record and in the interests of due process, SUBMISSION OF THE CASE IS HEREBY VACATED for purposes of development of the record." (Order Vacating Submission, dated May 19, 2023.)

SCIF contends that the reporting of the AME should remain in evidence, because "the AME report will not be coming in to guide and let the new doctors know what happened to this applicant from 2010 to 2017 critical years in which contemporaneous exams, diagnostics and review of records were performed by the AME." (Petition for Removal (Petition), dated June 9, 2023, at p. 5:25.)

Pacific/ACE's Response avers SCIF has not established significant prejudice, and "[i]f ... SCIF has destroyed records in an actively litigated case after seven years, it is not incumbent upon any party or the WCAB to remedy their negligence." (Response, at p. 2:7.)

The WCJ's Report notes that Pacific/ACE was joined some ten years following the last date of claimed injury, and that the unavailability of the AME for cross-examination informed the WCJ's determination that, "[g]iven the totality of the circumstances, the length of time for discovery was inadequate to constitute due process. Pacific Employers should be granted the right to complete their discovery with a QME or AME." (Report, at p. 8.) With respect to whether the reporting of the AME should be stricken from the evidentiary record, the WCJ states, "upon due consideration, the undersigned has no objection to an Order to reopen discovery for the parties to obtain an AME or PQME in orthopedics, without striking the reports and cross-examination of Dr. Sanders, who may offer useful history and context to the new examining physician." (*Id.* at p. 9.)

We agree. The weight accorded the evidence, including the weighing of medical-legal reporting in evidence, is a matter to be determined by the WCJ and by the Appeals Board. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *Lundberg v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 436, 440 [33 Cal.Comp.Cases 656].) All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. (Lab. Code, § 3202.5.)

However, even in instances where a WCJ determines that a report has limited or no evidentiary weight with respect to the medical-legal conclusions reached by the evaluating physician, or because of other procedural or substantive deficiencies including the unavailability of the evaluating physician to submit to cross-examination, the report may nonetheless contain information relevant to the determination of issues necessary to the adjudication of the claim. Examples of relevant information may include a record of presenting symptoms, medical histories, a review of medical records that later become lost or otherwise unavailable, records of diagnostic testing, and clinical observations. (See, e.g., *Cervantes v. Pac. Am. Fish Co.* (2021) (April 12, 2021, ADJ8204680) [2021 Cal. Wkr. Comp. P.D. LEXIS 93] [absent evidence of ex parte communication or other statutory requirement for exclusion, no basis to find reports inadmissible].)

Allowing procedurally or substantively deficient medical-legal reporting to remain in evidence while assigning it the appropriate evidentiary weight is consonant with well-established principles favoring the broad admissibility of evidence in workers' compensation proceedings. "The Appeals Board is accorded generous flexibility by sections 5708 and 5709 to achieve

substantial justice with relaxed rules of procedure and evidence.” (*Barr v. Workers’ Comp. Appeals Bd.* (2008) 164 Cal.App.4th 173, 178 [73 Cal.Comp.Cases 763].) Similarly, the Appeals Board is broadly authorized to consider “[r]eports of attending or examining physicians.” (§ 5703, subd. (a); *Valdez v. Workers’ Comp. Appeals Bd.* (2013) 57 Cal. 4th 1231, 1239 [78 Cal. Comp. Cases 1209] (*Valdez*).) Section 4064(d) provides the no party is prohibited from obtaining *any* medical evaluation or consultation at the party’s own expense, and that *all* comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board except as provided in specified statutes. (Lab. Code, § 4064(d); *Valdez, supra*, at p. 1239.) Section 4062.3(a) further provides that any party may provide to the QME, subject to the restrictions set forth in the statute, any records prepared or maintained by the employee’s treating physician or physicians and medical and nonmedical records relevant to determination of the medical issue. (Lab. Code, § 4062.3(a).) Taken together, these case law and statutory prescriptions underscore the importance of allowing the full consideration of the entire evidentiary record, in furtherance of the substantial justice required in workers’ compensation proceedings. Accordingly, even in those instances where an evaluating physician is no longer available, or the physician’s reporting does not meet minimum standards, it should generally remain in evidence and be accorded its appropriate evidentiary weight. (See also Cal. Code Regs., tit. 8, § 10682(c).)

Following a WCJ’s determination that a physician is no longer available, the WCJ retains the discretionary authority to develop the record. In those instances where additional development of the record is required, “the selection of an agreed medical evaluator (AME) by the parties should be considered at this stage in the proceedings.” (*McDuffie v. L.A. County Metro. Transit Auth.* (2002), 67 Cal.Comp.Cases 138, 142 [2002 Cal. Wrk. Comp. LEXIS 1218] (*McDuffie*).) If the parties are unable to agree on an AME, the WCJ retains the authority pursuant to sections 5906 and 5701 to appoint a regular physician. (Lab. Code, §§ 5701, 5906; *Tyler, supra*, 56 Cal.App.4th 389; see also *McDuffie, supra*, at p. 142; *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

Accordingly, we will amend the May 19, 2023 Order Vacating Submission to reflect that the reporting of Alan Sanders, M.D., will remain in evidence, but will otherwise affirm the Order. Upon return of this matter to the trial level, we recommend the WCJ set the matter for status conference pursuant to the protocols set forth in *McDuffie, supra*, 67 Cal.Comp.Cases at p. 142.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the decision of June 9, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the decision of June 9, 2023 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

IT APPEARING that Agreed Medical Evaluator Alan Sanders, M.D., is no longer available for further reporting or cross-examination, and GOOD CAUSE APPEARING:

SUBMISSION OF THE CASE IS HEREBY VACATED for purposes of development of the record. The parties are ordered to meet and confer prior to a status conference, to be set on notice, regarding possible agreement to an Agreed Medical Examiner, or, in the alternative, the appointment of a regular physician pursuant to Labor Code section 5701. The reports of Dr. Sanders remain in evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 11, 2024

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

SAR/abs

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

SERVICE LIST

**ROSARIO MONTES
LAW OFFICE OF MOISES VAZQUEZ
LAW OFFICES OF BRADFORD & BARTHEL
GOLDMAN, MAGDALIN & KRIKES
STATE COMPENSATION INSURANCE FUND**