

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

KELLY EVANS COOKE, *Applicant*

vs.

**DIGNITY HEALTH dba MERCY GENERAL HOSPITAL;
third party administrator SEDGWICK, *Defendants***

**Adjudication Number: ADJ11109952
Sacramento District Office**

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

Applicant seeks removal in response to the Order denying her Petition for a new qualified medical examiner (QME) Panel issued by the workers' compensation administrative law judge (WCJ) on April 19, 2021.

Applicant contends that she is entitled to a new QME and that the WCJ should have ordered a new QME panel under the provisions of Labor Code section 4067.

We did not receive a report or recommendation from the WCJ regarding the Petition as the WCJ has retired. We received an answer from defendant.

We have considered the allegations in the Petition and the answer. Based on our review of the record, and for the reasons discussed below, we will rescind the April 19, 2021 Order and return the matter to the trial level for further proceedings and decision.

BACKGROUND

Applicant filed an application for adjudication on November 29, 2017, claiming injury to her arm on August 11, 2017, while employed by defendant as a nurse. On March 11, 2019,

applicant amended her application to include her left elbow. The parties entered into stipulations and an award and order approving the stipulations issued on August 29, 2019.

On December 3, 2020, applicant filed a Petition to Reopen.

On March 24, 2021, applicant filed a Petition for a new QME panel alleging that, pursuant to Labor Code section 4067¹, applicant was entitled to a new panel.

On April 19, 2021, the WCJ issued the Order denying the Petition for a new QME panel without a hearing. Applicant filed a Petition for Removal on May 3, 2021.

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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); *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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).)

A WCJ is required to “make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.” (Lab. Code, §§ 5502, 5313; Cal. Code Regs., tit. 8, former § 10541, now § 10761 (eff. Jan. 1, 2020); see also *Blackledge v. Bank of America, ACE American Insurance Company (Blackledge)* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Bd. en banc)².)

¹ All statutory references not otherwise identified are to the Labor Code.

² En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, former § 10341, now § 10325(a) (eff. Jan. 1, 2020); *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].)

The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton, supra*, at p. 476.) 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 p. 475.) In *Hamilton*, we held that the record of proceeding must contain, at a minimum, "the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence." (*Ibid.*)

In the April 19, 2021 Order denying applicant's Petition for a new QME panel, the WCJ appears to discuss his reasoning. However, the Order issued without a hearing, no minutes were filed, no testimony was taken, and the WCJ does not provide a summary of the evidence relied on.

The object of the workers' compensation system is to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.) To that end, under section 5709, "[n]o informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule[.]" (Lab. Code, § 5709.) Here, the WCJ did not hold a hearing on applicant's allegations that she was entitled to a new QME panel, and did not address the application of section 4067.

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].) A fair hearing is ". . . one of 'the rudiments of fair play' assured to every litigant . . ." (*Id.*, at p. 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 pp. 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 “essence of due process is simply notice and the opportunity to be heard.” (*San Bernardino Cmty. Hosp. v. Workers’ Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 936 [88 Cal.Rptr.2d 516].) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties’ rights to due process. (*Gangwish, supra*, at p. 1295, citing *Rucker, supra*, at pp. 157-158.)

Due process requires “a ‘hearing appropriate to the nature of the case.’” (*In re James Q.* (2000) 81 Cal.App.4th 255, 265, quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313.) Although due process is “a flexible concept which depends upon the circumstances and a balancing of various factors,” it generally requires the right to present relevant evidence. (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817.) When applicant filed her March 24, 2021 petition for a new QME panel, the WCJ should have issued a notice of intention or set the matter for hearing, pursuant to WCAB Rule 10832, created a record, and then issued a decision. (Lab. Code, § 5313; Cal. Code Regs., tit. 8, former § 10450, now § 10510 (eff. Jan. 1, 2020); Cal. Code Regs., tit. 8, former § 10544, now § 10750 (eff. Jan. 1, 2020); Cal. Code Regs., tit. 8, § 10758 (eff. Jan. 1, 2020); Cal. Code Regs., tit. 8, § 10832 (eff. Jan. 1, 2020).)

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, former § 10750, now § 10803 (eff. Jan. 1, 2020).) Here, the adjudication file in EAMS does not contain a minutes of hearing and summary of evidence as to either of applicant’s petitions, there are no stipulations and/or issues identified, and there is no evidence admitted into the record with respect to either petition. In the absence of an evidentiary record, we are unable to evaluate the basis of the WCJ’s April 19, 2021 Order denying applicant’s Petition for a new QME panel. Therefore, we must return this matter to the trial level for further proceedings consistent with this order.

Accordingly, we grant applicant’s Petition for Removal, rescind the April 19, 2021 Order, and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal in response to the Order issued on April 19, 2021 by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the decision of April 19, 2021 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 2, 2021

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

**KELLY EVANS COOKE
LAW OFFICE OF FLUSS & WILLIAMS
KAESER HULL**

JB/abs

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