

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

ZALANA GRAHAM-BRYANT, *Applicant*

vs.

**WKS FROSTY CORPORATION;
ADMINISTERED BY SEDGWICK CMS, *Defendants***

**Adjudication Number: ADJ16511542
Marina Del Rey District Office**

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

Applicant seeks removal in response to the November 28, 2022 Order Compelling Applicant's Deposition. Applicant contends the deposition has been rescheduled, that applicant intends to attend the deposition, and that the WCJ's order is unnecessary and a "waste of judicial resources." (Petition for Removal, dated December 8, 2022, at 4:23.)

We have not received an answer from any party.

The WCJ issued a Report and Recommend on 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 workers' compensation administrative law judge (WCJ) with respect thereto. 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 and decision.

BACKGROUND

Applicant claimed injury to the thoracic spine, lumbar spine, right ankle, left knee and left shoulder, while employed as a shift supervisor by defendant WCKS Frosty Corporation dba

Wendy's on June 26, 2022. She alleged that she was injured due to a slip and fall in the freezer. (Application for Adjudication, dated August 4, 2022.)

On November 8, 2022, defendant filed a Petition to Compel Applicant's Attendance at Deposition, averring applicant had not attended a previously agreed upon and scheduled deposition on November 2, 2022. (Petition to Compel, dated November 8, 2022, at 1:19.) The petition further noted that the deposition had been rescheduled by agreement of the parties for December 16, 2022. (*Id.* at 1:27.)

On November 18, 2022, applicant filed an Objection to defendant's Petition to Compel. (Applicant's Objection to Defendant's Petition to Compel Applicant's Attendance at Deposition, dated November 18, 2022.)

On November 21, 2022, the WCJ issued an Order Compelling Applicant's Deposition. (Order Compelling, dated November 21, 2022.)

Applicant's Petition for Removal (Petition) avers the order compelling deposition results in irreparable harm and substantial prejudice to applicant because the order is unnecessary, and because applicant has confirmed that she will be present for and participate with the deposition on December 16, 2022. (Petition, at 4:21.) Applicant asserts the order compelling is both unnecessary and a waste of judicial resources.

The WCJ's Report initially observes that defendant's Notice of Representation does not comply with WCAB Rule 10390, by failing to correctly identify the parties, and whether the employer is self-insured. (Cal. Code Regs., tit. 8, § 10390; Report, at p. 1, fn. 1.) The Report notes that it is unclear whether the rescheduled deposition transpired on December 16, 2022, and that if the deposition was completed, this dispute may be moot. The Report also notes that the removal proceedings are expending additional judicial resources, that the WCJ reviewed applicant's objection prior to issuing the order compelling, that the objection did not provide good cause for applicant's failure to attend the November 2, 2022 deposition, and that the order does not result in irreparable harm to applicant. (Report, at p. 3.)

DISCUSSION

We initially observe that WCAB Rule 10390, entitled Proper Identification of Parties, requires that any party appearing at a hearing or filing a pleading identify the insurer and/or employer as the party or parties and not identify a third party administrator as a party. If the

employer is self-insured, the pleadings should reflect this. Here, the defendant's Notice of Representation and subsequent pleadings identify the defendant as "WKS Frosty Corporation and Sedgwick." The pleadings do not appropriately identify whether the employer is self-insured, or in the alternative, the identity of the insurer. All parties to these proceedings are expected to comply with Rule 10390 in any subsequent pleadings, and in all future Notices of Representation.

We further note that pursuant to Code of Civil Procedure section 2016.040, it is incumbent that a petitioning party make reasonable efforts to meet and confer with opposing counsel to remediate any discovery disputes as a condition precedent to seeking WCAB intervention, and to set forth those efforts with specificity in any ensuing petition to compel applicant's attendance. Here, defendant's November 8, 2022, does not document defendant's efforts, if any, to meet and confer with applicant's counsel to amicably resolve the discovery dispute.

Additionally, we write to note our agreement with the WCJ's observation that the *entirety* of this dispute may have been rendered moot if applicant attended the scheduled and agreed-upon deposition on December 16, 2022. Unfortunately, no party to these proceedings has advised the WCJ or the Appeals Board whether the deposition was completed, necessitating the expenditure of additional resources to address the instant dispute. It is expected that the parties will take all reasonable steps in the future to provide the court with notice of any change in circumstance affecting a pending petition with the WCAB.

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); 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, § 10955(a).)

Here, the WCJ's November 21, 2022 Order compelling applicant's attendance at deposition did not provide the parties with the rationale for the issuance of the Order. We acknowledge that while the Report ultimately discussed the WCJ's concerns that no adequate excuse was provided by applicant for not attending the November 2, 2022 deposition, these concerns were neither raised nor discussed in the Order Compelling, and appear to have been

explicated for the first time in the WCJ's Report. We also note that the WCJ has the authority under WCAB Rule 10842 to issue a Notice of Intention prior to the issuance of a discovery order, which would have afforded the WCJ a vehicle in which to raise the concerns outlined in the Report, and would further provide the parties with a specific opportunity to address those concerns. (Cal. Code Regs., tit. 8, § 10842.) Such steps could have potentially avoided the Order as well as the resulting Petition for Removal.

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) (*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 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].)

We will therefore grant removal in this matter, rescind the Order Compelling dated November 21, 2022, and return the matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the Order Compelling Applicant's Deposition, dated November 21, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Order Compelling Applicant's Deposition, dated November 21, 2022 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 25, 2023

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

**ZALANA GRAHAM-BRYANT
HINDEN & BRESLAVSKY
LAW OFFICES OF KARGOZAR & ASSOCIATES**

SAR/abs

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