

1 WORKERS' COMPENSATION APPEALS BOARD

2 STATE OF CALIFORNIA

3 Case No. WCK 0039701

4 DANIEL KAISER,

5 Applicant,

6 vs.

7 CALIFORNIA ELECTRIC; CALIFORNIA
8 CASUALTY INDEMNITY EXCHANGE,

9 Defendant(s).

10 OPINION AND ORDER
11 DENYING PETITION FOR
12 REMOVAL

13 On February 13, 1998, applicant, Daniel Kaiser, filed an Application for
14 Adjudication of Claim (application) which alleged that, while employed as an
15 electrician on November 5, 1996 by California Electric, he sustained injury to his left
16 shoulder while pulling wire through a conduit. On March 20, 1998, defendant filed a
17 Petition for Removal with the Workers' Compensation Appeals Board (Board)
18 pursuant to Labor Code section 5310. Defendant contends that the Board does not
19 have jurisdiction over applicant's claim because the injury is covered by the
20 alternative dispute resolution process under Labor Code section 3201.5. Defendant
21 requests that the Board remove this matter to itself, dismiss the application, and allow
22 the parties an opportunity to resolve applicant's claim by following the *Alternative*
23 *Disputes Resolution Agreement*, as established in its collective bargaining agreement
24 pursuant to the provisions of Labor Code section 3201.5 and consistent with the
25 Board's decision of Becerra v. Eastside Reservoir Project/Advanco Constructors (1997)
26 62 Cal.Comp.Cases 937.

27 After reviewing the record, the Board will deny removal, but will return this
matter to the workers' compensation administrative law judge (WCJ) for further
proceedings and decision. In so doing, and for the reasons set forth below, the Board

1 concludes: (1) that the WCJ does have the authority to determine if dismissal of an
2 application is appropriate (i.e., the WCJ does have the authority to determine whether
3 applicant and his injury are subject to the provisions of Labor Code section 3201.5);
4 and (2) that, in determining whether to dismiss an application, a notice of intention
5 and/or hearing procedure should generally be followed to assure that the parties have
6 had an adequate opportunity for input and participation.

7 In Becerra, *supra*, the Board addressed the issues of jurisdiction and the
8 procedures to be followed in cases where a request for dismissal of an application is
9 made on the basis that the injury is covered by the alternative dispute resolution
10 process under Labor Code section 3201.5. The Board determined first that it has
11 jurisdiction pursuant Labor Code section 3201.5, subdivision (a)(1), to review a
12 decision by an arbitrator once the case has moved appropriately through the dispute
13 resolution process set up by the collective bargaining agreement.

14 The Board also discussed the proper procedure to be followed in cases falling
15 within the provisions of Labor Code section 3201.5, stating in part as follows:

16 "Under the conventional system, an Application is generally needed to
17 initiate a case before the Workers' Compensation Appeals Board. After
18 the Application is filed, a Declaration of Readiness initiates proceedings
19 before a WCR, and a party dissatisfied with the WCR's decision may
20 seek review by filing a petition for reconsideration with the Appeals
21 Board. Under the alternative system, the Appeals Board does not
22 ordinarily become involved until a petition for reconsideration from
23 the arbitrator's decision is filed in accordance with section 10865 of the
24 Rules of Practice and Procedure (Cal. Code of Regs., tit. 8 section 10865.)
25 It is premature to file either an Application or a petition for
26 reconsideration since no arbitrator's decision has been issued in this
27 case. An Application is neither necessary nor required.

"Applicant objected to the motion to dismiss the Application on the
ground that an Application is necessary to confer jurisdiction on
the Appeals Board in the event that he wanted to file a petition for
reconsideration of the arbitrator's decision or in the event that there
was a violation of section 3201.5(b). However, jurisdiction is conferred

1 The Labor Code was recently amended to change the title of workers' compensation referee (WCR) to workers' compensation administrative law judge (WCJ).

1 on the Appeals Board by section 3201.5 and all parties preserve their
2 rights by following the alternative system's procedures, not by the
3 filing of an Application. An allegation of a violation of section
4 3201.5(b) and other issues raised by the parties may be resolved by the
5 Appeals Board in San Francisco upon review after a petition for
reconsideration has been filed. Thus, in this case the filing of an
Application is not necessary or required so defendant's motion to
dismiss the Application should be granted."

6 Accordingly, the Board dismissed the application as being neither necessary nor
7 required, and it noted that the issues being raised would be preserved and properly
8 considered through a timely petition for reconsideration following the arbitrator's
9 decision.

10 As noted above, a preliminary question presented in this case is whether a
11 WCJ has the authority and jurisdiction to dismiss an application on the basis that
12 the injured employee's claim comes within the provisions of Labor Code section
13 3201.5, or whether a petition for such dismissal may only be handled directly by the
14 Board itself through a Petition for Removal. The Board concludes that the WCJ
15 does have such authority and jurisdiction as part of the WCJ's general authority to
16 hear and decide cases. (See, Lab. Code, §§ 5309 and 5310; Cal. Code Regs., tit. 8, § 10348
17 [Board Rule 10348]).

18 Where a motion is made, or a petition is filed, requesting that an application
19 be dismissed on the basis that the case comes within the provisions of Labor Code
20 section 3201.5, the WCJ must determine: (1) whether there is a collective bargaining
21 agreement as described in Labor Code section 3201.5, to which both parties were
22 subject at the time of the alleged injury; and (2) whether the Administrative
23 Director has issued an appropriate letter of eligibility in connection with that
24 collective bargaining agreement. Thus, the WCJ must have a record to justify a
25 finding that the parties are subject to the provisions of Labor Code section 3201.5.

26 Generally, when a party submits a motion or petition to dismiss an
27 application under of Labor Code section 3201.5, the moving party will, or should,

1 provide the documentation which supports its request. The assigned WCJ may
2 thereafter issue a notice of intention to grant the motion based upon the
3 documentation attached to the petition, to deny the motion based on the absence of
4 such documentation, or to allow the petitioner an opportunity to file the necessary
5 supporting documentation. Of course, the notice should provide the opposing party
6 with an opportunity to respond. Thereupon, the WCJ may issue an appropriate
7 order, giving reasons therefor.

8 The WCJ may also choose to set the matter for conference or hearing to allow
9 the parties an opportunity to complete the record, including any proffered objections
10 and to thereafter issue an appropriate decision. This procedure should assure that
11 the petitioning party has an opportunity to substantiate its motion to dismiss the
12 application, and that the responding party has an opportunity to submit any
13 objections.

14 We emphasize that the procedures described above are generally preferred,
15 but they are not exclusive. Accordingly, as circumstances warrant in a particular
16 case, the WCJ, in his or her discretion, may utilize another appropriate procedure, so
17 long as this procedure achieves the basic goals of giving notice and an opportunity
18 to be heard and of creating an adequate record. (Such other procedures might
19 include the use of letters, in place of a notice of intention and/or in place of a
20 conference. They might also include the use of stipulations by the parties that some
21 or all of the requisites for the application of Labor Code section 3201.5 are or are not
22 present.) Again, however, any alternative procedure must assure that the moving
23 party has an opportunity to substantiate its motion to dismiss the application, and
24 that the responding party has an opportunity to object and to substantiate its
25 objections.

26 In the present case, and because defendant has not established that substantial
27 prejudice will result if removal is not granted (Swedlow, Inc. v. Workers' Comp.

1 Appeals Bd. (Smith) (1983) 48 Cal.Comp.Cases 476 (writ denied); Lubin v. Berkley
2 East Convalescent Hospital (1976) 41 Cal.Comp.Cases 283 (Appeals Board panel
3 opinion); Hardesty v. McCord & Holdren, Inc., et al., (1976) 41 Cal.Comp.Cases 111
4 (Appeals Board panel opinion)), the Board will deny removal. The matter will be
5 returned to the WCJ to consider the appropriate procedure to be implemented in
6 determining whether dismissal of the application is warranted in this case.

7 For the foregoing reasons,

8 **IT IS ORDERED** that defendant's Petition for Removal filed April 20, 1998, be,
9 and it hereby is, **DENIED**. and that this matter be, and it is hereby, **RETURNED** to
10 the WCJ for further proceedings and decision consistent with this opinion.

11
12 **WORKERS' COMPENSATION APPEALS BOARD**

13
14 /s/ Colleen S. Casey

15 **I CONCUR.**

16 /s/ J. Wiegand

17
18 /s/ Douglas M. Moore, Jr.

19 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

20 **October 28, 1998**

21 **SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS**
22 **RECORD EXCEPT LIEN CLAIMANTS, BUT INCLUDING PETITIONING LIEN CLAIMANT.**

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