

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

NIRMAL KUMAR, *Applicant*

vs.

BANWAIT PROPERTIES, INC.; ZENITH SACRAMENTO, *Defendants*

**Adjudication Number: ADJ12515803
Sacramento District Office**

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

Applicant Nirmal Kumar seeks removal of the April 5, 2023 order to take the matter off calendar, wherein the workers' compensation administrative law judge (WCJ) took the mandatory settlement conference hearing of the April 11, 2018 specific injury off calendar in order to litigate this specific injury together with a cumulative injury involving the same applicant.

Applicant contends that he has a constitutionally mandated right to have his specific injury workers' compensation claim adjudicated "expeditiously, inexpensively, and without encumbrance of any character." (Cal. Const., Art. XIV §v4.)

We have not received an answer from defendants Banwait Properties, Inc./Zenith Sacramento. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied.

We have considered the Petition for Removal and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant removal and return this matter to the trial level for further proceedings.

FACTS

The WCJ provided the following summary of facts:

1. On March 15, 2023, applicant filed a DOR to MSC based on the reporting of QME, Gerard Dericks, MD. Applicant asserted no discovery was pending.

2. Defendant filed a timely objection to DOR indicating Dr. Dericks found a subsequent cumulative trauma injury.
3. On April 5, 2023, an MSC went forward.
4. At conference, attorneys agreed that Dr. Dericks was deposed on March 3, 2023.
5. At conference, attorneys agreed Dr. Dericks indicated there was a cumulative trauma injury subsequent.
6. Although not in a citable record, at conference, attorneys agreed that there was an overlap of industrial injuries between the specific, April 11, 2018, and cumulative trauma injury subsequent: Neck, back and hips.
7. When the undersigned asked applicant's attorney why applicant had not filed an application for adjudication of claim for the newly identified injury, he responded: To be honest, if it were 50% industrial causation for the cumulative trauma injury subsequent, I would have.
8. Defendant's attorney stated that he had completed an application for adjudication of claim for the cumulative trauma injury subsequent yesterday and his assistant would be filing it shortly.
9. On April 6, 2023, an application for adjudication of claim CT 03/30/2022 was filed resulting in ADJ17532210. (EAMS Doc ID 45820200.)
10. Attached to his petition for removal, applicant filed Dr. Dericks' March 3, 2023, deposition transcript. (EAMS Doc ID 45938400.)
11. Repeatedly, Dr. Dericks confirmed the applicant suffered a subsequent, aggravation cumulative trauma injury. (*Id.* at pp: 14:8-9; 23:13; 24:25; 29:16; 30:17; 31:15-16; 32:24; 33:3.) (Report, pp. 1-2.)

DISCUSSION

The WCJ ordered the mandatory settlement conference for the specific injury off calendar because she opined that the specific injury and cumulative trauma injury should be tried together as there appears to be overlap in industrially injured body parts. (Report, pp. 3-4.)

Labor Code,¹ section 3208.2, provides that:

When disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific, cumulative, or both, all questions of fact and law shall be separately determined with respect to each such injury, including, but not limited to, the apportionment between such injuries of liability for disability benefits, the cost of medical treatment, and any death benefit. (§ 3208.2.)

A specific injury and a cumulative trauma injury are two different injuries. A specific injury is one occurring as the result of one incident or exposure which causes disability or need for medical treatment. (§ 3208.1.) A cumulative trauma injury is a repetitive mentally or physically traumatic activity extending over a period of time, the combined effect of which causes any disability or need for medical treatment. (§ 3208.1.) Accordingly, applicant's specific injury and cumulative trauma injury should be determined separately, including any apportionment with respect to each injury.

A party may petition for removal of an interim order. (Cal. Code Regs., tit. 8, § 10843.) 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, § 10843(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, § 10843(a).)

Cal. Const., art. XIV, § 4, provides that the system of workers' compensation "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State" We agree that applicant is entitled to adjudicate his specific injury first irrespective of whether he has a cumulative trauma injury pending. As such, we grant applicant's petition for removal and return this matter to the trial level for further proceedings consistent with this opinion.

¹ All statutory references are to the Labor Code unless otherwise indicated.

For the foregoing reasons,

IT IS ORDERED that applicant Nirmal Kumar's Petition for Removal of the April 5, 2023 order to take the matter off calendar is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 15, 2024

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

**NIRMAL KUMAR
EASON & TAMBORNINI
CHERNOW PINE ROSEVILLE**

LSM/oo

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