

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

PABLO PENA, *Applicant*

vs.

**SOUTHERN CROSS DAIRY;
ARCH INSURANCE; administered by
YORK RISK SERVICES GROUP, *Defendants***

**Adjudication Number: ADJ12492733
Pomona District Office**

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

Defendant seeks removal in response to the Order taking the matter off calendar issued by the workers' compensation administrative law judge (WCJ) on March 8, 2021, wherein the WCJ stated that additional reporting is necessary because the report from the Qualified Medical Examiner (QME) did not address injury to all of the body parts alleged.

Defendant contends that the record is complete and the parties should proceed to trial.

We received a Report and Recommendation on Petition for Removal (Report) from the WCJ recommending that we deny removal. We have not received an answer from applicant.

We have considered the allegations of the Petition and the contents of the Report.

Based on our review of the record, and for the reasons discussed below, we will grant the Petition for Removal, rescind the March 8, 2021 Order, and return the matter to the WCJ for further proceedings and decision.

FACTS

Applicant claimed injury to various body parts while employed by defendant Southern Cross Dairy as a milker, during the period from July 1, 2016 to July 1, 2019.

On March 8, 2021, the parties proceeded to trial, however, the WCJ issued an order taking the matter off calendar, stating:

PMQE report does not address shoulders or low back. Defendant objects to OTOC [order taking off calendar]. Parties to obtain QME report addressing all body parts.

(March 8, 2021 minutes.)

DISCUSSION

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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); *Cortez, supra*; *Kleemann, supra*.) Additionally, 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).)

The statutory and regulatory duties of a WCJ include the issuance of a decision that complies with Labor Code section 5313.¹ An adequate and complete record is necessary to understand the basis for the WCJ's decision and the WCJ shall “. . . make and file findings upon all facts involved in the controversy[.]” (Lab. Code, § 5313; *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [2001 Cal.Wrk.Comp. LEXIS 4947] (Appeals Bd. en banc)² (*Hamilton*)). As required by section 5313 and explained in *Hamilton*, “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]).

¹ All statutory references not otherwise identified are to the Labor Code.

² En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, former § 10341, now § 10325(a) (eff. Jan. 1, 2020); *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].)

The Appeals Board's record of proceedings is maintained in the adjudication file and consists of: the pleadings, minutes of hearing and summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits marked but not received in evidence, notices, petitions, briefs, findings, orders, decisions, and awards, and the arbitrator's file, if any. . . . Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings. (Cal. Code Regs., tit. 8, former § 10544, now § 10750 (eff. Jan. 1, 2020).)

Here, defendant contends that the record is complete and the parties should have proceeded to trial. Defendant also contends that further development of the record was unwarranted. However, according to the WCJ's notes in the minutes, the WCJ determined that further reporting from the QME is appropriate. As conceded by defendant in its petition, however, the WCJ has the duty to develop the record and the authority to order additional medical evidence as required so that the decision is based on substantial evidence.³

Here, no documents or testimony were admitted into evidence. In the absence of an evidentiary record, we are unable to evaluate the basis for the WCJ's Order. Therefore, we must return this matter to the trial level for further proceedings.

Accordingly, we grant defendant's petition, rescind the March 8, 2021 Order, and return the matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Amended Petition for Removal of the Order of March 8, 2021 is **GRANTED**.

³ Lab. Code, §§ 5701, 5906; *Old Republic Ins. Co. v. Workers' Comp. Appeals Bd.* (2020) 85 Cal.Comp.Cases 504, 508 [2020 Cal. Wrk. Comp. LEXIS 26] (writ den.); *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 [2002 Cal. Wrk. Comp. LEXIS 1218] (Appeals Board en banc); see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Order of March 8, 2021 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 25, 2021

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

**PABLO PENA
LAW OFFICES OF MICHAEL DE LA GARZA
BRADFORD & BARTHEL
CIPOLLA, CALABA & WOLLMAN**

JB/abs

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