

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

SHERI EASTERLY, *Applicant*

vs.

**SAY SAN DIEGO; CYPRESS INSURANCE COMPANY, administered by
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ11315552
San Diego District Office**

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

Defendant seeks removal in response to an Order issued by the workers' compensation administrative law judge (WCJ) at a Status Conference (Conference) on January 25, 2024. At the Conference, the WCJ issued an Order denying defendant's petition to quash the deposition of the former claims examiner on applicant's case, as well as an Order allowing defendant to depose applicant's treating physician, with the condition that the physician's deposition be set in front of the WCJ.

Defendant contends that the Order denying defendant's motion to quash the deposition of the claims examiner without the opportunity to make a record and present evidence at a trial on the issue will result in significant prejudice and /or irreparable harm, in violation of their due process.

We received an Answer from applicant.

We received a Report and Recommendation (Report) from the WCJ, which recommends that the Petition be denied.

We have considered the allegations of the Petition for Removal, the Answer, and the contents of the Report. Based on our review of the record, and as discussed below, we will grant the Petition for Removal, rescind the January 25, 2024 Order denying defendant's petition to quash the deposition of claims examiner Corinne Ruzzo, and return this matter to the district office for further proceedings.

RELEVANT FACTUAL BACKGROUND

Applicant, while employed by defendant on December 19, 2017, sustained injury arising out of and in the course of employment (AOE/COE) to her head, neck, hearing, right shoulder, right hip and vestibular system. (Stipulated findings of Fact and Award, July 13, 2021.)

On January 13, 2023, defendant filed a Petition for Removal and petition to quash the deposition of claims examiner Corinne Ruzzo (Petition), in response to December 21, 2022 order by the WCJ setting the matter for trial, alleging trial was premature prior to a meet and confer at a status conference to define a discovery plan.

On April 11, 2023, we issued our Opinion and Order Dismissing Petition for Removal (OOD), noting that on February 15, 2023, the WCJ ordered that all orders issued in the Minutes of Hearing dated December 21, 2022 be vacated, and issued new orders pursuant to the discovery plan entered into by the parties. (OOD, 4/11/23.)

On June 27, 2023, applicant filed a Petition to compel the deposition of Corinne Ruzzo to appear in court for her deposition on July 31, 2023 at 10:00 a.m.

On July 3, 2023, the WCJ issued an Amended Order compelling the deposition of Ms. Ruzzo for said date and time. (Amended Order, 7/3/23.) On July 17, 2023, defendant filed a Petition for removal of that Order. On July 21, 2023, the WCJ issued an Order vacating same, indicating that the issue of depositions, including that of Ms. Ruzzo, will be considered at the July 24, 2023 hearing set for 1:30 p.m. (Order Vacating, 7/21/23.)

The July 24, 2023 trial date was continued by agreement to September 25, 2023. The parties thereafter submitted a joint correspondence on September 20, 2023 requesting a further continuance due to ongoing discovery. On September 22, 2023, as reflected in Case Events in the Electronic Adjudication Management System (EAMS), the court cancelled the trial set for September 25, 2023.

On November 16, 2023, defendant filed a petition for protective order and motion to quash the deposition of Corinne Ruzzo, in response to the applicant's Subpoena Duces Tecum (SDT) and Notice of Deposition of Corinne Ruzzo, set for December 4, 2023 at applicant's counsel's office.

On November 17, 2023, applicant filed a motion to quash and/or motion for a protective order in response to the defendant's noticed motion of the deposition of applicant's treating physician, Thomas Schweller, M.D., set for November 30, 2023 by video or teleconference.

On November 20, 2023, per Case Events in EAMS, the WCJ set this case for a status conference on January 25, 2024.

At the January 25, 2024 conference, the WCJ issued Orders denying defendant's petition to quash the deposition of Ms. Ruzzo, and granting defendant's request to depose Dr. Schweller, under the condition that said deposition occur in front of the WCJ.

On February 28, 2024, defendant filed their petition for removal.

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].)

In the January 25, 2024 Minutes of Hearing, under Other/Comments, the WCJ states as follows:

DEF PETITION TO QUASH IS DENIED, AND MR. ROTT CAN GET CORINNE RUZZO'S DEPOSITION. DEF WILL GET DEPO OF DR.

SCHWELLER BUT ONLY IF SET IN FRONT OF ME, IN PERSON OR VIA ZOOM. DATE OF DEPO TO BE COORDINATED WITH AA.

(MOH, 1/25/24.)

The WCJ thereafter issued an Order granting applicant's request to take the matter off calendar (OTOC).

The WCJ does not discuss the reasoning for her decision at the hearing, nor in the Report, other than noting that the scope of discovery may be "reasonably calculated to lead to the discovery of admissible evidence". The WCJ further reasons that a trial on this discovery dispute would not result in a different order, and that while the defendant may not have to produce Ms. Ruzzo due to a Notice to Produce as she is no longer an employee of defendant, the defendant cannot prevent her from responding to a Subpoena to attend a duly noticed deposition. (Report, p. 6.)

While this ultimately may be correct, no evidence was offered, identified, or admitted at the hearing. While a WCJ may submit an issue for decision at a conference hearing, the preferred method would be to set the matter for a noticed hearing, after laying out the specific issues, exhibits, and evidence or testimony prepared at a Mandatory Settlement Conference (MSC) in accordance with WCAB Rule 10759.

WCAB Rule 10761 states:

(a) A workers' compensation judge may receive evidence and submit an issue or issues for decision at a conference hearing if the parties agree.

(b) If documentary evidence is required to determine the issue or issues being submitted, the parties shall comply with the provisions of rule 10759 regarding the listing and filing of exhibits.

(c) After submission at a conference, the workers' compensation judge shall prepare minutes of the hearing and a summary of evidence as set forth in rule 10787.

(Cal. Code Regs., tit. 8 § 10761.)

Here, there was no agreement by the parties for submission of their dispute at the status conference on January 25, 2024. Additionally, there was no listing and filing of exhibits, nor did the WCJ issue a summary of evidence, as no record was made.

Decisions of 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 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].) An adequate and complete record is necessary to understand the basis for

the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 (Appeals Bd. en banc) (*Hamilton*).

As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton, supra*, at p. 476 citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

At this time, we are unable to determine if good cause exists for the Order issued by the WCJ due to a lack of an adequate record. Therefore, we must rescind the Order denying defendant's petition to quash and return this matter to the WCJ for further proceedings consistent with this opinion.

Accordingly, we grant defendant's Petition for Removal, rescind the January 25, 2024 Order denying defendant's motion to quash the deposition of Corinne Ruzzo, and return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Removal in response to the Order issued on January 25, 2024 by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Order of January 25, 2024 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 11, 2024

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

**SHERI EASTERLY
HIDEN, ROTT & OERTLE
PURINTON LAW**

LAS/abs

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