

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

**RUSSELL BECKERS, *Applicant***

**vs.**

**NEDERLANDER THEATRICAL CORP.; VIGILANT INSURANCE COMPANY,  
administered by CHUBB, *Defendants***

**Adjudication Number: ADJ10925934  
Van Nuys District Office**

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

Defendant Vigilant Insurance Company, workers' compensation insurance carrier for Nederlander Theatrical Corp.<sup>1</sup>, administered by Chubb, seeks removal of the Orders issued on April 24, 2023 by a workers' compensation administrative law judge (WCJ). Defendant contends that the Order striking panel #1570067 and the reports of Dr. Darakjian, and the Order appointing Stephen Silbart, M.D., as a regular physician pursuant to Labor Code section 5701, will result in substantial prejudice and irreparable harm.

We did not receive an answer from applicant. We received a Report and Recommendation (Report) from the WCJ, which recommends that the Petition for Removal be denied.

We have considered the allegations of the Petition for Removal and the contents of the Report. Based on our review of the record, and as discussed below, we will grant the Petition for Removal, rescind the Order striking panel #15700067 and the reports of Dr. Darakjian, and the Order appointing Steven Silbart, M.D., as a regular physician, and return this matter to the trial level for further proceedings consistent with this opinion.

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<sup>1</sup> While Nederlander West Coast is listed as the defendant's legal name on the Minutes of Hearing and Summary of Evidence dated September 28, 2022, the notice of representation by defendant's counsel filed on September 18, 2016 list the defendant as Nederlander Theatrical Corp. Further, the amended application filed March 2, 2020 lists defendant as Nederlander Theatrical Group. This should be clarified.

## **BACKGROUND**

Applicant, in pro per, while by employed by defendant on September 3, 2012, sustained industrial injuries to his lumbar spine, and claims to have sustained injury arising out of and in the course of employment to his thoracic spine and teeth.

This case was initially set for trial on May 4, 2020. Due to a number of continuances, as well as withdrawal by applicant's legal counsel, trial commenced on September 28, 2022. Stipulations and issues were read into the record, and the matter was continued in order to review the exhibits with the parties at the next hearing. No evidence was identified, submitted or admitted. The issue of whether the reporting by Dr. Darakjian was invalid was not raised by any party.

Thereafter, on April 24, 2023, the WCJ, issued the following statement of facts and orders on an attachment to the minutes:

**COMMENT/DISCUSSION/MOTION** The court has discussed the issues at length with the parties. The parties have stipulated the following facts:

1. While applicant was unrepresented panel # 153117 issued. The physicians included on the panel were Dr. Mac Arthur, Dr. Darakjian, and Dr. Chung.
2. Applicant struck Dr. Darakjian and Dr. Chung, and an appointment was made for applicant to be evaluated by Dr. Mac Arthur.
3. The parties were then notified that Dr. MacArthur was unavailable and a replacement panel issued under panel #1570067. The replacement panel included Dr. Darakjian who had been struck from the first panel.
4. Applicant was evaluated by Dr. Darakjian but now objects to his reporting contending that he was selected from an invalid panel.

Admitted into evidence without objection are:

Joint Exhibit Y1	panel # 153117 dated August 2, 2013 with handwritten strikes
Joint Exhibit Y2	QME appointment notification form for October 4, 2013 appointment
Joint Exhibit Y3	panel #1570067 dated November 5, 2013

### **ORDER(S)**

It is ordered that panel #1570067 be stricken and that the reports of Dr. Darakjian be stricken based on his having been selected from an invalid panel.

It is further ordered that Stephen Silbart M.D. be appointed as a regular physician pursuant to Labor code section 5701, with defendant to schedule the evaluation. Defendant is to provide Dr. Silbart with a complete copy of their medical file, excluding the stricken reports of Dr. Darakjian. Any additional information to be provided to, or communication with Dr. Silbart shall be subject to the rules applicable to agreed medical evaluators as set forth in section 4062.3.

Defendant thereafter filed a Petition for Removal alleging that while reviewing the exhibits proposed by applicant at the trial of April 24, 2023, the issue of the validity of replacement panel #1570067, and the reporting of Dr. Darakjian, was unilaterally raised by the WCJ.

Defendant contends that in the last ten years, Dr. Darakjian issued about nine reports from 2014 to 2019, and that applicant and/or his prior legal counsel never objected to Dr. Darakjian on any basis, including on panel validity.<sup>2</sup>

Further, defendant asserts that their due process rights were violated when the WCJ issued Orders regarding panel #1570067 and qualified medical evaluator (QME) Dr. Darakjian and the appointment of a regular physician, since the parties did not raise that as an issue for trial.

### **DISCUSSION**

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd. (Cortez)* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd. (Kleemann)* (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); 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).

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].) A fair hearing is "one of 'the rudiments of fair play' assured to every litigant..." (*Id.* at p. 158.) As stated by the Supreme Court of California 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 p. 577.) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

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<sup>2</sup> Panel #1570067 issued on November 5, 2013 (Jt. Exh. Y3).

In his Report, when addressing one of the arguments made by defendant in the Petition, the WCJ states as follows:

Defendant goes on to argue that “applicant selected Hrair Darakjian, M.D. from the replacement Panel.” (Defendants Petition for Removal, page 4, lines 16-17). However, there is no evidence in the record that applicant selected Dr. Darakjian.

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ’s decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) “It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence.” (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 475.) The WCJ’s decision must “set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on,” so that “the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record.” (*Id.* at p. 476 (citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350])).

Here, it appears that the WCJ raised the issue of the validity of Dr. Darakjian’s reporting *sua sponte* at the trial of April 24, 2023. While there may be merit in the WCJ’s ultimate finding that the record requires further development, such a finding requires a record and the opportunity to be heard, in order for there to be a meaningful right of appeal and to comport with due process. Instead, it appears that the WCJ based his decision solely on a review of the proposed evidence at trial and did not provide an opportunity for the parties to present evidence and create a record on the newly raised issue by the WCJ. Thus, the Order to strike panel #1570067 and the medical reporting of Dr. Darakjian, and the Order appointing a regular physician, without creating a record and without notice to the parties, resulted in substantial prejudice and irreparable harm to defendant.

Accordingly, we grant defendant’s Petition for Removal, rescind the April 24, 2023 Orders, and return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Removal in response to the Orders issued on April 24, 2023 by the WCJ is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Removal of the Workers' Compensation Appeals Board that the Orders of April 24, 2023 are **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**March 4, 2024**

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

**RUSSELL BECKERS  
PEARLMAN, BROWN & WAX, LLP**

**LAS/ara**

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