

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SYDNEY COHEN, *Applicant*

vs.

**FITNESS 19;
ZURICH AMERICAN INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ6861349
Santa Ana District Office**

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

Applicant seeks removal of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 2, 2020. By the F&O, the WCJ found that the medical record was inadequate with respect to whether applicant has a neck injury and needs to be further developed. The WCJ ordered the parties to agree on a medical examiner in orthopedics or return to the orthopedic qualified medical evaluator (QME).

Applicant contends that the WCJ erred in finding that the neck must be industrially related for applicant to have sustained a dental injury. Applicant further contends that defendant's failure to object to the treating physician's determination that applicant sustained a dental injury precludes a later objection to that determination.

We did not receive an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that we deny removal.

We have considered the allegations of applicant's Petition for Removal and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant removal, rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

On April 13, 2015, a Findings and Award was initially issued on this matter with a finding that applicant had sustained an injury to her low back and psyche through September 30, 2008 while employed as a personal trainer by Fitness 19.

Blake Thompson, M.D. provided treatment to applicant as her primary treating physician (PTP). In his April 12, 2018 report, Dr. Thompson said that applicant was “having TMJ issues” and “referral to a dentist is reasonable.” (Applicant’s Exhibit No. 46, PTP Progress Report by Dr. Blake Thompson, April 12, 2018, exh. p. 4.) She was referred to Dr. Jack Rosenson to evaluate her for TMJ with a request for authorization (RFA) for this referral submitted. (*Id.* at exh. p. 1.)

Dr. Rosenson issued a report dated July 2, 2018, wherein he diagnosed applicant with a temporomandibular joint/myofascial pain disorder. (Applicant’s Exhibit No. 53, RFA and Report by Dr. Rosenson, July 2, 2018, p. 5.) He opined that this disorder resulted from her industrial injury and submitted an RFA for treatment related to this disorder. (*Id.* at pp. 5 and 9.) There is no evidence in the record of a utilization review (UR) decision regarding this RFA or of an objection by defendant to Dr. Rosenson’s findings.

The matter proceeded to trial on September 3, 2020. The parties stipulated to injury to the low back and psyche, with applicant also claiming injury to her jaw, neck and headaches. (Minutes of Hearing, September 3, 2020, p. 2.) The disputed issues were specifically identified as follows: 1) need for further medical treatment with respect to dental and an aftercare program; 2) attorney fees; 3) applicant claims the defendant has waived its right to attack the treating physician’s opinions as to the dental injury; 4) applicant raises penalties under section 5814 and 5814.5 with respect to medical treatment intending unreasonable delay with respect to dental care and unreasonable delay with respect to the aftercare program; 5) defendant contends that the dental injury is not an accepted claim and that Dr. Rosenson’s reporting is not substantial evidence because he has an inaccurate history. (*Id.* at pp. 2-3.)

In the resulting F&O, the WCJ found that the medical record is inadequate to determine if applicant has a neck injury as a consequence of her industrial injury. It was further found that the record regarding the existence and cause of a neck injury needs to be further developed. Determination of the necessity of the TMJ treatment was deferred until the “precipitating neck problem is addressed.” The parties were ordered to agree to an orthopedic medical examiner or have applicant re-examined by the orthopedic QME.

DISCUSSION

The Appeals Board may remove to itself the proceedings on any claim. (Lab. Code, § 5310.)¹ Removal is discretionary and is generally employed only as an extraordinary remedy

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

which must be denied absent a showing of significant prejudice or irreparable harm, or that reconsideration will not be an adequate remedy after issuance of a final order, decision or award. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); *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].)

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) Due process requires, in relevant part, that a party receive notice and an opportunity to be heard before an action adverse to its interest is taken. (*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789 [59 Cal.Comp.Cases 461]; *Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449 [56 Cal.Comp.Cases 537].) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) As stated by the Court of Appeal in *Pinkney*:

A denial of due process to a party ordinarily compels annulment of the Board's decision only if it is reasonably probable that, absent the procedural error, the party would have attained a more favorable result. However, if the denial of due process prevents a party from having a fair hearing, the denial of due process is reversible per se.

(*Pinkney, supra*, at p. 806, citations omitted.)

It is acknowledged that a WCJ has broad authority to issue orders to ensure proper adjudication of each claim, including "any interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case." (Cal. Code Regs., tit. 8, former § 10348, now § 10330 (eff. Jan. 1, 2020).) This includes the discretionary authority to develop the record when the medical record is not substantial evidence to determine causation of or treatment for a disputed body part. (See Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) However, in this matter, the WCJ found that the record was inadequate to address causation for the neck, a body

part that was not identified as one of the disputed issues to be adjudicated at trial. The F&O improperly addressed issues that were not submitted for adjudication.

Additionally, with respect to applicant's contention that it was improper for the WCJ to find that the neck must be industrial in order to find that the dental injury is industrial, it is noted that the F&O contains no findings that causation for the alleged dental injury is contingent on causation for the neck and the WCJ's discussion of the interrelationship between the parts is contained only in the Opinion on Decision. The Opinion on Decision provides the rationale for the F&O, but the actual findings of fact and orders must be contained in the F&O. (Lab. Code, § 5313.)

We make no comment on the other contentions raised by applicant in her Petition and defer determination of the disputed issues to the trier of fact in the first instance.

Therefore, we will grant removal, rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal of the Findings and Order issued by the WCJ on November 2, 2020 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on November 2, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 16, 2021

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

**LAW OFFICES OF PHILIP COHEN
LAW OFFICE OF TRACEY LAZARUS
SYDNEY COHEN**

AI/pc

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