

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

JACQUELINE GONZALEZ, *Applicant*

vs.

SAMSON PHARMACEUTICALS, INC.;
TECHNOLOGY INSURANCE COMPANY, administered by AMTRUST NA, *Defendants*

**Adjudication Number: ADJ13378182
Los Angeles District Office**

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

Applicant seeks removal of the September 3, 2021, Order Compelling Applicant Deposition (Order), wherein the workers' compensation administrative law judge (WCJ) ordered that applicant was compelled to attend her deposition scheduled for September 23, 2021, at 10 a.m. on Zoom.

Applicant contends that the WCJ issued the Order without first issuing a notice of intention. Applicant further contends that the Order compelled the deposition without providing the equipment for the applicant to participate in the deposition.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied.

We have considered the Petition for Removal 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 WCJ's Order, and return this matter to the WCJ for further proceedings.

FACTS

Applicant claimed that, while employed by defendant as a packer and janitor from April 20, 2020, to June 12, 2020, she sustained an industrial injury to her head, neck, arm, hand (not wrist or fingers), and other body systems due to repetitive job duties.

Defendant filed a Petition to Compel Attendance at Deposition, alleging that neither the applicant nor her attorney appeared at the deposition scheduled for July 22, 2021. Defendant

requested that the WCJ order applicant to appear at the deposition scheduled for September 23, 2021. On September 3, 2021, the WCJ issued an Order Compelling Applicant Deposition scheduled for September 23, 2021, at 10 am on Zoom. The order further stated:

This Order shall be null and void if, within FIFTEEN (15) days of service of this Order, applicant and/or applicant's attorney files a written objection, setting forth good cause as to why applicant failed her previously scheduled deposition(s) and/or why applicant cannot attend the upcoming deposition.

On September 10, 2021, defendant served the Order on the parties, including applicant and her attorney. On September 21, 2021, applicant filed the Petition for Removal regarding the Order on September 21, 2021. On November 3, 2021, defendant State Insurance Compensation Fund filed an objection to the declaration of readiness (DOR) that was filed on October 28, 2021.¹

DISCUSSION

I.

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, now § 10955(a); *Cortez v. Workers' Comp. Appeals Bd.*, *supra*, 136 Cal.App.4th at p. 599, fn. 5; *Kleemann v. Workers' Comp. Appeals Bd.*, *supra*, 127 Cal.App.4th at p. 280, fn. 2.) 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, now § 10955(a) (eff. Jan. 1, 2020).) In light of the considerations discussed below, we conclude that granting removal is appropriate in this matter.

II.

Preliminarily, we note that the Order may already be void. The Order from the WCJ had this self-voiding clause:

This Order shall be null and void if, within FIFTEEN (15) days of service of this Order, applicant and/or applicant's attorney files a written objection, setting

¹ The DOR is not in EAMS.

forth good cause as to why applicant failed her previously scheduled deposition(s) and/or why applicant cannot attend the upcoming deposition.

Defendant served the Order on the parties on September 10, 2021. Applicant filed the Petition for Removal regarding the Order on September 21, 2021, within the 15-day time frame to object. Therefore, if we construe the Petition for Removal as an objection, the Petition may have voided the order.

We next consider the issue of good cause. Although applicant alleged good cause in her Petition for Removal, the WCJ did not hold a hearing, create a record, or make a finding as to good cause. The WCJ is in the best position to observe the demeanor of the applicant and make a credibility determination. (See *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) Therefore, without a good cause finding by the WCJ, we decline to make this finding de novo.

Additionally, there must be a complete record for review of the case. “[A] proper record enables any reviewing tribunal, be it the Board on reconsideration or a court on further appeal, to understand the basis for the decision.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Bd. en banc).) Therefore, we cannot make a finding regarding good cause without giving the parties an opportunity to be heard and for the WCJ to create a complete record for our review.

Furthermore, all parties in workers' compensation proceedings retain their 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] (*Rucker*).) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, 82 Cal.App.4th at pp. 157-158, citing *Kaiser Co. v. Industrial Acc. Com.* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710-712 [57 Cal.Comp.Cases 230].) Consequently, we cannot interpose our own findings without violating the parties' rights to due process. (*Gangwish v. Workers' Comp. Appeals Bd., supra*, 89 Cal.App.4th at p. 1295 [66 Cal.Comp.Cases 584], citing *Rucker, supra*, 82 Cal.App.4th at pp. 157-158.)

Finally, an order with a clause rendering the order null and void if an objection is received is not a notice of intention and must be served by the WCJ. (Cal. Code Regs., tit. 8, former §

10349, now § 10832(e) (eff. Jan. 1, 2020).) The Order in this case was served by designated service and not by the WCJ.

III.

In the instant case, the defendant properly filed the Petition to Compel Attendance at Deposition, requesting that the WCJ order applicant to appear at her upcoming deposition after missing her earlier deposition. However, instead of issuing a notice of intention, the WCJ issued an order with a self-voiding clause and did not hold a hearing. Applicant did not file an answer or an objection with the WCJ but instead filed the Petition for Removal at issue in this matter.

Under the circumstances here, the WCJ could have considered issuing a notice of intention instead of an Order with a self-voiding clause. The WCAB Rules provide a framework for parties to make requests and for the WCJ to issue notices of intention and orders. First, a party must make any request for action by the WCJ, other than form pleadings, by petition, and an opposing party may file an answer within 10 days. (Cal. Code Regs., tit. 8, § 10510.) WCAB Rule 10832 allows a WCJ to issue a notice of intention for any proper purpose, and then if an objection is filed within the time provided, after consideration of the objection, the WCJ may take appropriate action. (Cal. Code Regs., tit. 8, § 10832.) We note that the notice of intention may be served by designated service but the order issued after the notice of intention must be served by the WCJ. (Cal. Code Regs., tit. 8, §§10628, 10629.) Issuing a notice of intention clearly sets out the next steps and requires further action by the WCJ. This procedure avoids the uncertainty of a self-voiding clause as occurred in this case.

Alternatively, upon return, the WCJ may conduct a conference wherein the parties are encouraged to seek amicable resolution of their differences and to institute a discovery plan. (Cal. Code Regs., tit. 8, § 10758.)

Accordingly, we grant applicant's petition, rescind the September 3, 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 applicant's Petition for Removal of the September 3, 2021, Order Compelling Applicant Deposition is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that the September 3, 2021, Order is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 4, 2022

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

**JACQUELINE GONZALEZ
GARRETT LAW
MCNAMARA DRASS**

JMR/pc

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