

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

JEFFREY KEITGES, *Applicant*

vs.

**SEATTLE MARINERS;
NATIONAL UNION FIRE INS. CO., ADMIN. BY GALLAGHER BASSETT, *Defendants***

**Adjudication Number: ADJ13367297
Santa Ana District Office**

**OPINION AND ORDER
GRANTING PETITION
FOR REMOVAL
AND DECISION
AFTER 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 the WCJ's analysis of the petitioner's arguments in the report, we will grant the Petition for Removal, amend the WCJ's decision to clarify the scope of the issues for trial, and return this matter to the trial level for further proceedings and decision.

Initially, we observe that in order to be timely, a petition for removal must be filed within 20 days after the service of the order or decision or of the occurrence of the action in issue. (Cal. Code Regs., tit. 8, § 10955(a).) Here, the WCJ designated defendant to serve the Minutes of Hearing pursuant to Board Rule 10629. (Cal. Code Regs., tit. 8, § 10629(a).) Defendant filed its corresponding proof of service on May 13, 2022. (Proof of Service of Minutes of Hearing, dated May 13, 2022.) Board Rule 10605 provides that where service is accomplished by mail, fax, e-mail or any method other than personal service on a party within California, the party has five additional calendar days in which to exercise or perform any right or duty to act. (Cal. Code Regs., tit. 8, § 10605(a)(1).) Because the Petition was filed within twenty plus five days of the service of the Minutes of Hearing, the petition is timely.

Applicant seeks removal of the WCJ's May 12, 2022 order denying continuance and setting the matter for trial, asserting it was an abuse of discretion for the WCJ to "deny applicant the opportunity to attend scheduled medical evaluations." (Petition for Removal (Petition), dated June 6, 2022, at 10:5.) The minutes from the May 12, 2022 Mandatory Settlement Conference state:

It is up to the trial judge to decide if AA has shown due diligence in attempting to schedule medical appointments. Parties to prepare/file pretrial conference statement and exhibits no later than 10 days before trial and present arguments to trial judge for final decision on whether or not they were timely in attempting to obtain ortho/internal medical-legal exams. (May 12, 2022 Minutes of Hearing.)

The WCJ's Report and Recommendation on Petition for Removal (Report) explains that the case was not set for trial on all issues, but rather was set on the limited issue of whether applicant has shown due diligence in obtaining medical-legal examination reporting. (Report, at p. 5.) The WCJ noted, "[a]s the undersigned judge did not order that the entire case be set for trial, there is no prejudice at all for the applicant to go to trial to present his arguments regarding his timeliness of scheduling and canceling/rescheduling medical-legal exams." (Report, at p. 5.)

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, it is not clear whether discovery has closed, or whether the record is sufficient to support a complete adjudication of the matter. In *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [2001 Cal.Wrk.Comp. LEXIS 4947] (Appeals Bd. en banc) (*Hamilton*) we explained that, "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].)

Additionally, it is well established that decisions by 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].) The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that “[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete.” (*Id.* at p. 141.) The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers’ compensation claims. (*Tyler v. Workers Compensation Appeals Bd.*, *supra*, at 928.)

Here, we believe that the issue of the sufficiency of the record must be determined in tandem with the evaluation of the issue of applicant’s due diligence. The trial WCJ must determine whether the record is sufficient to allow for a complete adjudication of the matter, and if not, whether development of the record is consistent with principles of due process as set forth in *Tyler v. Workers' Comp. Appeals Bd.*, *supra*, 56 Cal.App.4th 389, and *McClune v. Workers' Comp. Appeals Bd.*, *supra*, 62 Cal.App.4th 1117. Accordingly, while we agree that the MSC judge retains the discretion to set this matter for trial on issues relating to due diligence, it is prejudicial not to weigh the concomitant issue of the sufficiency of the record as required by principles of due process. Accordingly, we grant removal to defer to the trial judge the issues of whether discovery closed at the time of the mandatory settlement conference, and also whether further development

of the record is appropriate, under the authorities espoused above. Once the trial WCJ has issued a decision, any party aggrieved thereby may seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal of the Order denying continuance and setting matter for trial issued by the WCJ on May 12, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Order denying continuance and setting matter for trial issued by the WCJ on May 12, 2022 is **AMENDED** as follows:

The issues of whether discovery was closed at the time of the mandatory settlement conference and whether further development of the record is appropriate are deferred to the trial WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 10, 2022

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

**JEFFREY KIETGES
GLENN STUCKEY AND PARTNERS
BOBER, PETERSON & KOBY**

SAR/abs

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