

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JASBIR BASI, *Applicant*

vs.

**A PLUS ACADEMICS, MONTESSORI SCHOOL OF MODESTO;
PROCENTURY INSURANCE COMPANY, administered by ILLINOIS MIDWEST
INSURANCE AGENCY, LLC, *Defendants***

**Adjudication Number: ADJ14238444
Sacramento District Office**

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

Defendant seeks removal in response to the workers' compensation administrative law judge's (WCJ) August 25, 2021 order quashing its subpoena for the deposition of David Wells, DPM, and the September 7, 2021 minute order quashing the rescheduled deposition of David Wells, DPM ("Orders"). Defendant contends it will be significantly prejudiced and/or will suffer irreparable harm if it is precluded from deposing Dr. Wells. We did not receive an answer from applicant. The WCJ issued a Report and Recommendation on the Petition for Removal (Report) recommending that we deny removal.

We have considered the allegations of the Petition for Removal and the contents of the report of the WCJ with respect thereto. Based on our review of the record, we will grant the Petition for Removal, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings.

FACTUAL BACKGROUND

Applicant alleges injury to her bilateral legs, ankles, feet and toes during the period of June 2, 2014 through March 16, 2020 while employed by the defendant as a teacher. Defendant denied the claim.

On July 21, 2021, applicant filed a Declaration of Readiness to Proceed to a Priority Conference (DOR). On August 5, 2021, defendant filed an objection to applicant's DOR. In its objection, defendant states:

Dr. Wells' deposition is needed in order to determine whether applicant's injury is a result of her work for the employer. Dr. Wells is the applicant's primary treating physician and a podiatrist.

(Objection to DOR, August 5, 2021, p. 1)

Defendant then noticed the deposition of David Wells, DPM, which was originally scheduled to take place on September 3, 2021.

On August 6, 2021, applicant wrote to the WCJ and requested that the issue of the deposition of Dr. Wells be included as an issue at the Priority Conference.

On August 13, 2021, applicant filed a petition to quash the deposition of Dr. Wells. In the petition, applicant alleges that: 1) she received medical treatment for the injury from David Wells, DPM, including surgery; 2) Stephanie Hawkins, D.O. was the primary treating physician for this injury; and 3) David Char, M.D. is the Qualified Medical Evaluator (QME) in this case. Applicant objected to defendant attempting to obtain causation opinions outside of the QME process by deposing Dr. Wells.

On August 25, 2021, the WCJ issued an Order Quashing Deposition Subpoena of Dr. Wells. At the request of the WCJ, defendant submitted a letter to the WCJ on August 20, 2021 stating that the purpose of the deposition was to obtain Dr. Wells' opinion regarding causation of applicant's injury since he had treated applicant since 2013 and is a podiatrist.

A Priority Conference was held on September 7, 2021. In the Minutes of Hearing, the WCJ quashed the rescheduled deposition of Dr. Wells.

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).) As discussed below, we conclude that the Orders will result in significant prejudice or irreparable harm, and that reconsideration will not be an adequate remedy, and that therefore, we will rescind them.

Labor Code Section 4062.3¹ provides in relevant part, as follows:

- (a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:
 - (1) Records prepared or maintained by the employee's treating physician or physicians.
 - (2) Medical and nonmedical records relevant to determination of the medical issue.

The California Supreme Court has analyzed the admissibility of medical reports in workers' compensation proceedings and opined in pertinent part:

[T]he comprehensive medical evaluation process set out in section 4060 et seq. for the purpose of resolving disputes over compensability does not limit the admissibility of medical reports...Under section 4064, subdivision (d), "no party is prohibited from obtaining any medical evaluation or consultation at the party's own expense," and "[a]ll comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board . . ." except as provided in specified statutes. The Board is, in general, broadly authorized to consider "[r]eports of attending or examining physicians." (§ 5703, subd. (a).) These provisions do not suggest an overarching legislative intent to limit the Board's consideration of medical evidence.

(*Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, 1239 [78 Cal.Comp.Cases 1209].)

As acknowledged by the Court in *Valdez*, sections 4060, 4064(d) and 5703 suggest an expansive rather than limiting approach by the Legislature regarding the admissibility of medical evidence.

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 notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70

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

Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].) Implicit in the right to present evidence is the right to obtain evidence. (See e.g., *Duncan v. Workers' Comp. Appeals Bd.* (2010) 75 Cal.Comp.Cases 762 (writ den.) [the medical-legal evaluation process in the Labor Code does not apply to claims against SIBTF, but due process requires permitting SIBTF to obtain and offer into evidence medical reports addressing SIBTF claims].)

Additionally, the language of section 4062.3(a) is fairly expansive because it is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(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, 317 [35 Cal.Comp.Cases 500] [“[A]ny award, order or decision of the board must be supported by substantial evidence in the light of the entire record”].); *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) “The term ‘substantial evidence’ means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value.” (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) To constitute substantial evidence “... a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.” (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Therefore, on its face, 4062.3(a) encourages broad discovery to further the goal of obtaining substantial evidence and to ensure that decisions are supported by substantial evidence.

The Evidence Code defines relevant evidence as “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.)² This definition has been characterized as “manifestly broad.” (*In re Romeo C.*

² It is acknowledged that the Appeals Board “shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division.” (Lab. Code, § 5708.) However, the rules of evidence may provide guidance in addressing evidentiary disputes.

(1995) 33 Cal.App.4th 1838, 1843.) Here, defendant seeks to depose a physician who treated applicant for the claimed injury. The testimony of Dr. Wells certainly falls under this broad discovery standard as he would be testifying regarding his treatment of applicant's ankles and feet, which may be related to her injury. Discovery is ascertaining facts previously unknown.³ The point of discovery is not whether the testimony elicited is admissible or not.⁴ We do not know what Dr. Wells will testify to, but would likely testify regarding relevant issues beyond causation including apportionment and permanent disability. The testimony sought at the deposition is therefore reasonable because it furthers the Board's goal of obtaining substantial evidence.

We remind the parties that informal resolution of these disputes helps to progress matters in an expeditious fashion and avoid involving the Appeals Board in disputes the parties are capable of resolving without judicial intervention. A moving party is obligated to swear under penalty of perjury that it made "a genuine, good faith effort to resolve [a] dispute" before seeking intervention from the Appeals Board through a declaration of readiness to proceed. (Cal. Code Reg., tit. 8, § 10414(d).) (*Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1814 (Appeals Board en banc).)

Accordingly, we grant defendant's petition, rescind the August 25, 2021 and September 7, 2021 Orders, and return the matter to the WCJ for further proceedings consistent with this decision.

³ The word "discover" means "to make known or visible" or "to obtain sight or knowledge of for the first time." (Merriam-Webster Online Dict., <<https://www.merriam-webster.com/dictionary/discovering>> [as of November 18, 2021].)

⁴ For example, under the California Code of Civil Procedure section 2017.010, "...any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action..."

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Removal of the August 25, 2021 order quashing subpoena for the deposition of David Wells, DPM, and the September 7, 2021 minute order quashing the rescheduled deposition of David Wells, DPM is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that the August 25, 2021 order quashing its subpoena for the deposition of David Wells, DPM, and the September 7, 2021 minute order quashing the rescheduled deposition of David Wells, DPM are **RESCINDED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 23, 2021

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

**JASBIR BASI
LIEBERT LAW FOLSOM
MULLEN & FILIPPI, LLP**

HAV/ara

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