

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

LOYDA MARTINEZ, *Applicant*

vs.

**STAFFING NETWORK, LLC; EVEREST NATIONAL INSURANCE COMPANY,
adjusted by ESIS, *Defendants***

**Adjudication Number: ADJ14466674
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration 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 stated in the WCJ's report, which we adopt and incorporate, and for the reasons stated below, we will deny reconsideration.

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 guarantees all parties the right to notice of hearing and a fair hearing. (*Rucker, supra*, at 157-158.) 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. (*Rucker, supra*, at 157-158, citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21].) However, there is no record that defendant subpoenaed applicant or served her with notice to appear at trial as a witness pursuant to Code of Civil Procedure section 1987. (Code Civ. Proc., § 1987; see also Cal. Code Regs., tit. 8, § 10642.) Therefore, defendant did not avail itself of the opportunity to cross-examine her.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 8, 2022

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

**LOYDA MARTINEZ
LAW OFFICES OF CHRISTINA LOPEZ
LAUHLING FALBO LEVY & MORESI**

PAG/00

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

**Report and Recommendation
on
Petition for Reconsideration**

Terri Ellen Gordon, Workers' Compensation Judge, hereby submits her Report and Recommendation on the Petition for Reconsideration filed herein.

INTRODUCTION

Defendant, Staffing Network, LLC, insured by Everest National Insurance Company adjusted by ESIS (hereinafter referred to as "defendant") petitions for reconsideration of the Findings and Award that issued in this case on 12/17/2021 wherein I found applicant Loyda Martinez (hereinafter referred to as "applicant") sustained industrial injury while working for defendant on 12/08/2020 to her right elbow and left index finger, that applicant is entitled to total temporary disability from 12/08/2020 through 07/26/2021 at a weekly rate to be informally adjusted between the parties with WCAB jurisdiction reserved, that defendant did not satisfy its burden of proving it offered applicant modified work consistent with applicant's work restrictions, and that applicant attorney is entitled a reasonable fee.

Defendant contends that I acted without or in excess of my powers and that the order, decision or award is unreasonable. Defendant takes issue only with my denying its request to cross-examine applicant in violation of its right to due process. Defendant's Petition for Reconsideration was timely filed and is accompanied by the verification required under Labor Code section 5902. Applicant has not filed an Answer as of 01/18/2022.

DISCUSSION

A review of EAMS reflects applicant filed a Declaration of Readiness (hereinafter referred to as "DOR") on 10/12/2021 identifying temporary disability as the issue and requesting an expedited hearing. Defendant did not file an Objection. The matter came on my expedited hearing calendar on 11/09/2021. Counsel for applicant appeared telephonically as did defense counsel. Applicant did not appear. There was no objection to the matter being held virtually. Defendant objected to the expedited hearing proceeding partly on lack of notice as to the particular period of temporary disability. Defendant also objected to the expedited hearing proceeding because it requested the opportunity to cross-examine applicant regarding medical treatment, employment subsequent to the date of injury, and income. Applicant was not present for the hearing. Defendant

failed to describe any efforts it made to ensure applicant would appear at the hearing, including submitting a request for applicant to appear or subpoenaing applicant. Based on my review of EAMS, the relevant law, and statements of counsel, I did not find good cause to continue or take the matter off calendar. Applicant offered the medical legal report of Dr. Miller as support for her claim for temporary disability. Defendant offered numerous exhibits all of which were received into evidence. Defendant's Exhibits B and C reflect emails between counsel for applicant and defendant discussing the temporary disability dispute. (Minutes of Hearing, hereinafter referred to as "M.O.H", dated 11/09/2022 at pages 1 – 3)

California Code of Regulations section 10752 allows a party to appear at trial by an attorney. There is no statutory or regulatory requirement that a represented applicant appear at an expedited hearing absent a subpoena or a notice to appear, even if the applicant filed the DOR. In *Barthel v. Curbside Hospitality*, 2012 Cal. Wrk. Comp. P.D. LEXIS 556 the Appeals Board upheld a trial judge's denying defendant's request to cross-examine the applicant regarding medical treatment at an expedited hearing where applicant did not appear and when the defendant did not issue a notice to appear or subpoena applicant. In *Dole v. Bakersfield v. Workers Comp. Appeals Bd (Arguelles)*, (1998) 64 Cal. App.4th 1273 the Court of Appeal concluded that when a witness is disclosed at a mandatory settlement conference, and then appears for trial, the opposing party should be allowed to cross-examine the witness even if the opposing party did not disclose the witness. The Court of Appeal also noted that had the applicant failed to appear at trial, defendant would have been without a remedy absent a subpoena or a notice to appear. Defendant's reliance on *Keller v. California State Auto Association*, 2009 Cal.Wrk. Comp. P.D. LEXIS 381 is misplaced. In that decision, the Appeals Board rescinded the trial judge's Findings and Award and returned the matter to the trial level to provide defendant the opportunity to cross-examine applicant at an expedited hearing. Although not entirely clear from the decision, it appears the applicant in pro per appeared at the original expedited hearing but did not testify and the trial judge determined that defendant had not made a sufficient showing to allow cross-examination of the applicant.

Parties should be fully prepared to present their evidence at the time of trial. Applicant's counsel appeared at the 11/09/2022 on behalf of applicant who did not appear. Defendant failed to show it had issued a notice to appear or subpoena to ensure applicant would appear. Continuances are not favored and are granted only for good cause. Defendant did not show good cause for a

continuance and I did not find good cause to grant a continuance. As to defendant's claim that it did not have notice as to the particular period of temporary disability, that claim is without merit. There is only one date of injury, one ADJ case number. Applicant's DOR identified temporary disability as the issue for the expedited hearing. Defendant's Exhibits B and C reflect emails between counsel for applicant and defendant discussing the temporary disability dispute, including defendant's email statement that the PQME said applicant was TTD from the DOI without providing any analysis as to why she was TTD that whole time and as such, it is not substantial medical evidence. Defendant's same email statement indicates it has work status reports saying the exact opposite and therefore there is a dispute as to the retroactive period. Based on my review of the evidence, the relevant law, and the foregoing, I remain persuaded that defendant was not denied its due process right to cross-examination or adequate notice of the issue(s) identified for the expedited hearing.

RECOMMENDATION

For the foregoing reasons, I recommend that defendant's Petition for Reconsideration, filed 01/06/2022, be DENIED.

DATE: 01/18/2022

Terri Ellen Gordon
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE