

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

DESIDERIO SANDOVAL, *Applicant*

vs.

MENLOP, INC.;
TECHNOLOGY INSURANCE COMPANY,
ADMINISTERED BY AMTRUST NORTH AMERICA, *Defendants*

Adjudication Number: ADJ11853453
Riverside District Office

**OPINION AND ORDER
DENYING PETITION
FOR REMOVAL**

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, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny 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 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, for the reasons stated in the WCJ's report, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 26, 2024

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

**DESIDERIO SANDOVAL
JOHN JANSEN, ESQ.
TIMBOL & KAPLAN**

AS/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR REMOVAL

I

INTRODUCTION

1. Applicant's Occupation: Cook
Applicant's DOB: April 20th 1949
Date of Injury: January 1, 2017 through January 31, 2018
Parts of Body Injured: Right knee, right shoulder and lumbar spine.
Manner in which injury occurred: Cumulative Trauma
2. Identity of Petitioner: Defendant
Timeliness: it is timely
Verification: it is verified
3. Date of Issuance of Order: February 15, 2024

II

CONTENTIONS

Petitioner contends that the undersigned WCJ erred in vacating the submission of the trial and finding that additional development of the record is necessary.

II[I]

FACTS

The application for adjudication alleging injury to the shoulders, arm, knee and back during the period of January 1, 2017 through January 31, 2018 was filed on January 16, 2019. A Notice and Request for Allowance of Lien was filed by EDD on May 14, 2019.

A Declaration of Readiness was filed by Defendant on March 22, 2023 requesting the matter be set for a Mandatory Settlement Conference.

A Mandatory Settlement Conference took place on July 6, 2023, at which time the matter was taken off calendar for possible settlement. It was noted in the Minutes of Hearing that EDD was agreeable to the parties settling and deferring EDD's lien.

A Declaration of Readiness was filed by Defendant on July 26, 2023 requesting the matter be set for a Mandatory Settlement Conference.

A Mandatory Settlement Conference took place on November 9, 2023, at which time the parties, including EDD, jointly agreed to set the matter for trial.

The case in chief settled by Compromise and Release, with the Order Approving Compromise and Release issuing on November 22, 2023. The Compromise and Release noted that “Defendant agrees to hold Applicant harmless for any EDD lien, and will address, adjudicate and resolve if applicable any EDD lien related to this matter.”

The matter came before the undersigned for trial on the EDD lien on December 18, 2023. The trial was considered submitted on December 18, 2023.

The parties requested the court’s assistance with resolving disputes surrounding the lien of EDD and whether they are entitled to reimbursement for benefits paid for the period of June 27, 2018 through December 31, 2018.

[IV]

DISCUSSION

The issue of EDD’s entitlement to reimbursement for benefits paid during the period of June 27, 2018 through December 31, 2018, requires the court to make a determination as to whether the Applicant was disabled for an industrially related condition during this period of time. As noted by the stipulations of the parties, injury is admitted for the right shoulder. Applicant underwent surgery for this accepted body part on June 20, 2018, per the Panel QME Dr. Ian Brodie in his report dated 11/5/2019 (Defendant’s Exhibit “D”). EDD’s disability period corresponds with the surgery. There is sufficient evidence to indicate that the applicant underwent a surgery for an industrial condition and that some reasonable period of disability would follow. However, the court has not been provided with any substantial medical evidence addressing the issue of the nature, extend and reasonable period of disability following the Applicant’s surgery.

It is well established that any award, order, or decision of the Appeals Board must be supported by substantial evidence. The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or where there is insufficient evidence to determine an issue.

The record requires development as to the question of the nature, extend and reasonable period of disability following the Applicant’s surgery.

Defendant has filed for Removal. Removal is an extraordinary remedy rarely granted and then only when substantial prejudice is shown or if irreparable harm will result if it is not granted. Defendant’s petition fails to identify what substantial prejudice or irreparable harm would be suffered. The court notes that in Defense Exhibit “C”, the Defendant acknowledges the need for

supplemental/additional reporting to address the issue of entitlement to TD. Defendant's current position that the court should not be allowed to develop the record on an issue that they knew and acknowledged was undeveloped is disingenuous and contrary to the intent of the workers compensation laws of the state of California which are intended to provide benefits to injured workers.

IV

RECOMMENDATION

It is respectfully requested that the Petition for Removal be denied.

DATE: 3/12/2024

Joseph Yalon
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE