

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

PATRICIA HERNANDEZ, *Applicant*

vs.

**KAISER FOUNDATION HOSPITAL, Permissibly Self-insured and Administered by
SEDGWICK KAISER LEXINGTON, *Defendant***

**Adjudication Numbers: ADJ593255 (VNO0412842); ADJ1150025 (VNO0412849)
Marina del Rey District Office**

**OPINION AND ORDER
GRANTING PETITION FOR REMOVAL**

Applicant Patricia Hernandez seeks removal of the June 8, 2021 Joint Order Suspending Action on Compromise and Release, wherein the workers' compensation administrative law judge (WCJ) declined to approve the proposed Compromise and Release in this case, and set the matter for a further hearing. Applicant contends the WCJ erred in failing to approve the Compromise & Release, and that time is of the essence due to the need to secure ongoing care, which is currently being provided voluntarily by the defendant pending approval of the settlement.

We did not receive an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied. We also received two letters from the Applicant's Attorney, dated July 8, 2021 and August 4, 2021, which, in the extraordinary circumstances presented here, we will accept as Supplemental Petitions under WCAB rule 10964 (Cal. Code Regs., tit. 8, former § 10848, now § 10964 (eff. Jan. 1, 2020).)

We have considered the Petition for Removal, the Supplemental Petitions, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Removal, rescind the Order Suspending, and order the parties to file an amended Compromise and Release (C&R) with us for approval.

FACTS

Applicant filed two Applications for Adjudication for industrial injuries received while employed by defendant, one for a specific injury on November 24, 1998, and the second for a cumulative trauma injury for the period of November 24, 1998 through June 22, 2000. Applicant obtained a Findings and Award on May 8, 2007, for 100% permanent total disability and future medical care. After protracted disputes related to the provision of that care, the parties ultimately resolved to settle their dispute with a C&R providing for over \$3,000,000.00 of benefits in a structured settlement including direct payments, a Medicare Set-Aside, structured settlement funding to fund an annuity, and the resolution of a lien for care provided by applicant's son, along with a fee for applicant's attorney. (See Signed Compromise & Release, dated June 2, 2021.)

On June 3, 2021, the parties appeared remotely before the WCJ to seek approval of their Compromise and Release. The WCJ requested that the parties file medical reports in EAMS for her review, and instructed them to return on June 4, 2021, the next day. The parties filed medical reports, along with other documentation related to the reasons for and the adequacy of the settlement.

On June 4, 2021, after discussion, the WCJ expressed concern that the settlement did not adequately protect applicant's interests without a trust into which to deposit settlement funds. The WCJ therefore advised the parties to establish such a trust, and ordered the parties to appear again on June 11, 2021 to discuss further issues related to the settlement.

On June 7, 2021, the WCJ issued a Joint Order Suspending Action on Compromise and Release, Order Dismissing the Teleconference, Orders for the Parties to Serve AME Kramer [sic] with RN Evaluation Nursing Visit Notes dated 2/18/2021; and Order for Dr. Kramer [sic] to Write a Supplemental Report on Future Medical Treatment. On June 8, 2021, the WCJ replaced this prior order with an Order Suspending Action of Compromise and Release; Order Vacating and Setting Aside Orders Dated June 7, 2021; Order for the Parties to Appear at Status Conference, ordering the parties to appear for a further status conference on August 3, 2021.¹

This Petition for Removal followed. The Petition makes clear that a trust already exists for applicant's benefit, administered by a professional trustee. (See Petition for Removal, at p. 4.)

¹ The WCJ also ordered that the parties file the 2007 F&A in EAMS; this has subsequently been done.

The Petition for Removal also makes clear that it is possible to amend the C&R to provide for deposit of funds into the trust. (*Id.* at pp. 4–5.)

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 significant 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); 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, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).)

Here, we are satisfied that the applicant has met the standard for removal – the representations made convince us that time is of the essence in this matter, and that irreparable harm may accrue to the applicant if approval of the settlement is further delayed. Applicant is currently receiving medical care on a voluntary basis from defendant in anticipation of approval of the settlement; further delay may result in the withdrawal of that care, or even in the collapse of the settlement entirely, with serious consequences for applicant's health and wellbeing that are by definition irreparable. Accordingly, in this extraordinary circumstance, we will grant removal, and consider the adequacy of the settlement ourselves.

Labor Code section 5001 states in pertinent part that “[n]o release of liability or compromise agreement is valid unless it is approved by the appeals board or referee.” Labor Code section 5002 states:

A copy of the release or compromise agreement signed by both parties shall forthwith be filed with the appeals board. Upon filing with and approval by the appeals board, it may, without notice, of its own motion or on the application of either party, enter its award based upon the release or compromise agreement.

WCAB Rule 10700 states:

The Workers' Compensation Appeals Board shall inquire into the adequacy of all compromise and release agreements and stipulations with request for award, and may set the matter for hearing to take evidence when necessary to determine whether the agreement should be approved or disapproved, or issue findings and awards.”

(Cal. Code Regs., tit. 8, former § 10882, now § 10700 (eff. Jan. 1, 2020).)

As noted above, the Petition for Removal states that it is feasible to amend the C&R to include provisions related to deposit of funds into applicant's pre-existing trust, in order to address the concerns raised. Assuming such amendments are made, we conclude that the settlement amount will be adequate, and that the agreement will be in the best interest of applicant. We have considered that any potential right to death benefits is being released, that the settlement releases all right to supplemental job displacement vouchers, and the proposed allocation of benefits to the Medicare Set-Aside. In addition, we conclude that the attorney's fee requested is reasonable and should be allowed. Accordingly, we will rescind the Order Suspending, and order the parties to file an amended C&R including the trust provisions outlined in the Petition for Removal directly with the Office of the Commissioners in the manner specified below; upon receipt, we will speedily evaluate the amended C&R for approval.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the June 8, 2021 Joint Order Suspending Action on Compromise and Release is **GRANTED**.

IT IS FURTHER ORDERED that the June 8, 2021 Joint Order Suspending Action on Compromise and Release is **RESCINDED**.

IT IS FURTHER ORDERED that the parties shall file an amended Compromise and Release including provisions related to applicant's trust, as outlined above and in the Petition for Removal. The amended C&R shall be electronically filed directly with the Office of the Commissioners of the Workers' Compensation Appeals Board at WCABEmergencyBox@dir.ca.gov and may be electronically filed in the Electronic Adjudication Management System (EAMS), but it shall not be submitted to the district office from which the WCJ's decision issued or to any other district office of the Workers' Compensation Appeals Board.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 3, 2021

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

**PATRICIA HERNANDEZ
ROWAN GURVEY & WIN
RUSSELL LEGAL (2)
SEDGWICK KAISER LEXINGTON**

AW/abs

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