WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VICTOR SAMUEL XAMBA SOC, *Applicant*

vs.

KADAMI ENTERPRISES;
EMPLOYERS ASSURANCE CO. *Defendants*

Adjudication Numbers: ADJ12061993, ADJ12061994
Santa Rosa District Office

OPINION AND ORDER
DENYING PETITION
FOR REMOVAL

We have considered the allegations of the Petition for Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny removal.

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); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) Here, for the reasons stated in the WCJ's report,[1] we are not persuaded that substantial prejudice or irreparable harm will result if removal is

[1] In his Report prepared on August 18, 2022, the WCJ adopted and incorporated an earlier Report and Recommendation on Petition for Reconsideration/ Removal prepared on November 3, 2021 and served on November 30, 2021. The WCJ refers to the Report as the November 3, 2021 Report in the August 18, 2022 Report. We adopt and incorporate the November 30 Report and deem all references in the August 18, 2022 Report to the November 3, 2021 Report to be references to the November 30, 2021 Report.

denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 13, 2023

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

VICTOR SAMUEL XAMBA SOC
KENNETH D. MARTINSON, ESQ.
TOBIN LUCKS, LLP

MWH/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR REMOVAL

I

INTRODUCTION AND RELEVANT FACTS

The court held a proceeding in the form of a supervised deposition on October 11, 2021 at which the undersigned made rulings regarding the admissibility of various testimony and lines of questioning. These primarily dealt with applicant's objection to certain lines of questions under 5th amendment and various antidiscrimination statutes. The court made its rulings during the course of the deposition. (See Exhibit Jl). Petitions for Removal were filed by both applicant and defendant, with a Report and Recommendation issuing on November 3, 2021 setting forth the undersigned's reasoning as to each ruling.

The Board found that the Petitions were premature and noted that the deposition transcript was not admitted as an Exhibit. (Opinion and Order Dismissing Petitions for Removal dated February 15, 2022). Thereafter the court set the matter for trial and the deposition transcript was marked as Exhibit Jl. (See Minutes of Hearing and Order dated June 7, 2022). At the urging of the parties, the court designated the "rulings" on the discovery issues as "orders" because the parties felt that would make the rulings/orders removable. Applicant then filed the present Petition for Removal stating in essence that the rulings/orders were not made with enough specificity to enable a meaningful appeal.

II

DISCUSSION

First, the court frankly does not understand the distinction being made between "rulings" and "orders." The defendant sought to have certain questions answered during the course of the deposition, the applicant objected to those questions and stated the basis for its objection, and the court made a ruling on the spot giving its opinion as to whether the objection was well founded or not. In cases where the ruling was that the objection was not well founded the applicant's attorney

did not allow an answer to the question in accordance with the court's decision but rather prevented his client from answering the question pending an appeal of the court's decision.

The court discussed the merits of the objections and the reasons for its rulings in its Report and Recommendation on Petition for Removal dated November 3, 2021. That discussion is incorporated by reference herein.

The applicant appears to argue that there needed to be discussion regarding the conversion of the "rulings" to "orders," but this alleged conversion is not, in the courts view, a meaningful legal distinction. In each case, the court heard a question, heard an objection and made a decision on whether the question should be allowed. Moreover, the court outlined its reasoning previously in the November 3, 2021 Report and Recommendation, which the parties were aware of. The most recent trial was essentially just for the purpose of completing the record by admission of the deposition transcript.

The arguments regarding the merits of the rulings/orders remains as set forth previously and the court is at a loss as to why the merits of the rulings were not addressed in the present Petition for Removal. The argument that the conversion of rulings to orders were inadequately supported is, in the undersigned's view, meritless.

III

RECOMMENDATION

The recommendation of the court remains as set forth in the November 3, 2021 Report and Recommendation.

08/19/2022

JASON E. SCHAUMBERG
Workers' Compensation Judge

REPORT AND RECOMMENDATION ON PETITION FOR REMOVAL

I

INTRODUCTION

This case came to a hearing before the undersigned due to objections to questions proposed by the defendant in the course of applicant's deposition, The court made rulings on those deposition questions, and defendant seeks removal of one of those rulings. Defendant's Petition for Removal was timely[1]and properly verified. In addition, although the undersigned ruled that most of the questions were permissible, counsel for applicant instructed his client not to answer those questions absent further ruling by the Board. The applicant's attorney has not filed a Petition for Removal. The case is not currently set for hearing.

II

FACTS

Applicant allegedly sustained injury on October 22, 2018 and December 12, 2018. Defendant sought to take applicant's deposition eventually doing so on September 10, 2020. During the course of that deposition, counsel for applicant objected to a number of questions. As a result, the parties sought to have the deposition completed with the help of the w1dersigned, who could be available to address the disputed issues.

Accordingly, on October 11, 2021, the undersigned presided over the applicant's deposition and made rulings as follows:

[1] The court specifically ruled that the time for filing a Petition for removal would run from the date the official deposition transcript was filed with the Board, which was October 27, 2021.

Ruling number 1:

Q: When you started work for Kadami Enterprises, what social security number did you provide for work? (Deposition Transcript, EAMS Document ID 38789280 (Hereinafter "Depo") at pg. 8 ln 25 -26).

Basis for objection (following clarification): Board Rule 10455(e). (Depo pg. 10 ln 23 -24).

Ruling: Objection overruled. (Depo pg. 11 ln 14 -15).

Ruling number 2:

Q: Have you ever used any other social security numbers for work purposes? (Depo pg. 12 ln 11 -12).

Basis for objection: Board Rule 10455 and Evidence Code§ 940. (Depo pg. 12 ln 13 -14).

Ruling: Objection overruled with respect to the application of Board Rule 10455. Objection sustained "with respect to the applicant's right to refuse to disclose a matter which may incriminate him, under the Fifth Amendment to the US Constitution." Depo pg. 12 ln 16 -21).

Ruling number 3:

Q: Regarding your education, where did you complete the 11th grade? (Depo pg. 13 In 18 -19).

Basis for objection: "if the answer involves the subject of national origin, such as education in another country, I believe that would violate Government Code 11135 and also Title 6 of the Civil Rights Act of 1964, which both prohibit application of national origin factors to government administrative programs like workers' compensation.". Depo pg. 13 In 21 -26). Additionally: "I'm objecting under Labor Code Section 1117.5, in addition to what was set forth already." (Depo pg. 15 In 13 -14).

Ruling: Objection overruled. (Depo pg. 15 ln 15 -16).

Ruling number 4:·

Q: ... who was responsible for maintaining or repairing the saw that you used on December 12th, 2018? (Depo pg. 24 ln 21 -22).

Basis for objection:

MR. MARTINSON: I'm going to object and ask to defer that, because usually blame is not part of statutory workers' comp. And I don't believe that the applicant or re prepared to move forward on this type of inquiry. So we would be in agreement to return to do this type of inquiry, but not ready to proceed on this type of --go ahead.

MR. KELLY: Are you instructing the applicant not to answer?

MR. MARTINSON: For today. But we are willing to present at another time, with more consideration given to this line of inquiry.

(Depo pg. 25 ln 16 -27).

Ruling: Objection overruled. (Depo pg. 25 In 14 -15).

III

DISCUSSION

In general, discovery in workers' compensation cases is broad.

> Although the specific provisions of the Code of Civil Procedure relating to discovery do not govern proceedings before us, however, we must give force to the declaration of public policy implicit in those provisions and in the decisional law interpreting them that liberal pre-trial discovery is desirable and beneficial for the purpose of ascertaining the truth checking and preventing perjury detecting and exposing false, fraudulent and sham claims and defenses making available in a simple, convenient and inexpensive way facts which otherwise could not be proved except with great difficulty educating the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlement expediting litigation safeguarding against surprise preventing delay, simplifying and narrowing the issues and expediting and facilitating both pre-trial preparation and trial. [citing *Greyhound Corp. v. Superior Court* (1961) 56 Cal. 2d 355]
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> *Hardesty v. McCord & Holdren, Inc*., 41 Cal. Comp. Cases 111, 114 (W.C.A.B. March 16, 1976)

Accordingly, in general, the court prefers broad pre-trial discovery, and only will limit discovery where a compelling argument suggests that discovery should not be allowed.

Ruling number 1:

The only stated basis for applicant's counsel objecting to this question Board Rule 10455(e), which states that a social security number need not be disclosed on an application. The court finds that this Board Rule does not operate to bar discovery by a defendant regarding the applicant's use of a specific social security number in connection with employment. The court recognizes that there is a legitimate privacy interest involved, but the defendant has a very real and concrete interest in that information: it allows searches to be done to determine if the applicant has prior claims, may be useful in

obtaining medical records from large health care providers, and i:nay bear upon the applicant's veracity and trustworthiness in the event that a false social security number was used. The court finds the defendant's interest in discovery outweighs any privacy interest described in Board Rule 10455(e).

Ruling number 2:

As to the defendant's inquiry regarding whether the applicant ever used any other social security numbers for work purposes, this squarely raises a conflict between the defendant's right to discovery and the applicant's constitutional right not to incriminate himself. Because the constitutional right against self-incrimination is supreme and supersedes the defendant's interest in full discovery, the court ruled that the applicant may not be compelled to answer that question. The court has not at this point entertained any formal request regarding what the consequences of that refusal should be.

In its Petition for Removal, defendant cites the case V*ianey Vargas v. Select Staffing*, (2010) Cal. Wrk. Comp P. D. LEXIS 548 in which the Board found that the applicant had a right to refuse to answer questions regarding his social security number but that doing so might result in the dismissal of his application. That approach seems appropriate in the present case. That being said, the court has not at this point made any such order nor has such an order been formally requested. The court's rulings to date have been limited to those described herein.

Ruling number 3:

With respect to questions regarding where the applicant attended 11th grade, the court found no persuasive argument why discovery should not proceed. Counsel for applicant argues in effect that Government Code§ 11135, which bars discrimination among State of California programs based on national origin, should bar inquiries which would lead to disclosure of national origin. However, discovery conducted concerning applicant's educational background is not the same as discrimination based on national origin. In the event that, as a result of defendant's conclusion that the applicant was a foreign national, defendant were to deny some benefit that the applicant was otherwise

entitled to, that would be discriminatory, and appropriate remedies would be available. However, although the applicant is protected from discrimination based on national origin, that information is not privileged. Similarly, Federal statutes prohibiting discrimination, e.g. the Federal Civil Rights Act of 1964, do not make a person's national origin privileged and protected from otherwise lawful discovery.

Finally, Labor Code §1171.5 states that: "For purposes of enforcing state labor, employment, civil rights, consumer protection, and housing laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status unless the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law." Cal. Labor Code§ 1171.S(b). For discovery purposes, the court finds that inquiries into where the applicant went to school, or even inquiries into the applicant's national origin, are not legally equivalent to inquiries into the applicant's immigration status. Again, benefits may be paid to an undocumented worker. That does not mean that otherwise lawful discovery into the applicant's work history or educational background are privileged. This is not to say that inquiries into whether a foreign national is documented or undocumented might not trigger Fifth Amendment privileges: they almost certainly would. However, mechanisms exist to protect those rights.

Ruling number 4:

With respect to the court's ruling that discovery should proceed with respect to issues of negligence and comparative negligence, counsel for applicant essentially requested time to confer with his client, which seems reasonable, and the fact that he sought to do that without the involvement of the undersigned appears to have been considerate of the court's time. Moreover, it does not appear that defendant has sought removal of that issue. Accordingly, the court would recommend that the parties address that issue between themselves, with jurisdiction reserved in the event that the parties are unable to come to a negotiated resolution.

IV

RECOMMENDATION

The undersigned recommends as follows: The applicant 'should be directed to answer the above questions that do not implicate the applicant's Fifth Amendment right to not be compelled to incriminate himself. For any questions where the applicant's Fifth Amendment rights are implicated, the court would recommend that the case be remanded with instructions to issue a Notice of Intent setting forth that in the event those questions are not answered within a reasonable period of time, the applicant's right to maintain proceedings would be suspended per Labor Code§ 4053, and that he would be barred per Labor Code § 4054 if he continued to refuse.

November 3[0], 2021

JASON E. SCHAUMBERG
Workers' Compensation Judge