

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

**ALEJANDRO ROSARIO RAMIREZ, *Applicant***

**vs.**

**NICHOLS FARMS, INC.; ZENITH INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ15164960**

**Fresno District Office**

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

Defendant seeks reconsideration of the Findings of Fact and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on February 16, 2023, wherein the WCJ found the report from chiropractic qualified medical examiner (QME) Ronald P. Ybarra, D.C., is substantial evidence, and based thereon the WCJ found/ordered that applicant sustained a cumulative injury arising out of and occurring in the course of employment (AOE/COE) to his back, thoracic spine, and chest during the period from January 1, 2010, through September 2, 2021.

Defendant contends that the F&A could not properly be issued while its Petition For Removal and/or Petition For Disqualification of Judge was pending; that the report of Laurie Hagopian-Dresser, M.D., is substantial evidence, and the report from QME Ronald P. Ybarra, D.C., is not substantial evidence.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will dismiss the Petition For Removal and/or Petition For Disqualification of Judge; and we will grant reconsideration, rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

## BACKGROUND

Applicant claimed injury to his back, thoracic spine, and chest while employed by defendant as a laborer/forklift operator during the period from January 1, 2010, through September 2, 2021.

Applicant initially received medical treatment from providers at Kings Medical Center.<sup>1</sup> (See Joint Exh. 2, Ronald P. Ybarra, D.C., April 14, 2022, pp. 6 – 8, record review.) On February 1, 2022, applicant was evaluated by QME Dr. Ybarra. His medical-legal report includes the following:

Physical examination:

This comprehensive medical-legal evaluation is incomplete due to a lack of medical records and diagnostic imaging. As such, I am unable to calculate a whole person impairment rating. The physical examination was performed to provide a work status. After receipt of medical records and diagnostic imaging, the patient should return for a follow-up medical-legal evaluation which will include a physical evaluation of the findings demonstrated on medical records and diagnostic imaging.

Diagnosis (This is a working diagnosis and is subject to change pending receipt of medical records and diagnostic imaging):

1. Lumbar sprain/strain.
2. Thoracic sprain/strain.
3. Intercostal [muscle situated between the ribs] sprain/strain.

I am hereby requesting a copy of the radiographic images described above. If the x-rays were not taken as weight bearing (standing), then in addition to the above referenced radiographs, I hereby also request that the patient undergo an x-ray study, and provide the images to me, consisting of:

- A. Thoracic spine AP view, weight-bearing. (standing)
- B. Thoracic spine lateral view, weight-bearing. (standing)
- C. Lumbar spine AP view, weight-bearing, (standing)
- D. Lumbar spine lateral view, weight-bearing. (standing)
- E. MRI of the Lumbar spine W/O contrast, supine. This study is to be performed with no pillow under the knees.  
(Joint Exh. 2, pp. 4 – 6, emphasis deleted.)

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<sup>1</sup> We note that Joint Exh. 2 is an “Invoice” from Kings Medical Center indicating an examination date of July 29, 2021, and a June 30, 2021 date of injury. The document does not include the name of the physician/provider, nor does it include the signature of the physician/provider.

The parties proceeded to trial on February 1, 2023. The issues identified by the parties were injury arising out of and occurring in the course of employment, and attorney fees. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 1, 2023, p. 2.) In the MOH/SOE the WCJ stated:

Other issues: The parties had a discussion prior to going on the record and have found that QME Dr. Ybarra prepared a report dated April 14, 2022. The Court has explained that Defendant's refusal to accept industrial causation in this case given the date of that report and maintaining a denial based upon a July 29, 2021 report from King Medical Center appears to amount to a bad faith tactic or frivolous action. It also appears to amount to an unreasonable delay. Therefore, the Court is adding the following issues sua sponte<sup>2</sup> to this trial.

(a) Whether Defendant maintaining the denial with the current status of the evidence equates to a bad faith tactic or frivolous action pursuant to Labor Code Section 5813 justifying sanctions as attorney's fees.

(b) Whether Defendant maintaining the denial with the current status of the evidence equates to an unreasonable delay pursuant to Labor Code Section 5814 justifying sanctions as attorney's fees.  
(MOH/SOE, p. 2, emphasis deleted.)

The WCJ ordered that defense counsel:

... [F]ile a declaration under penalty of perjury by February 9, 2023. That declaration under penalty of perjury shall set-forth the timeline Defense Counsel provided prior to beginning trial testimony on February 1, 2023. The timeline relates to all the actions taken by Zenith once it received the QME report of Ronald Ybarra, D.C. on April 18, 2022.  
(MOH/SOE, p. 6.)

On February 9, 2023, defendant filed a Petition for Removal and/or Petition for Disqualification of Judge. On February 14, 2023, the WCJ issued an "Order Re: Rescinding Issues Added for Trial on February 1<sup>st</sup>, 2023;" and a separate "Order Re: Vacating Order That Defense Counsel Sign and File A Declaration Under Penalty of Perjury Detailing Defendant Carrier's Claim Handling Since April 18, 2022" (emphasis in originals deleted). The F&A was issued on February 16, 2023.

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<sup>2</sup>"Of one's own will"... an action taken by the court without the prompting of the parties. (Black's Law Dictionary.)

## DISCUSSION

Pursuant to Appeals Board rule 10960:

Proceedings to disqualify a workers' compensation judge under Labor Code section 5311 shall be initiated by the filing of a petition for disqualification supported by an affidavit or declaration under penalty of perjury stating in detail facts establishing one or more of the grounds for disqualification specified in section 641 of the Code of Civil Procedure. ... (Cal. Code Regs., tit. 8, § 10960)

In this matter, defendant filed a Petition for Removal and/or Petition for Disqualification of Judge. Review of said pleading indicates that it does not comply with the Appeals Board rule 10960 requirements for a Petition for Disqualification of Judge. However, a Petition for Removal is the appropriate relief sought when a WCJ's decision pertains to an interlocutory issue. Here, the issues that were added sua sponte are interlocutory, and do not constitute resolution of a threshold issue. Thus, they will be addressed under the removal standard applicable to non-final decisions. It is also important to note that if addressed as a Petition for Disqualification, the WCJ remedied his errors by rescinding the order. Willingness to remedy one's errors is not evidence of bias; to the contrary, it is, if anything, evidence of a lack of bias. The WCJ's Report denies any bias against defendant, and we see no basis to question that denial. The fact that a party subjectively believes a WCJ is biased against it does not constitute grounds for disqualification.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) 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*.)

The WCJ's decision to raise the issues identified above, without providing prior notice to defense counsel, and ordering defense counsel to "Sign and File a Declaration Detailing Defendant Carrier's Claim Handling" is contrary to defendant's due process rights. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284 [66 Cal.Comp.Cases 584].) But as noted above, prior to issuing the F&A the WCJ rescinded the issues added at trial and vacated the order that defense counsel submit a declaration as to defendant's handling of the injury claim. Clearly, the

WCJ's conduct did not cause defendant substantial prejudice or irreparable harm. In fact, under these circumstances, the Petition for Removal is moot and therefore is dismissed.

Regarding the issue of injury AOE/COE as raised in the Petition, we agree with the WCJ that the treating physician's opinions appear to be based on incorrect facts. (Report, p. 7.) Further, the only report from a treating physician is Joint Exh. 2. The parties refer to that exhibit as a report from Laurie Hagopian-Dresser, M.D. Review of the document clearly shows that it does not include the name of the physician, nor does it include the physician's signature. (See footnote 1, above.) A report that does not indicate the name or status of the medical provider and does not include the signature of that provider does not constitute evidence upon which a finding may be based. (Cal. Code Regs., tit. 8, § 10682(b)(15).)

As to the report from QME Dr. Ybarra, having performed a physical examination of applicant, the report does not include any reference to the findings and/or results of the physical exam. Also Dr. Ybarra stated, "This comprehensive medical-legal evaluation is incomplete due to a lack of medical records and diagnostic imaging." (Joint Exh. 2, p. 4.) He then went on to state that after reviewing diagnostic imaging, including the x-rays and MRI that he had requested, he would need a "follow-up medical-legal evaluation which will include a physical evaluation of the findings demonstrated on medical records and diagnostic imaging." (Joint Exh. 2, p. 4; see also pp. 5 - 6.)

A medical opinion is not substantial evidence if it is based on an inadequate medical history or examination, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93].) When deciding a medical issue, such as whether an applicant sustained a cumulative injury, the WCJ must utilize expert medical opinion. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) Here, Dr. Ybarra did not explain the relationship between applicant's employment and the findings and/or results of his physical examination of applicant. Nor did he have the opportunity to review the diagnostics he stated were necessary to complete his evaluation of applicant. Any conclusion addressing the issue of injury AOE/COE would be based on an inadequate medical examination/history and would constitute speculation or guess. Thus, Dr. Ybarra's report does not constitute substantial evidence

and therefore he should be given the opportunity to review the diagnostics he requested and to re-evaluate applicant if he determines a re-evaluation to be necessary.

Accordingly, we dismiss the Petition for Removal and/or Petition For Disqualification of Judge; and we grant reconsideration, rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that defendant's] Petition for Reconsideration of the Findings of Fact and Award issued by the WCJ on February 16, 2023, is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 16, 2023 Findings of Fact and Award is **RESCINDED**, and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

**IT IS FURTHER ORDERED** that defendant's Petition For Removal and/or Petition For Disqualification of Judge is **DISMISSED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

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

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



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

**May 12, 2023**

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

**ALEJANDRO ROSARIO RAMIREZ  
LAW OFFICES OF GEORGE A. ALMODOVAR  
CHERNOW, PINE AND WILLIAMS**

**TLH/mc**

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