

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

EVELYN NWAIGWE, *Applicant*

vs.

**ATASCADERO STATE HOSPITAL;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ10610513
San Luis Obispo District Office**

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

Applicant seeks removal in response to the workers' compensation administrative law judge's (WCJ) October 26, 2021 Order Granting Petition for Additional Qualified Medical Evaluator (QME) Panel in Psychiatry (Order). Applicant contends that the Order violates her due process rights.

We received an answer from defendant. The WCJ issued a Report and Recommendation on applicant's petition recommending that we deny removal.

We have considered the allegations of the Petition for Reconsideration 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 claimed injury to various body parts while employed by the defendant as a nurse on November 10, 2014.

On May 27, 2021, defendant filed a Declaration of Readiness to Proceed (DOR) to Status Conference. The issues stated for the hearing were:

05/19/21 Joint Request for Additional Panel

05/18/21 Objection to Dr. Malik, Joint Request for Panel Sent

Dr. Malik is unable to adequately address the legal issues presented.
Reporting does not meet the requirements of the Labor Code and

California Code of Regulations. Joint Request for Additional Panel in psychiatry submitted. Absent agreement on additional panel, order for additional panel is needed to address this specialty.

(May 27, 2021 DOR, p. 8.)

The parties proceeded to a Status Conference on June 28, 2021. The Minutes of Hearing (MOH) state in relevant part “defendant desired depo[sition] and/or supplemental [report] from Malik.”

The hearing was continued to a Mandatory Settlement Conference (MSC) on October 18, 2021. The MOH state in relevant part “QME panel issue – defendant to petition for QME before MSC.” No record was made; no testimony or evidence were admitted on the record.

On October 25, 2021, defendant filed a petition for an additional QME panel. On October 26, 2021, the WCJ issued an Order Granting Petition for Additional QME Panel in Psychiatry. On October 29, 2021, applicant filed an objection to the WCJ’s Order.

The MSC was continued to December 20, 2021. The MOH state that the matter was ordered off calendar “...for applicant to petition for removal re: order for replacement panel.” No record was made; no testimony or evidence were admitted on the record.

Applicant filed her Petition for Removal on December 20, 2021.

DISCUSSION

I.

While applicant did file her Petition for Removal on December 20, 2021, we will construe the October 29, 2021 objection to the WCJ’s order as a petition for removal.

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, § 10955(a); 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, § 10955(a).)

Here, for the reasons discussed below, we conclude that applicant will suffer substantial prejudice or irreparable harm as a result of the Order and that reconsideration will not be an

adequate remedy. Removal is therefore warranted to permit the trier of fact to make a record regarding applicant's petition.

II.

The statutory and regulatory duties of a WCJ include the issuance of a decision that complies with Labor Code section 5313.¹ An adequate and complete record is necessary to 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 [2001 Cal.Wrk.Comp. LEXIS 4947] (Appeals Bd. en banc)² (*Hamilton*)). As required by section 5313 and explained in *Hamilton*, “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton, supra*, at 475.) 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 Appeals Board's record of proceedings is maintained in the adjudication file and consists of: the pleadings, minutes of hearing and summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits marked but not received in evidence, notices, petitions, briefs, findings, orders, decisions, and awards, and the arbitrator's file, if any. . . . Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings. (Cal. Code Regs., tit. 8, § 10544.)

Here, no documents or testimony were admitted into evidence at either the October 18, 2021 or the December 20, 2021 hearings. In the absence of an evidentiary record, we are unable to evaluate the basis for the WCJ's Order. Therefore, we must return this matter to the trial level for further proceedings.

III.

Next, we turn to the issue of whether the WCJ violated the applicant's right to due process by issuing the Order without a hearing. All parties in workers' compensation proceedings retain

¹ All statutory references not otherwise identified are to the Labor Code.

² En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10325(a); *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].)

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].) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572,

[The] commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law. (*Id.* at 577.)

Due process guarantees all parties the right to notice of hearing and a fair hearing. (*Rucker, supra*, at 157-158.) 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 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].) Here, the lack of a hearing prevented either party from exercising their right to call witnesses, cross-examine witnesses and/or introduce evidence in support of their positions or in rebuttal of the opposing parties' evidence. "The improper restriction on the right to present evidence in rebuttal is a deprivation of the constitutional guaranty of due process of law." (*Rucker, supra*, at 157 citing *Pence v. Industrial Acc. Com.* (1965) 63 Cal.2d 48, 50-51.)

WCAB Rule 10832 provides in relevant part that "The Workers' Compensation Appeals Board may issue a notice of intention for any proper purpose . . . ; [i]f an objection is filed within the time provided, the Workers' Compensation Appeals Board, in its discretion may . . . [i]ssue an order consistent with the notice of intention together with an opinion on decision; or . . . [s]et the matter for hearing." (Cal. Code Regs., tit. 8, § 10832.) Had the WCJ issued a notice of intention (NIT) to order an additional QME panel in psychiatry, the aggrieved party could have objected and requested a hearing. If no party objected, then the Order would become final.

Therefore, the WCJ denied both parties their fundamental right to due process with respect to the Order, and we must rescind the Order and return the matter to the WCJ on due process grounds as well.

Accordingly, we grant applicant's petition, rescind the October 26, 2021 Order, and return the matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal of the October 26, 2021 Order Granting Petition for Additional QME Panel in Psychiatry (Order) is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that the WCJ's October 26, 2021 Order Granting Petition for Additional QME Panel in Psychiatry is **RESCINDED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 29, 2022

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

**EVELYN NWAIGWE
GHITTERMAN, GHITTERMAN & FELD
STATE COMPENSATION INSURANCE FUND**

HAV/ara

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