

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

**TERESA TATE, *Applicant***

**vs.**

**ARAMARK; ACE AMERICAN INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13451838  
Sacramento District Office**

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

Applicant seeks removal of the Order Regarding Qualified Medical Examiner Contact (Order) issued by the workers' compensation administrative law judge (WCJ) on December 10, 2020.<sup>1</sup> By the Order, the WCJ ordered that the parties may advise the qualified medical evaluator (QME) of the law regarding apportionment, but neither party "should ask the physician to read and rely upon appellate case decisions or panel decisions."

Applicant contends that the WCJ abused his discretion by the Order and misapplied the law by barring applicant from providing the QME with panel decisions regarding apportionment.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that we deny the Petition.

We have considered the allegations of applicant's Petition for Removal, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant removal, rescind the Order and return this matter to the trial level for further proceedings consistent with this opinion.

**FACTUAL BACKGROUND**

Applicant claims injury to her back on November 20, 2018 while employed as a bus driver by Aramark.

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<sup>1</sup> The Order is dated December 9, 2020, but was not served until December 10, 2020.

On September 29, 2020, defendant filed a declaration of readiness to proceed (DOR) to a status conference. The disputed issue was identified as:

DEFENDANT OBJECTS TO THE PROVISION OF NON-BINDING CASE LAW TO THE PANEL QME AND APPLICANT REFUSES TO REMOVE THE REFERENCES FROM THEIR ADVOCACY LETTER, WCAB ASSISTANCE REQUIRED

(Defendant's DOR, September 29, 2020, p. 2.)

Applicant filed an objection to defendant's DOR on October 2, 2020.

The matter proceeded to a hearing on October 22, 2020. The Minute Order from the hearing states: "Def. objects to applicant citing to panel decisions in contacting the QME. Points and authorities required on this issue. They are due on 11/10/20. Issue will be submitted at that time." (Minutes of Hearing, October 22, 2020.)

Both parties submitted briefs per the Minute Order. The WCJ then issued the disputed Order as outlined above. To date, no evidence has been admitted into the record regarding the QME dispute.

## DISCUSSION

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Furthermore, decisions of 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 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, former § 10566, now § 10787 (eff. Jan. 1, 2020).) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra*, at p. 475.)

The Order in this matter was issued without an evidentiary record. We are unable to

address whether the WCJ's decision is supported by substantial evidence in the absence of a record.

Upon return of this matter to the trial level, we recommend the trier of fact create a complete evidentiary record regarding this dispute and issue a new decision. Either party may then challenge that decision.

It is acknowledged that the WCJ offered guidance regarding apportionment in the Order for the parties to provide to the QME. The trier of fact has the authority to determine what information may be provided to the QME if the parties cannot informally agree on what information to provide to the QME. (*Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1814 (Appeals Board en banc).) The trier of fact also "retains wide discretion in assessing the contents of...parties' advocacy letters to ensure parties do not serve correspondence which could confuse or misdirect the attention of a medical examiner, even if that 'communication' does not expressly contain, reference, or enclose 'information.'" (*Maxham v. California Department of Corrections and Rehabilitation* (2017) 82 Cal.Comp.Cases 136, 147 (Appeals Board en banc).)

We note that "[p]hysicians in workers' compensation matters must...be educated by the parties on the correct legal standards of apportionment." (*Gay v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555 [44 Cal.Comp.Cases 817], 563, citations omitted.) It may be incumbent on the parties to educate the QME regarding the legal standards of apportionment in order to ensure the physician's report is substantial medical evidence. (See *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358] ["an expert's opinion which does not rest upon relevant facts or which assumes an incorrect legal theory cannot constitute substantial evidence upon which the board may base an apportionment finding"].) Consequently, we cannot conclude that it is per se improper for a party to provide a QME with decisions addressing apportionment or discuss those decisions in a cover letter, but we will defer determination of whether applicant may provide the proposed documents to the QME to the trier of fact in the first instance following creation of an evidentiary record.

Therefore, we will grant removal, rescind the Order and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Removal of the Order Regarding Qualified Medical Examiner Contact issued by the WCJ on December 10, 2020 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Removal of the Workers' Compensation Appeals Board that the Order Regarding Qualified Medical Examiner Contact issued by the WCJ on December 10, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**February 24, 2021**

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

**BRADFORD & BARTHEL  
MASTAGNI HOLSTEDT  
TERESA TATE**

***AI/pc***

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