

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

**JO ANNE ROTH, *Applicant***

**vs.**

**SOUTH COUNTY RETIREMENT HOME; OAK RIVER INSURANCE COMPANY,  
C/O BERKSHIRE HATHAWAY, *Defendants***

**Adjudication Number: ADJ11116060  
Salinas District Office**

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

Defendant seeks removal in response to the “Order Directing the Medical Unit to Issue Additional Qualified Medical Evaluator (QME) Panels” issued by a workers’ compensation administrative law judge (WCJ) on August 11, 2023.

Defendant contends that the Notice of Intention (NIT) to Order additional QME panels issued by the WCJ on July 21, 2023 was not properly served, and therefore it was divested of its right to object and offer evidence to rebut the need for such additional panels. As such, defendant asserts its due process rights have been violated.

We received an Answer from applicant. The WCJ filed a Report and Recommendation on Petition for Removal (Report) recommending that removal be denied.

We have reviewed considered the allegations of the Petition for Removal, the Answer, and the contents of the WCJ’s Report with respect thereto.

Based upon our review of the record and for the reasons stated below, we will grant the Petition for Removal, rescind the WCJ’s August 11, 2023 Order, and return this matter to the WCJ for further proceedings consistent with this opinion.

**BACKGROUND**

On July 5, 2023, applicant filed and served a petition for additional panel QME lists (PQME) in the field of ophthalmology (MOP) and rheumatology (MMR), based on the March 9,

2023 medical-legal reporting of the psychiatric panel QME M. Joel Scheinbaum, in which he opined that applicant was entitled to comprehensive evaluations by an ophthalmologist and rheumatologist. Thereafter, on July 21, 2023, the WCJ issued a NIT to Order additional panels on July 21, 2023, providing an interested party time to file and serve a written objection within fifteen (15) days from service of the notice.

After having received no response to the NIT, on August 11, 2023, the WCJ issued the Order Directing the Medical Unit to Issue Additional QME Panel Lists.

Defendant's verified petition for removal filed on September 5, 2023 asserts that it did not receive the NIT to Order additional panels at either the email address on the proof of service of dbava@bavalaw.com, or the registered email address of service@bavalaw.com.

### **DISCUSSION**

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd. (Cortez)* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd. (Kleemann)* (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).)

Parties to a workers' compensation proceeding retain the 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].) A fair hearing is "one of 'the rudiments of fair play' assured to every litigant..." (*Id.* at p. 158.) As stated by the Supreme Court of California 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 p. 577.) 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].)

The WCJ states in his Report as follows:

... the court fails to see how the issuance of panels has resulted in substantial prejudice or irreparable harm to the defendant. A panel is merely a list of three physicians. Defendant is not precluded from objecting to the applicant proceeding with additional evaluations in ophthalmology and rheumatology nor from requesting a stay of the evaluations until the parties are both heard on the issues. (Report, p. 2).

Defendant alleges that since it was unable to timely object to the NIT to issue additional panels, it was denied the right to object and offer appropriate evidence to rebut the need for such panels, depriving it of due process and the right to be heard, and thus causing substantial prejudice and irreparable harm that reconsideration cannot cure.

Labor Code section 5313<sup>1</sup> requires the WCJ to “make and file findings upon all facts involved in the controversy and [make and file] an award, order, or decision stating the determination as to the rights of the parties...[and include] a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.” (Lab. Code, § 5313.) The WCJ’s decision “must be based on admitted evidence in the record” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Bd. en banc)), and the decision 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. Workers’ Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) In *Hamilton*, we held that the record of proceedings must contain, at a minimum, “the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence.” (*Hamilton, supra*, at p. 475.)

Here, there was no hearing and thus no minutes and summary recording stipulations, defining the issues, and identifying the evidence prior to the WCJ’s Order for additional PQME panels. In addition, the WCJ issued the Order without an opinion on decision. Without an evidentiary record, we are unable to determine whether the WCJ’s Order is supported by substantial evidence.

Therefore, we return this matter to the trial level for the WCJ to prepare a proper record of the proceedings in accordance with section 5313 and *Hamilton*.

---

<sup>1</sup> All statutory references hereinafter are to the Labor Code unless otherwise indicated.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Removal in response to the Order issued on August 11, 2023 by the WCJ is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Removal of the Workers' Compensation Appeals Board that the Order of August 11, 2023 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings by the WCJ consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



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

**MAY 20, 2024**

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

**JO ANNE ROTH  
WILSON & WISLER, LLP  
BAVA & ASSOCIATES, PC  
GOLDMAN MAGDALIN**

*LAS/ara*

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

CS