

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

DONALD TOOMER, *Applicant*

vs.

OAKLAND UNIFIED SCHOOL DISTRICT, permissibly self-insured; NATIONAL FOOTBALL LEAGUE; STONINGTON INSURANCE; SAN FRANCISCO UNIFIED SCHOOL DISTRICT, permissibly self-insured, *Defendants*

**Adjudication Numbers: ADJ11401401, ADJ12385898
Santa Ana District Office**

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

Defendant Oakland Unified School District (OUSD) seeks removal of the Minute Order (Order) issued by the workers' compensation administrative law judge (WCJ) on May 4, 2021. By the Order, the WCJ ordered the parties to obtain a report from the panel qualified medical evaluator (QME), Dr. Martha Singer, addressing the newest Kaiser records. Discovery was otherwise ordered to remain closed.¹

Defendant contends that applicant violated a prior order closing discovery by obtaining additional Kaiser records. Defendant further contends that it will be irreparably harmed by the cost to have the QME review these records and that applicant improperly served these records to the QME without first serving defendant in violation of Labor Code² section 4062.3(b). (Lab. Code, § 4062.3(b).)

We received an answer from applicant. The WCJ issued a Joint Report and Recommendation on Petition for Removal (Report) recommending that we deny the Petition.³

We have considered the allegations of defendant's Petition for Removal, applicant's

¹ The WCJ also dismissed without prejudice co-defendant San Francisco Unified School District (SFUSD) in the Order, noting there was no objection by the parties to SFUSD's dismissal. This order was not challenged by OUSD in its Petition.

² All further statutory references are to the Labor Code unless otherwise stated.

³ The Report inadvertently refers in its recommendation to "applicant's Petition for Removal," although defendant OUSD filed the Petition. (Report, May 25, 2021, p. 5.)

answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant removal, rescind the Order to obtain a report from the QME and return this matter to the trial level for further proceedings consistent with this opinion. The Order dismissing SFUSD will be retained.

FACTUAL BACKGROUND

Applicant has filed two Applications for Adjudication of Claim: 1) to multiple body parts through August 1, 2017 while employed as a professional clock operator by the National Football League (ADJ11401401); and 2) to multiple body parts through September 24, 2020 while employed as a relief teacher/principal/teacher by OUSD and SFUSD (ADJ12385898).

The matter proceeded to a mandatory settlement conference on February 25, 2021 at which time discovery was closed and the matter set for trial. (Supplement to Minutes of Hearing, February 25, 2021, p. 2.) The trial was scheduled for May 4, 2021.

On May 4, 2021, the matter was ordered continued to a mandatory settlement conference scheduled for June 10, 2021. The Minute Order from the hearing states as follows:

Pursuant to Petition for Dismissal by Party Defendant SFUSD and there being no objections by parties, SFUSD is DISMISSED without prejudice from both cases. Remaining parties are ordered to obtain report from PQME Singer addressing newest Kaiser records. **Discovery otherwise remains closed. IT IS SO ORDERED.**

(Minutes of Hearing, May 4, 2021, emphasis in original.)

The Order also stated: "AA will serve Jorge Moreno with Kaiser records (again) by email." (*Id.*)

In his Report responding to defendant's Petition, the WCJ cites the discretionary authority of the Appeals Board to develop the record in support of his decision ordering the parties to obtain a supplemental report from the QME. (See Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].)

DISCUSSION

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).) Furthermore, decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.*

(1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) 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, former § 10566, now § 10787 (eff. Jan. 1, 2020).) "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*, at p. 475.)

In its Petition, defendant contends that after discovery was closed on February 25, 2021, applicant violated the order closing discovery by obtaining 4,000 pages of Kaiser records. Defendant also contends that applicant then improperly served these records to the QME Dr. Singer without first serving defendant per section 4062.3(b) and *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803 (Appeals Board en banc). The WCJ in his Report does not address these contentions and focuses on the need for a supplemental report from the QME addressing these records. Applicant in his answer states that he withdrew his initial request to Dr. Singer that she review these records.

Defendant's Petition makes contentions regarding applicant's conduct, to which applicant responds in his answer, but there is no evidence in the record yet regarding the dispute between the parties. We are unable to address whether the WCJ's decision is supported by substantial evidence in the absence of a record.

Upon return of this matter to the trial level, we recommend the trier of fact create a complete evidentiary record regarding this dispute and issue a new decision. Either party may then challenge that decision. We make no comment on the disputed issue between the parties and will defer determination of the dispute to the trier of fact in the first instance.

Co-defendant SFUSD was ordered dismissed without prejudice in the Minute Order with a notation that there was no objection by the parties to its dismissal. The Order dismissing SFUSD was not challenged and we will thus retain this Order in our decision.

Therefore, we will grant removal, rescind the Order to obtain a report from the QME and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Removal of the Minute Order issued by the WCJ on May 4, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Minute Order issued by the WCJ on May 4, 2021 is **RESCINDED** and **SUBSTITUTED** with the following:

Pursuant to Petition for Dismissal by Party Defendant SFUSD and there being no objections by parties, SFUSD is **DISMISSED** without prejudice from both cases. **IT IS SO ORDERED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 1, 2021

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

**DONALD TOOMER
GLENN STUCKEY LLP
LAUGHLIN FALBO LEVY & MORESI
SHAW JACOBMEYER CRAIN & CLAFFEY
STOCKWELL HARRIS**

AI/pc

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