

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

JUAN PAZ-MARENCO, *Applicant*

vs.

**MIR CO.; STARNET INSURANCE COMPANY
administered by BERKLEYNET, *Defendants***

**Adjudication Number: ADJ13264493, ADJ13264481
Marina del Rey District Office**

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

Applicant seeks removal in response to the minute order (Order) issued by the workers' compensation administrative law judge (WCJ) on April 7, 2021, wherein the WCJ continued the mandatory settlement conference (MSC) and ordered applicant's attorney to "to serve all records they have in their possession regarding this applicant that is not privileged (sic) within 45 days."

Applicant contends, in relevant part, that the WCJ improperly issued the order to applicant's attorney to serve applicant's records and without providing applicant an opportunity to object.

We received an answer from defendant.¹ 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 decision, and return this matter to the WCJ for further proceedings consistent with this decision.

¹ We reviewed defendant's answer. We note that to the extent defendant seeks the WCJ's assistance with its subpoena, defendant should file a declaration of readiness (DOR) regarding the issues.

BACKGROUND

Applicant claimed injury to various body parts while employed by defendant as a framer, during the period from December 8, 2018 to September 6, 2019 (ADJ13264481). Applicant also claimed injury to various body parts while employed by defendant as a framer, on September 6, 2019 (ADJ13264493).

On March 10, 2021, applicant filed a DOR, as follows:

Parties unable to resolve issue of AOE/COE informally despite PTP and PQME compensable findings. WCAB assistance is respectfully requested to move this matter forward.

(March 10, 2021 DOR, p. 9.)

The parties attended a mandatory settlement conference on March 29, 2021, and the WCJ issued an order continuing the matter. According to the minutes, the WCJ also ordered:

AA ORDERED to serve all records they have in their possession regarding THIS APPLICANT THAT IS NOT PRIVILEGED (sic) within 45 days. Service on both defendants. (March 29, 2021 minutes, p. 1.)

On April 26, 2021, applicant timely filed a petition for removal in response to the Order issued by the WCJ on April 7, 2021.

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

The statutory and regulatory duties of a WCJ include the issuance of a decision that complies with Labor Code section 5313.² An adequate and complete record is necessary to

² All future statutory references are to the Labor Code unless otherwise specified.

understand the basis for the WCJ's decision and the WCJ shall “. . . make and file findings upon all facts involved in the controversy[.]” (Lab. Code, § 5313; *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc)³ (*Hamilton*)). The purpose of this requirement is to enable “the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]” (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]). The record of proceeding must contain, at a minimum, “the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence.” (*Ibid.*)

No matter shall be placed on calendar unless one of the parties has filed and served a Declaration of Readiness to Proceed. (Cal. Code Regs., tit. 8, former § 10414, now § 10742 (eff. Jan. 1, 2020).) The WCJ has the authority to resolve a dispute at a mandatory settlement conference (MSC). (Lab. Code, § 5502(d)(2).) If a dispute cannot be resolved at an MSC, the WCJ frames the issues and stipulations for trial. (Lab. Code, § 5502(d)(2).) The parties shall thereafter file a pretrial conference statement noting the specific issues in dispute. (Lab. Code, § 5502(d)(3).) A hearing or “status conference” is a proceeding set for the purpose of ascertaining if there are genuine disputes requiring resolution, of providing assistance to the parties in resolving disputes, of narrowing the issues, and of facilitating preparation for trial if a trial is necessary. (Cal. Code Regs., tit. 8, former § 10301, now § 10305 (eff. Jan. 1, 2020).)

According to the report and as alleged by the parties on April 7, 2021, the WCJ considered the issue of defendant's subpoena. However, pursuant to applicant's DOR, the hearing was set on the issue of AOE/COE, not on defendant's subpoena. We see no order regarding AOE/COE – the issue that applicant brought before the WCJ in the DOR.

It is not entirely clear what issues were framed, narrowed, and/or adjudicated and the minutes are silent as to what evidence was considered, what stipulations were entered into at the conference, if any, or the grounds upon which the determination was made. Moreover, no evidence has been admitted into the record.

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.*

³ En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, former § 10341, now § 10325(a) (eff. Jan. 1, 2020); *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].)

Workers' Comp. Appeals Bd. (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is “. . . one of ‘the rudiments of fair play’ assured to every litigant . . .” (*Id.*, at p. 158.) 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. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (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 [57 Cal.Comp.Cases 230].) 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 [88 Cal.Rptr.2d 516].) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties’ rights to due process. (*Gangwish, supra*, at p. 1295, citing *Rucker, supra*, at pp. 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.)

Based on the record it is not clear whether the issue of AOE/COE, the actual subject of the DOR, was considered at the hearing. Furthermore, it is unclear whether applicant had notice and the opportunity to be heard with respect to defendant’s subpoena and how the issue of whether defendant’s subpoena was raised at the hearing.

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.

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 April 7, 2021 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/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 14, 2021

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

**JUAN PAZ MARENCO
HINDEN & BRESLAVSKY
ALBERT AND MACKENZIE**

JB/abs

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