

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

GRACIELA RIZO, *Applicant*

vs.

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES / IN HOME SUPPORTIVE SERVICES, Legally Uninsured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.; MOLINA INVESTMENT, INC., YORK RISK SERVICES, INC., A SEDGWICK COMPANY, *Defendants*

**Adjudication Number: ADJ11508555
Van Nuys District Office**

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

Defendant¹ seeks removal in response to the workers' compensation administrative law judge's (WCJ) June 29, 2021 Order Denying Petition for Joinder of Party Defendant Uninsured Employers Benefits Trust Fund (Order). Defendant contends it will be significantly prejudiced and/or will suffer irreparable harm if the Uninsured Employers Benefits Trust Fund (UEBTF) is not joined as a party defendant to the case. No answer was filed by any party in response to defendant's petition. 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. Defendant filed a request for supplemental pleading, which we grant. (Cal. Code Regs., tit. 8, § 10964.) 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 WCJ for further proceedings.

¹ Unless otherwise specified, "defendant" refers to defendant California Department of Social Services / In Home Supportive Services.

FACTUAL BACKGROUND

On June 28, 2021, defendant filed a Petition for Joinder seeking to join the UEBTF as a party defendant. On June 29, 2021, the WCJ issued an Order Denying Petition for Joinder of Party Defendant Uninsured Employers Benefits Trust Fund on the grounds that defendant “can only seek reimbursement directly from the uninsured defendant and not from the Uninsured Employers Benefits Trust Fund” because defendant had previously resolved the case-in-chief by compromise and release. (Order). There was no hearing held to address the Petition for Joinder or Order, and thus no evidence was admitted on the record. Defendant 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).)

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

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].)

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 evaluate the basis for the WCJ’s Order. Therefore, we must return this matter to the trial level for further proceedings.

Next, we turn to the issue of whether the WCJ violated the applicant’s right to due process by issuing the Order without a hearing. 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.)

Due process guarantees all parties the right to notice of hearing and a fair hearing. (*Rucker, supra*, at 157-158.) 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]; *Rucker, supra*, at 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

The lack of a hearing prevented 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.) Therefore, the WCJ denied both parties their fundamental right to due process with respect to the Petition for Joinder of Party Defendant Uninsured Employers Benefits Trust Fund, and we must rescind the Order and return the matter to the WCJ on due process grounds as well.

The WCAB Rules provide 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, the WCJ did not issue a Notice of Intention, but rather issued the Order with no hearing. Had the WCJ issued a Notice of Intention, the aggrieved party could have objected and requested a hearing. If no party objected, then the Order would become final.

Accordingly, we grant defendant’s Petition, rescind the June 29, 2021 Order, and return the matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that defendant’s Petition for Removal of the June 29, 2021 Order Denying Petition for Joinder of Party Defendant Uninsured Employers Benefits Trust Fund is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, the June 29, 2021 Order Denying Petition for Joinder of Party Defendant Uninsured Employers Benefits Trust Fund is **RESCINDED** and the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 21, 2021

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

**GRACIELA RIZO
LAW OFFICES OF ANTONY E. GLUCK
OFFICE OF THE DIRECTOR, LEGAL UNIT
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP
ALEJO MOLINA
EMPLOYMENT DEVELOPMENT DEPT.
FMR INTERVENTIONAL QUALITY
IHSS
JOYCE ALTMAN INTERPRETERS
SEDGWICK
STATE OF CA IHSS
TPC RECOVERY
WORK COMP RESOLUTIONS**

HAV/ara

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