

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

JUAN CARLOS HERNANDEZ, *Applicant*

vs.

**YMCA OF THE FOOTHILLS;
INSURANCE COMPANY OF THE WEST, *Defendants***

**Adjudication Number: ADJ14649906
Van Nuys District Office**

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

Applicant seeks removal of the July 7, 2022 Order closing discovery and setting this matter for trial on the case-in-chief.

Applicant's Petition for Removal¹ (Petition) asserts that discovery is not complete, because the cross-examination of Qualified Medical Evaluator (QME) Dr. Levine was not completed, and because applicant requires additional medical-legal evaluations in multiple additional specialties. Applicant avers he will sustain irreparable harm if the matter proceeds to trial, and that reconsideration will not be an adequate remedy following the issuance of decision from trial.

Defendant's August 4, 2022 Answer responds that applicant misapprehends the time allotted for the deposition of the QME, that the deposition was not terminated early, and that there is no further need for additional testimony from the QME. (Answer, dated August 4, 2022, at 6:1.) Defendant asserts that the trial judge can determine whether the record should be developed. (*Id.* at 6:11.)

¹ On July 18, 2022 applicant filed a Petition for Removal with exhibits. On July 28, 2022, applicant filed a "Supplemental Amended Petition for Removal," noting that the prior petition had correctly identified the transcript of the deposition of QME Dr. Levine as an exhibit, but had inadvertently attached an incorrect document, and that the amended filing now attached the correct exhibit. No other changes were made to the pleading. (Petition, at 1:19.) All further references are made to the July 28, 2022 Amended Petition.

We have considered the allegations of the Petition for Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, we will grant the Petition for Removal, rescind the order setting the matter for trial, and return the matter to the trial level for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his neck, left arm, brain, circulatory system, sleep disorder, eyes, psyche, neurological system, urological system, temporomandibular joint, and in the form of dental problems, heart problems, kidney problems, stress, and speech problems while employed as a maintenance worker by defendant YMCA of the Foothills on November 15, 2019. (Amended Application for Adjudication, dated May 16, 2022.) Applicant alleged that he was injured in a motor vehicle collision. (Petition, dated July 28, 2022, at 2:17.)

On October 29, 2021, Martin Levine, M.D issued a QME report in neurology, identifying industrial injury to the head, subsequent craniotomy, and injury to the cervical spine and left shoulder. (Report of Martin Levine, M.D., dated October 29, 2021, at p. 30.)

On January 24, 2022, defendant filed a Declaration of Readiness to Proceed to Mandatory Settlement Conference (MSC), indicating the parties were at an impasse and requesting WCAB intervention.

On February 2, 2022, applicant objected to the MSC, noting pending medical discovery. (Objection to Defendant's Declaration of Readiness to Proceed, dated February 2, 2022, at 2:1.)

On May 10, 2022, applicant amended the application for adjudication to include injury to the psyche and in the form of a traumatic brain injury.

On May 13, 2022, applicant's counsel undertook the deposition of Dr. Levine. The deposition lasted one hour and 15 minutes, at which time Dr. Levine indicated he needed to conclude the deposition. (Transcript of the Deposition of Martin Levine, M.D., dated May 13, 2022, at 58:22.) Applicant's counsel reserved his "right to a second deposition," and defense counsel indicated they would object to any additional deposition of the QME. (*Ibid.*)

On May 17, 2022, applicant amended the application for adjudication to include the body parts of eyes, temporomandibular joint, heart and kidneys.

On July 7, 2022, the parties proceeded to Mandatory Settlement Conference at which time the WCJ ordered the matter set for trial. The minutes indicated the matter was being “set for trial on case-in-chief over objection of AA.”

On July 18, 2022, applicant filed a Petition for Removal (Petition), contending that the WCJ erred in closing discovery and setting the matter for trial over applicant’s objection when the deposition of Dr. Levine was not complete, and applicant required medical-legal evaluations in additional specialties. (Petition, at 5:7.)

On August 4, 2022, defendant filed its answer, averring applicant had failed to explain why additional deposition testimony was required of Dr. Levine, and that the deposition was not cut short by the QME because the two hours of deposition fees advanced constituted one hour of preparation and one hour of deposition time. (Answer, at 3:18.)

On July 25, 2022, the WCJ filed his Report and Recommendation (Report), observing that the need to develop the record can only be triggered either after a trial or submission of the case for decision. (Report, at p. 3.) The WCJ noted that he was unable to rule at the MSC on the need for a second volume of deposition of Dr. Levine because applicant could not produce the transcript from the first volume. The report observed that the trial WCJ would be in an appropriate position to determine whether there was good cause to allow additional deposition testimony, as well as to remedy any other deficiencies in the evidentiary record. (Report, at pp. 3-4.) Accordingly, the WCJ recommended we deny the petition.

DISCUSSION

Applicant contends the matter should be taken off calendar pending completion of discovery, and that case adjudication at this juncture would abrogate applicant’s due process rights. (Petition, at 5:7.)

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, § 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, the WCJ notes that the applicant was unable to produce the transcript of the deposition of Dr. Levine at the July 7, 2022 MSC. (Report, at p. 2) The WCJ was thus unable to review the transcript and weigh the parties' arguments for and against additional deposition testimony from the QME. Additionally, applicant was unable to provide a scheduled deposition date and time. The WCJ further notes the "extreme discordance" between the parties participating in the July 7, 2022 MSC.² (*Ibid.*)

We note that following the original filing of the application for adjudication on May 18, 2021, applicant has amended the claim on multiple occasions, including amendments to include a traumatic brain injury on May 10, 2022, and injury to the eyes, temporomandibular joint, heart and kidneys on May 17, 2022.

Additionally, the minutes of hearing from the July 7, 2022 MSC do not purport to limit the scope of the trial, only indicating that the "case-in-chief" is to be set for trial over applicant's objection. (Minutes of Hearing, dated July 7, 2022.)

It is well established that "WCJ's have authority to decide discovery disputes." (*Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654, 662 [64 Cal.Comp.Cases 624].) In the event that the statutory provisions of the Labor Code are not adequate or convenient, "on appropriate motion and on appropriate showing of good cause, the trial judge has, and should exercise the authority conferred on him by § [10330] of our rules to issue such interlocutory orders relating to discovery as he determines are necessary to insure the full and fair adjudication of the matter before him, to expedite litigation and to safeguard against unfair surprise." (*Hardesty v. Mccord & Holdren* (1976) 41 Cal.Comp.Cases 111, 114 [1976 Cal. Wrk. Comp. LEXIS 2406] (Appeals Bd. panel decision, cited with approval in *Allison, supra*, 72 Cal.App.4th 654, and *Commander v. Union Oil Company of California* (1980) 45 Cal.Comp.Cases 1058, 1060 [1980 Cal. Wrk. Comp. LEXIS 3502].)

Additionally, decisions by 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

² This "extreme discordance" is further reflected in the transcript of the deposition of Dr. Levine, where the substance of the QME's medical-legal deposition testimony is difficult to parse from the unceasing procedural and evidentiary objections and arguments raised by the parties.

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].) Further, the Workers' Compensation Appeals Board "may not leave undeveloped matters as which its acquired specialized knowledge should identify requiring further evidence." (*Raymond Plastering v. Workmen's Comp. Appeals Bd.* (1967) 252 Cal.App.2d 748, 753 [32 Cal.Comp.Cases 287, 291].)

Following our review of the evidentiary and procedural history in this matter, including the transcript of the deposition of Dr. Levine, applicant's May, 2022 claim amendments, and the July 7, 2022 Minutes of Hearing, we are persuaded that applicant will sustain significant prejudice in proceeding to trial on the case-in-chief prior to a determination of multiple pending discovery issues. We believe that the discovery issues presented herein are best addressed at a status conference, prior to the expenditure of the time, expense and judicial resources required by trial proceedings. Multiple discovery issues are pending, including whether there is need for additional testimony from Dr. Levine, whether QME evaluations are necessary in additional specialties, and the scope of the evidence that will be submitted to and considered by those QMEs. The WCJ will be in the best position to review and balance the parties' respective discovery rights, and to work with the parties in creating a discovery plan that will yield a complete record upon which a sound factual and legal determination may be based.

Accordingly, we will grant the Petition and rescind the July 7, 2022 order setting the matter for trial. We will further order that the matter be set for status conference forthwith, to allow the WCJ to address any pending discovery disputes.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the decision of July 7, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the order of July 7, 2022 is **RESCINDED** and that the matter is **RETURNED** with the following **SUBSTITUTED** therefor:

ORDER

IT IS HEREBY ORDERED that the matter is continued to a status conference forthwith.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 16, 2022

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

**JUAN CARLOS HERNANDEZ
ACCIDENT DEFENDERS
TOBIN LUCKS**

SAR/abs

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