

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

ABATE VILLALPANDO, *Applicant* 608158809

vs.

**G BURGERS, EMPLOYERS PREFERRED INSURANCE COMPANY, STATE FARM
ADMINISTERED BY SEDGWICK CMS; GOLDEN ROAD FOOD SERVICES DBA
FRESH BROTHERS PIZZA, LIBERTY MUTUAL INSURANCE COMPANY; GARDEN
FRESH RESTAURANTS DBA SOUPLANTATION, TRAVELERS INSURANCE
COMPANY, *Defendants***

**Adjudication Number: ADJ10620763
Santa Ana District Office**

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

Applicant seeks removal in response to an October 11, 2023 Order Vacating Denial of Election (Order), wherein the Workers' Compensation Administrative Law Judge (WCJ) ordered that applicant's election pursuant to Labor Code¹ section 5500.5 as against G Burger, insured by State Farm, be deferred pending adjudication of the issue of injury arising out of and in the course of employment (AOE/COE).

Applicant contends the order abrogates his statutory right to elect against any one or more of the successive employers or successive insurance carriers during the claimed cumulative injury.

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 described herein, we will grant the Petition for Removal and affirm the Order, except that we will amend it to reflect that the issue of applicant's election is deferred pending the creation of an evidentiary record. We will then return this matter to the WCJ for further proceedings and decision.

¹ All further references are to the Labor Code unless otherwise noted.

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).)

Applicant alleges² injury head, neck, back, psyche, headaches, internal [system], and in the form of sleep disorder, while employed during the period February 1, 2016 to October 15, 2017 by G Burger, insured by Employers Preferred Insurance Company and State Farm Insurance Company administered by Sedgwick CMS; Golden Road Food Services DBA Fresh Brothers Pizza by Liberty Mutual; and Garden Fresh Restaurants DBA Souplantation by Travelers Insurance Company. Defendants have denied all liability for applicant's claim.

On June 13, 2023, the parties prepared a Pre-trial Conference Statement, indicating the need for adjudication of multiple issues, including injury AOE/COE.

On August 8, 2023, applicant filed a Notice of Election as against G. Burger and State Farm. On the same day, parties appeared at Mandatory Settlement Conference, and the matter was set for trial on September 13, 2023. (Minutes of Hearing, August 8, 2023.)

On September 13, 2023, the parties appeared at trial. However, applicant was unavailable, and the WCJ continued the matter to another trial date. The WCJ further issued a minute order, as follows:

AA's Election against G Burger under the coverage of State Farm is presently DENIED due to objection to election by State Farm and also because this case involves multiple employers and carriers for a CT claim that may extend past the alleged period and also because the terminal employer/carrier is not G Burger and State Farm.

(Minutes of Hearing, dated September 13, 2023.)

² On February 6, 2024, Employers Preferred Insurance filed an Application for Adjudication, purporting to amend the prior Application for Adjudication filed by the injured worker, alleging that the period of cumulative injury extends through February 20, 2023 pursuant to the opinions of QME Dr. Barnett.

On September 27, 2023, applicant filed a Petition for Removal from the WCJ's September 13, 2023 order denying election.

On October 11, 2023, the WCJ issued an Order Vacating Denial of Election pursuant to WCAB Rule 10955(d) (Cal. Code Regs., tit. 8, § 10955(d)), in which the WCJ vacated the minute order denying applicant's election, and substituted the following:

AA's Election against G Burger under the coverage of State Farm is DEFERRED pending adjudication at trial of this threshold issue due to objection to election by State Farm and the need to determine whether the applicant's alleged CT injury is AOE/COE."

(Order Vacating Denial of Election, dated October 11, 2023, at p. 1.)

On October 19, 2023, applicant filed the instant Petition for Removal in response to the WCJ's amendment of the minute order. Applicant avers his election "falls squarely within the language and legislative purpose of Labor Code § 5500.5," and that he "should be permitted to proceed against one defendant only, G Burger, as elected, whereas the remaining defendants lose no rights whatsoever except that they must await issuance of applicant's award prior to contribution issues." (Petition, at p. 2:13.)

Defendant State Farm has filed an Answer, averring that "applicant's right to elect one defendant is not unfettered; in fact, the Workers' Compensation Appeals Judge can decline even to allow an election in his or her discretion." (Answer, at p. 4:20, citing *Schrimpf v. Consolidated Film Industries, Inc.* (1977) 42 Cal.Comp.Cases 602 (appeals board en banc)). State Farm contends that the fact that it has five more days of coverage than codefendant Employers Preferred Insurance Company "is not a compelling basis under which to elect against a carrier when considering that for the duration of the case, applicant had engaged in direct litigation and discovery with Employers." (Answer, at p. 4:7.)

It is well established that decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp.Cases 473, 476 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Board en banc) (*Hamilton*)). 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, § 10787.) “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.)

Here, the record does not adequately set forth the arguments advanced by the parties, or the evidence relied upon by the WCJ in determining initially to deny applicant’s election pursuant to section 5500.5, and later to defer the election. (Minutes of Hearing, September 13, 2023; Order Vacating Denial of Election, October 11, 2023.) Given the pivotal nature of the election to the procedural posture of the case in chief, we are persuaded that a full and complete record pursuant to *Hamilton, supra*, 66 Cal.Comp.Cases 473, is essential to the proper evaluation of applicant’s election pursuant to section 5500.5. Accordingly, we will grant removal and return this matter to the trial level for the creation of adequate evidentiary record.

Upon return of this matter for further proceedings, we offer the following observations. Section 5500.5(c) provides, in relevant part:

In any case involving a claim of occupational disease or cumulative injury occurring as a result of more than one employment within the appropriate time period set forth in subdivision (a), the employee making the claim, or his or her dependents, may elect to proceed against any one or more of the employers. Where such an election is made, the employee must successfully prove his or her claim against any one of the employers named, and any award which the appeals board shall issue awarding compensation benefits shall be a joint and several award as against any two or more employers who may be held liable for compensation benefits.

(Lab. Code, § 5500(c).)

Thus, an “employee may obtain an award for the entire disability against any one or more of successive employers or successive insurance carriers if the disease and disability were contributed to by the employment furnished by the employer chosen or during the period covered by the insurance even though the particular employment is not the sole cause of the disability.” (*Colonial Ins. Co. v. Industrial Acc. Com. (Pedroza)* (1946) 29 Cal.2d 79, 82 [11 Cal.Comp.Cases 226].) An applicant may also choose not to elect against a particular defendant and proceed against all insurers or employers. (*Industrial Indemnity Co. v. Workers’ Comp. Appeals Bd. (Garcia)*

(1997) 60 Cal.App.4th 548, 554-556 [62 Cal.Comp.Cases 1661].) However, if an applicant elects to proceed against a single insurer, the insurer is entitled under Labor Code section 5500.5 to seek contribution for awarded benefits from the remaining insurers in subsequent proceedings. (See *Schrimpf, supra*, 42 Cal. Comp. Cases 602.)

The liability of non-elected defendants shall be determined in supplemental proceedings. (Lab. Code, § 5500.5(c).) Since the applicant need only prove his case against the elected defendant, a decision or settlement in the case in chief between the applicant and the elected-against insurer is not res judicata, and issues of liability among the defendants are decided de novo. (*Greenwald v. Carey Dist. Co.* (1981) 46 Cal. Comp. Cases 703, 708 (Appeals Bd. en banc).)

The WCJ's Report observes that, "[t]heoretically, if the orthopedic PQME opining that the applicant's more recent employment as a nursing assistant is found to be substantial medical evidence, then the applicant's alleged cumulative trauma injury would extend multiple years past the present end date of October 15, 2017 ... [a]s a result, the existing party defendants may no longer have exposure and the election would be unreasonable." (Report, at p. 6.)

However, the provision for an injured worker to make an election pursuant to section 5500.5(c) is intended to promote a prompt determination of the *injured worker's* entitlement to workers' compensation benefits. (*Rex Club v. Workers' Comp. Appeals Bd. (Oakley-Clyburn)* (1997) 53 Cal. App. 4th 1465 [62 Cal. Rptr. 2d 393, 62 Cal. Comp. Cases 441].) Pursuant to section 5500.5(c), once the employee has proven his or her claim against *any one* of the employers named, any Award issued by the Appeals Board "shall be a *joint and several* award... as against any two or more employers who may be held liable for compensation benefits." (Lab. Code, § 5500.5(c), italics added.) The elected employer thus shares joint and several liability with the non-elected employers. Requiring applicant to obtain a judicial determination on issues such as injury AOE/COE or the nature and extent of an injury as prerequisites to making an election is inconsistent with the legislative intent underlying the enactment of section 5500.5(c).

We also observe that in contribution proceedings, any employer held liable under the award may institute proceedings before the appeals board for the purpose of determining an apportionment of liability or right of contribution, and the contribution proceedings are de novo. Although an applicant has recourse against any defendant identified in a joint and several award issued pursuant to section 5500.5(a), that does not mean that each named defendant's liability is finally determined by such an award. To the contrary, section 5500.5(c) expressly provides that

“the liability of the employer [so named] shall not be determined until supplemental proceedings are instituted.” (Lab. Code, § 5500.5(c), bracketed material added.) Thus, and irrespective of the determination made in trial proceedings, if the appeals board finds “on supplemental proceedings for the purpose of determining an apportionment of liability or of a right of contribution that an employer previously held liable in fact has no liability, it may dismiss the employer and amend its original award in such manner as may be required.” (Lab. Code, § 5500.5(e).)

We thus encourage the parties to consider the legislative intent underlying the enactment of section 5500.5(c) upon return of this matter to the trial level and evaluation of applicant’s election.

In summary, we are persuaded that a complete evidentiary record is necessary to the proper determination of the issue of applicant’s election pursuant to section 5500.5. The WCJ’s Order presently defers the issue of the election pending a determination of injury AOE/COE. However, because we believe a record must be created to address the issue of the election in the first instance, we will grant removal and affirm the Order, but amend it to reflect that the issue of applicant’s election is deferred pending the creation of a full evidentiary record pursuant to *Hamilton, supra*, 66 Cal.Comp.Cases 473.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the decision of October 11, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers’ Compensation Appeals Board that the decision of October 11, 2023 is **AFFIRMED**, except that the following is substituted therefor:

This vacated language is amended and replaced as follows: Applicant’s election pursuant to Labor Code section 5500.5(c) as against G Burger and State Farm is deferred pending the creation of an evidentiary record.

IT IS FURTHER ORDERED the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 23, 2024

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

SAR/abs

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

SERVICE LIST

**ABATE VILLALPANDO
CORE MED STAFF
DEL CARMEN MEDICAL CENTER
EMPLOYMENT DEVELOPMENT DEPARTMENT
EMPLOYERS PREFERRED INSURANCE COMPANY
F AND M RADIOLOGY
G AND A INTERPRETER
GARBER AV
G BURGER
GARDEN FRESH RESTAURANT DBA SOUPLANTATIONS
GOLDEN ROAD FOOD SERVICE DBA FRESH BROTHERS PIZZA
HEALTH LINK MGT
LAW OFFICE OF J. FELIX MCNULTY
LIBERTY MUTUAL
MARRIOTT ASSOCIATES
PSYCHOLOGICAL ASSESSMENT
ROSENBERG YUDIN
SANTA ANA HEALTH GRP MED
SECURITY NATIONAL INSURANCE
SEDGWICK
STATE FARM
TOBIN LUCKS
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA**