

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

MICHAEL GARCIA, *Applicant*

vs.

**SOUTHERN CALIFORNIA EDISON, permissibly self-insured, and self-administered,
*Defendant***

**Adjudication Numbers: ADJ10738865, ADJ13719149
Oxnard District Office**

OPINION AND ORDER DENYING PETITION FOR REMOVAL

Applicant seeks removal of the Minute Order of December 5, 2022, wherein the WCJ set trial for January 4, 2023, allowing defendant to present the testimony of Carol Wood.¹

Applicant contends that because defendant did not disclose Ms. Wood as a witness before the July 2, 2019 trial herein, and because Labor Code section 5502(d)(3) bars the admission of evidence not disclosed at the MSC, the Minute Order will cause him substantial prejudice or irreparable harm.²

We received an Answer from defendant.

The WCJ filed a Report and Recommendation on the Petition for Removal (Report) recommending that it be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will deny the Petition.

BACKGROUND

On July 2, 2019, the matter proceeded to trial on the issue of whether defendant violated section 132a. (Minutes of Hearing and Summary of Evidence, July 2, 2019, p. 2:10.)

The parties stipulated that, while employed during the period of November 14, 1983 through December 9, 2014 by defendant as a lineman, applicant sustained injury arising out of and

¹ Commissioner Lowe, who previously served on the panel hearing petitions filed in this case, no longer serves on the Appeals Board. Commissioner Capurro has been substituted in her place.

² Unless otherwise stated, all further statutory references are to the Labor Code.

in the course of employment pursuant to a February 19, 2019 Stipulated Findings and Award. (*Id.*, p. 2:6-9.)

On August 6, 2019, the WCJ found that applicant failed to prove that defendant discriminated against him in violation of section 132a and ordered that he take nothing on his claim. (Findings of Fact and Award, August 6, 2019.)

On August 13, 2019, applicant sought reconsideration, alleging that the evidence demonstrated that defendant subjected him to disadvantages not visited upon other employees because they were injured by failing to engage in the interactive process, failing to offer him modified work, and terminating his employment.

On August 26, 2019, the WCJ issued a report recommending that reconsideration be granted, stating:

Applicant did suffer a loss of benefit as a result of his industrial injury and is entitled to an increase in benefits, reinstatement and back wages.
(Report and Recommendation on Applicant's Petition for Reconsideration, August 26, 2019, p. 4.)

On January 21, 2022, we rescinded the finding that applicant failed to prove his section 132a claim on the following grounds:

[W]e are unable to ascertain the reasons or grounds upon which the WCJ determined in the Report that applicant presented evidence sufficient to prove his prima facie claim. We note, moreover, that a record of the grounds for such a decision is necessary not only for our review, but for defendant to present its business necessities defense, as appropriate. We therefore conclude that the WCJ should develop the record on the issue of whether and on what grounds applicant has established a prima facie case that defendant discriminated against him in violation of section 132a, and other issues such as whether the business necessities defense applies or constitutes a mere pretext for adverse treatment, as appropriate.
(Opinion and Decision After Reconsideration, January 21, 2022, p. 12.)

On May 25, 2022, the matter proceeded to hearing "following a remand from the WCAB on as 132(a) petition wherein the WCAB gave specific instruction to the WCJ with regards to the Decision." (Minutes of Hearing, May 25, 2022, p. 2:7-8.) The parties presented no exhibits or witnesses at the hearing, and the matter was deemed to stand submitted upon submission of legal briefs. (*Id.*, pp. 1-2.)

On October 5, 2022, the WCJ found that applicant established his section 132a claim and issued an award of \$10,000.00 and reinstatement. (Findings of Fact and Award, October 5, 2022.)

On October 24, 2022, defendant sought reconsideration, alleging the WCJ failed to develop the record as required by the Appeals Board and that as of June 2022 it had apprised the court that it sought to present Ms. Wood’s testimony in support of its business necessities defense. (Petition for Reconsideration, October 24, 2022, pp. 1-14.)

On November 7, 2022, the WCJ ordered that the “Order submitting the matter for decision is vacated and the matter will be reset for an MSC for defendant to provide with specificity exactly what discovery they wish to pursue.” (Order Vacating Submission and Setting the Matter for MSC, November 7, 2022.)

On December 5, 2022, the matter proceeded to an MSC, where defendant requested that it present Ms. Wood as a witness and the WCJ set trial for January 4, 2023. (Minutes of Hearing, December 5, 2022.)

In the Report, the WCJ states:

Applicant filed a L.C. §132(a) claim following his termination of employment. The matter proceeded to trial and following a decision being issued finding no L.C. §132(a) violation.

Applicant filed a petition for reconsideration which was granted by the WCAB and remanded the matter back to the WCJ for further proceedings.

The matter was re-submitted without any additional testimony or evidentiary records being submitted to the WCJ.

Following a decision finding a L.C. §132(a) violation, defendant filed a petition for reconsideration they had a witness to present on the issues.

Based on defendant’s petition, an MSC was held, and the matter was reset for trial to allow defendant to present their witness.

...

At the MSC, Defendant stated he wants to present a witness specifically on the good faith business necessity defense and to more fully explain the process that occurred in this situation.

The WCAB said the WCJ should allow exactly this type of testimony. Applicant has failed to demonstrate any irreparable harm or substantial prejudice that would ensure to me as a result of the witness being allowed to testify. (Report, pp. 2-3.)

DISCUSSION

Removal may be requested to challenge interim and non-final orders issued by a WCJ. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [38 Cal. Rptr. 3d 922, 71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleeman v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) Removal is discretionary and is generally employed only as an extraordinary remedy upon a showing of substantial prejudice or irreparable harm and a showing that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [38 Cal. Rptr. 3d 922, 71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 272, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].)

In this regard, applicant contends that because defendant did not disclose Ms. Wood as a witness before the July 2, 2019 trial herein, and because section 5502(d)(3) bars the admission of evidence not disclosed at the MSC unless it was unavailable or could not have been discovered through due diligence beforehand, the Minute Order will cause him substantial prejudice or irreparable harm.

Here, the record shows that after the July 2, 2019 trial herein, the WCJ found that applicant failed to prove that defendant discriminated against him in violation of section 132a and ordered that he take nothing. (Findings of Fact and Award, August 6, 2019.) After applicant sought reconsideration, we rescinded the finding and ordered that the WCJ “develop the record on the issue of whether and on what grounds applicant has established a prima facie case that defendant discriminated against him in violation of section 132a, and other issues such as whether the business necessities defense applies or constitutes a mere pretext for adverse treatment, as appropriate.” (Opinion and Decision After Reconsideration, January 21, 2022, p. 12.)

However, the WCJ did not develop the record as required by our January 21, 2022 decision; and, instead, issued a new finding based on the evidence previously presented. (Minutes of Hearing, May 25, 2022, pp. 1-2.) After defendant sought reconsideration on the grounds that the WCJ had failed to develop the record and disregarded its request to present Ms. Wood’s testimony on the business necessities defense, the WCJ vacated the new finding and ordered the parties to appear at a MSC. (Petition for Reconsideration, October 24, 2022, pp. 1-14; Order Vacating Submission and Setting the Matter for MSC, November 7, 2022; Report, p. 3.) At the MSC, defendant proposed to present Ms. Wood in support of its business necessities defense and the

WCJ set a date when defendant could present her testimony. (Minutes of Hearing, December 5, 2022; Report, p. 3.)

On this record, we are unable to ascertain how the Minute Order could cause applicant prejudice or irreparable harm. Rather, the Minute Order complies, if belatedly, with our decision requiring development of the record, a decision arising from applicant's own request for relief from the August 6, 2019 Findings of Fact and Award. Hence we conclude that the Petition is without support.

Accordingly, we will deny the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the Minute Order issued on December 5, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 16, 2023

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

**MICHAEL GARCIA
GHITTERMAN, GHITTERMAN & FELD
INGBER & WEINBERG**

SRO/cs

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