

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

SALVADOR CORREA MEDINA, *Applicant*

vs.

**BMG ROOFING; CALIFORNIA INSURANCE COMPANY,
adjusted by APPLIED RISK SERVICES, *Defendants***

**Adjudication Number: ADJ10340498
Anaheim District Office**

**OPINION AND ORDER
DENYING PETITION
FOR REMOVAL**

We have considered the allegations of the Petition for Removal 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 based upon the WCJ's analysis of the merits of petitioner's arguments in the WCJ's report, we will deny removal.

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); see also *Cortez, supra*; *Kleemann, supra*.) Also, 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).) Here, based upon the WCJ's analysis of the merits of petitioner's arguments, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

Defendant seeks removal in response to a July 27, 2023 order issued by the WCJ at Mandatory Settlement Conference, taking the matter off calendar over defendant's objection. The Minutes reflect that the "[vocational rehabilitation] report needs to be reviewed by AME/PQMEs;

parties are encouraged to meet and confer regarding discovery plan.” (Minutes of Hearing, July 27, 2023.) Defendant contends it will suffer irreparable harm arising out of the delay and expense of submitting the vocational reporting to the evaluating physicians. However, as the WCJ notes in her Report, “[e]mployers are generally responsible for the costs of medical-legal evaluations pursuant to the Labor Code ... [d]efendant is consequently not irreparably harmed by its liability for the cost of potential additional medical-legal evaluations ... [t]hat cost is part of the medical-legal expenses that defendant is obligated to pay under the Labor Code.” (Report and Recommendation on Petition for Removal (Report), August 22, 2023, p. 2.)

Defendant further avers that pursuant to case law authority, “while it is proper for the doctor to give his opinion on whether an injured worker can perform his usual and customary duties, opinions about ‘competing in the open labor market’ is beyond the doctor’s expertise and must be left to the vocational rehabilitation specialist.” (Petition for Removal, at p. 4:24, citing *Applied Materials v. Workers’ Comp. Appeals Bd. (Chadburn)* (2021) 64 Cal.App.5th 1042, 1097 [279 Cal.Rptr.3d 728].) However, defendant’s contention presupposes that the application of vocational evidence in the present matter is limited to a determination of feasibility for reentry into the labor market, as described in *Milpitas Unified School Dist. v. Workers’ Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [115 Cal. Rptr. 3d 112, 75 Cal.Comp.Cases 837] (*Guzman*).

In *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 30]), we observed that “[i]n addition to the applications for vocational evidence contemplated in *Ogilvie, supra*, vocational reporting may also be admitted as evidence and considered by the WCJ under other circumstances ... [i]t is therefore appropriate and often necessary that evaluating physicians consider the vocational evidence as part of their determination of permanent disability, including factors such as whether applicant is feasible for vocational rehabilitation, and whether the reasons underlying applicant’s non-feasibility for vocational retraining arise solely out of the present industrial injury or are multifactorial.” (*Id.* at 750-751.) Vocational evidence may be considered by evaluating physicians as relevant to their determination of permanent disability and may assist the parties and the WCJ in assessing those factors of permanent disability. (*Id.* at 752.) Accordingly, “the physician that must exercise their skill, knowledge and experience as well as other considerations in formulating an opinion on permanent disability.” (*Id.* at 751, citing *Milpitas Unified School Dist. v. Workers’ Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808, 828 [115 Cal.Rptr.3d 112, 75 Cal.Comp.Cases 837].)

Given the breadth of applications of vocational evidence to the assessment of permanent disability herein, we discern no irreparable harm to defendant as a result of the evaluating physician's review of the vocational evidence.

We also observe that the WCJ's decision "must be based on admitted evidence in the record" (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Board en banc) (*Hamilton*) and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Section 5313 requires the WCJ to "file finding upon all facts involved in the controversy" and to issue a corresponding award, order or decision that states the "reasons or grounds upon which the [court's] determination was made." (Italics added; see also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-622 [2010 Cal. Wrk. Comp. LEXIS 74] (Appeals Board en banc).) The WCJ and the Appeals Board may not rely on medical or vocational reports known to be erroneous, or that are no longer germane, or are predicated upon an incorrect legal theory. (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 801 [33 Cal.Comp.Cases 358, 363].) For these reasons, the WCJ is vested with the authority and discretion to order development of the record in those instances where, following a review of the record, the WCJ determines that there is insufficient evidence upon which to reach a just and reasoned decision. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924, 926-927] (*Tyler*); *Lundberg v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 436 [33 Cal.Comp.Cases 656, 659]; *King v. Workers' Comp. Appeals Bd.* (1991) 231 Cal.App.3d 1640 [56 Cal.Comp.Cases 408, 414]; *Raymond Plastering v. Workmen's Comp. Appeals Bd. (King)* (1967) 252 Cal.App.2d 748 [60 Cal. Rptr. 860] [32 Cal.Comp.Cases 287, 291].)

Accordingly, and based on the foregoing, we conclude that petitioner has failed to establish substantial prejudice or irreparable harm arising out of the order for development of the record, or 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).) We deny defendant's petition, accordingly.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 8, 2023

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

**SALVADOR CORREA MEDINA
ULLASINI JOY DHOLAKIA
LAW OFFICES OF JOAN SHEPPARD**

SAR/abs

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