

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

MIGUEL GODINEZ, *Applicant*

vs.

**PERSONNEL STAFFING GROUP (EMPLOYMENT SOLUTIONS INC.);
NEXT LEVEL ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ15107350; ADJ15107351
Los Angeles District Office**

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

Applicant seeks removal in response to the Order compelling applicant's attendance at deposition, issued by the workers' compensation administrative law judge (WCJ) on February 9, 2022, wherein the WCJ ordered applicant to appear for deposition at the Law Offices of Kargozar & Associates.

Applicant contends that in light of the ongoing pandemic, he should be permitted to attend the deposition via Zoom and that the WCJ erred when ordering applicant to appear in person.

We received an answer.

The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that we deny removal.

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto.

Based on our review of the record, and as discussed herein, we will grant the Petition for Removal, rescind the WCJ's Order compelling applicant's attendance at deposition, and return this matter to the WCJ for further proceedings consistent with this decision.

BACKGROUND

On August 19, 2021, applicant filed an application for adjudication in case number ADJ15107350, claiming injury to various body parts while employed by defendant as a laborer/worker on June 18, 2021.

On August 19, 2021, applicant filed an application for adjudication in case number ADJ15107351, claiming injury to various body parts while employed by defendant as a laborer/worker, during the period from November 1, 2002, to July 18, 2021.

On November 15, 2021, defendant filed a petition to compel applicant's deposition.

On December 27, 2021, applicant filed a declaration of readiness (DOR) to proceed to mandatory settlement conference. The disputed issue was identified as: "defendant wrongfully cancelled QME examination requested defendant withdraw objection on 12 27 21." (Declaration of readiness, December 27, 2021.)

On January 27, 2022, defendant filed a second petition to compel applicant's deposition.

On February 7, 2022, the matter came on for mandatory settlement conference, but the parties requested that the conference be ordered taken off calendar. (Minutes, served February 9, 2022, p. 1.) It is unclear whether a hearing took place February 7, 2022, but the minutes state that "applicant will be examined by QME Kim after deposition," which suggests that some form of communication occurred. (*Id.*) The minutes also state that additional appearances are on a "sign-in addendum" on page 2, but the minutes in EAMS do not contain a second page. (*Id.*)

On February 9, 2022, the WCJ issued an Order compelling applicant's attendance at deposition at the Law Offices of Kargozar & Associates, counsel for defendant. (Order compelling applicant's attendance at deposition, served February 9, 2022, p. 1.)

On February 24, 2022, applicant timely filed a petition for removal in response to the Order issued by the WCJ on February 9, 2022.

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, § 10955(a); *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, § 10955(a).)

Pursuant to sections 5313 and 5815 and the California Constitution, a WCJ is charged with the duty to make determinations on all issues in controversy, to provide a statement of the reasons or grounds upon which those determinations were made, and to do so in a manner that is “expeditiously, inexpensively, and without encumbrance of any character.” (Cal. Const., art. XIV, § 4; Lab. Code, §§ 5313, 5815.) A WCJ is also required to “make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order, or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.” (Lab. Code, §§ 5313; Cal. Code Regs., tit. 8, §§ 10761, 10787; see also *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Bd. en banc).)

Here, it does not appear that the WCJ held a hearing on defendant’s petition for an order compelling applicant’s appearance at deposition and the record is silent as to what evidence was considered, if any, or the grounds upon which the WCJ’s Order is based. (Lab. Code, § 5313; Cal. Code Regs., tit. 8, §§ 10758, 10761, 10787.) No evidence has been admitted into the record and no minutes of hearing or summary of evidence were filed. (Cal. Code Regs., tit. 8, § 10787.) Moreover, it is not clear whether any issues were framed, narrowed, and/or adjudicated at the conference on February 7, 2022. (Lab. Code, § 5313; Cal. Code Regs., tit. 8, §§ 10745, 10758, 10759.) When defendant filed its petition for an order compelling applicant’s appearance at deposition, the WCJ should have issued a notice of intention or set the matter for hearing, pursuant to WCAB Rule 10832, created a record, and then issued a decision. (Lab. Code, § 5313; Cal. Code Regs., tit. 8, §§ 10750, 10758, 10832.)

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].) The “essence of due process is simply notice and the opportunity to be heard.” (*San Bernardino Cmty. Hosp. v. Workers’ Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986].) Determining an issue without giving the parties notice and an opportunity

to be heard violates the parties' rights to due process. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584], citing *Rucker, supra*, at 157-158.) Due process requires "a 'hearing appropriate to the nature of the case.'" (*In re James Q.* (2000) 81 Cal.App.4th 255, 265, quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313.) Although due process is "a flexible concept which depends upon the circumstances and a balancing of various factors," it generally requires the right to present relevant evidence. (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817.)

In furtherance of the goal of resolving claims expeditiously, inexpensively, and without encumbrance of any character, the Legislature has created a "complete system of workers' compensation" to compensate workers for industrial injury or disability irrespective of the fault of any party. (Cal. Const. Art. XIV, § 4.) This "complete system" includes procedures for, inter alia, subpoenas, including the issuance of a notice to appear. (See Cal. Code Regs., tit. 8, §§ 10640 et seq.)

Although section 5710 provides for the taking of depositions in workers' compensation proceedings, the Appeals Board is accorded generous flexibility by sections 5708 and 5709 to achieve substantial justice with relaxed rules of procedure and evidence. (Lab. Code, §§ 5708-5710; *Barr v. Workers' Comp. Appeals Bd.* (2008) 164 Cal.App.4th 173, 178-179 [73 Cal.Comp.Cases 763].) The WCJ is correct that section 5710 appears to incorporate the Civil Discovery Act¹, however, it does so permissively, and the Appeals Board is not bound by the Code of Civil Procedure with respect to the parameters of conducting depositions. (*Moran v. Bradford Bldg., Inc.* (1992) 57 Cal.Comp.Cases 273, 286.)

The issue that we face on removal is that there is an insufficient record to evaluate the WCJ's Order. As discussed above, at a minimum, the record of a hearing must contain the issues submitted for decision, the admissions and stipulations of the parties, and the admitted 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.

¹ To the extent that it may be relevant during future proceedings, we note that the Legislature recently made amendments to the Code of Civil Procedure regarding remote depositions. (See, e.g., Code Civ. Proc., §2025.310, as amended by Stats. 2022 (eff. January 1, 2023).)

We presume that the WCJ's reference to California Rule of Court 3101(a)(3) is a typographical error and that he intended to cite Rule 3.1010(a)(3). (Report, p. 3 ["Both the Civil Discovery Act as well as California Rule of Court 3101(a)(3) provide for an attorney's right to be present with the deponent."].) We note that Rule 3.1010(a)(3) was recently amended. (California Rules of Court, Rule 3.1010, as amended (eff. January 1, 2022).)

Accordingly, we grant removal, rescind the Order, and return the matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Order of February 8, 2022, 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/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 23, 2023

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

**MIGUEL GODINEZ
LAW OFFICES OF ROBERT LEE
LAW OFFICES OF KARGOZAR & ASSOCIATES**

JB/mc

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