

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

TOMAS PEREZ, *Applicant*

vs.

CLEANCO CONSTRUCTION; HINKLEY AND ASSOCIATES; REDLANDS UNIFIED SCHOOL DISTRICT; JOSEPH P. SOARES dba CLEAN CO; TIG MANCHESTER; KEENAN ASSOCIATES RIVERSIDE; SCIF INSURED GLENDALE, *Defendants*

**Adjudication Number: ADJ2030301 (ANA0376740)
Santa Ana District Office**

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

Defendant State Compensation Insurance Fund (SCIF) seeks removal in response to the Findings and Order (F&O) issued by a workers' compensation administrative law judge (WCJ) on June 12, 2023, wherein the WCJ denied its petition for remote testimony by party witness Jeffrey Hinkley on the basis that defendant failed to demonstrate good cause.

Defendant contends in pertinent part that it has demonstrated good cause because Mr. Hinkley resides in Arizona and because applicant and the other parties have stipulated that Mr. Hinkley can appear remotely; and that the WCJ failed to explain why the witness' credibility could not be judged remotely.

We did not receive an answer from any party. 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 and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will grant the Petition for Removal, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

This matter was initially set for a priority conference on June 7, 2022. At that time, the case was set for trial commencing on November 15, 2022, on the issue of employment. On June

24, 2022, defendant SCIF filed a Petition to permit remote witness trial testimony of defense witnesses Jeff Hinkley and John Eastman.

On June 29, 2022, the WCJ issued an Order denying defendant's petition on the basis that no good cause had been shown for allowance of such remote testimony. No evidence was identified, nor was any record made or testimony taken prior to denial by the WCJ of the Petition. Thereafter, on July 7, 2022, defendant filed a Petition for Removal of the June 29, 2022 Order.

On November 30, 2022, we issued an "Opinion and Order Granting Petition for Removal and Decision After Removal," remanding the matter back to the trial judge to make a record, in order to enable us to understand the basis for the WCJ's decision per *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Board en banc).¹

Thereafter, a trial hearing took place on April 25, 2023, at which time the sole issue to be decided was whether Mr. Hinkley should be granted a remote appearance for purposes of testimony in any future trial related to the case. The stipulations of the parties included the statement that there were no objections to the remote testimony of Mr. Hinkley.²

On June 12, 2023, the WCJ issued the F&O denying SCIF's petition.

DISCUSSION

Preliminarily, we reiterate that any decision of the WCJ granting or denying a petition to allow an electronic appearance or electronic testimony must be reduced to writing and be based upon an adequate record, after providing the parties an opportunity to be heard, in the same manner as any other order touching on the parties' due process rights. (Lab. Code § 5313; Cal. Code Regs., tit. 8, § 10833; *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

A party intending to appear electronically³ may seek permission to appear electronically at a hearing pursuant to WCAB Rule 10816, by filing a petition pursuant to WCAB Rule 10510.

¹ Commissioner Sweeney, who was on the panel that issued the November 30, 2022 Opinion and Order Granting Petition for Removal and Decision After Removal no longer serves on the Appeals Board. Another panelist was assigned in her place.

² While both witness John Eastman and Jeff Hinkley initially requested permission to testify remotely, per the April 25, 2023 Minutes of Hearing and the Report, defendant no longer wished to present witness John Eastman at trial. (Report, p. 3.)

³ The term "electronically" is also commonly referred to as "remotely" or "virtually" by WCJs and the parties.

(Cal. Code Regs., tit. 8, §§ 10510, 10816.) A witness seeking permission to testify electronically may likewise file a petition pursuant to WCAB Rule 10817 (Cal. Code Regs., tit. 8, § 10817).⁴ The person seeking to appear electronically or testify electronically must demonstrate good cause. (Cal. Code Regs., tit. 8, §§ 10816(a), 10817(a).)

A stipulation between the parties constitutes such good cause, and obviates the need to provide an opportunity to be heard or to create a record. (Cal. Code Regs., tit. 8, § 10835.) Here, the parties stipulated that Mr. Hinckley could testify electronically. By doing so, the parties demonstrated good cause. Thus, as explained below, in order to disregard the stipulation, the WCJ was required to demonstrate good cause to set it aside.

Stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1] (*Weatherall*)). As defined in *Weatherall*, "A stipulation is 'An agreement between opposing counsel . . . ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,' (Ballentine, Law Dict. (1930) p. 1235, col. 2) and serves 'to obviate need for proof or to narrow range of litigable issues' (Black's Law Dict. (6th ed. 1990) p. 1415, col. 1) in a legal proceeding." (*Weatherall, supra*, at p. 1119.)

Section 5702 states:

The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. The appeals board may thereupon make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.

It is true the Appeals Board has the discretion under section 5702 to reject factual stipulations. (See *Frankfort General Ins. Co. v. Pillsbury* (1916) 173 Cal. 56, 58-59 [159 P. 150] [decided under predecessor statute].) However, the Appeals Board should not reject a stipulation clarifying the issues in controversy absent good cause. (See *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 790-791 [52 Cal.Comp.Cases 419]; *Weatherall, supra*, p. 1119; See *Bailey v. Taaffe* (1866) 29 Cal. 422, 424 [exercise of discretion should not be capricious].)

⁴ If the matter is set for an electronic hearing pursuant Rule 10815, no petition is required, unless otherwise requested, ordered, or allowed. (Ca. Code Regs, tit. 8 §§ 10745, 10816(b), 10817(b).)

Here, while we initially returned this matter on November 30, 2022 in order to create a record to determine whether good cause existed to allow defendant's witnesses to testify electronically, the parties thereafter stipulated at the trial of April 25, 2023 that there was no objection by the parties to allow Mr. Hinkley to do so.

We see no basis on the existing record for the WCJ to have rejected the stipulation. The WCJ's rejection of the agreement at trial to allow the witness' remote testimony was stated as "[i]n order to properly assess the credibility of a witness, a trier of fact (as well as the other parties in a case) is best served by being able to observe the witness in 'real life' rather through a monitor or on a phone." (Report, p. 7.) Based on our review, we do not believe that this is a sufficient reason to reject the stipulation.

If, after the remote testimony commences, and the WCJ finds good cause to thereafter terminate testimony and order that Mr. Hinkley testify in "real life," it is within their province to do so. This will create a record in keeping with due process, and will ensure that there is a meaningful right of appeal.

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].)

Thus, the Order denying defendant's petition to permit remote testimony of Jeff Hinkley in light of the stipulation of the parties at trial resulted in substantial prejudice and irreparable harm to defendant, as well as unnecessary delay.

Accordingly, we grant defendant's Petition for Removal, rescind the June 12, 2023 Findings and Order, 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 Finding and Order issued on June 12, 2023 by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Findings and Order of June 12, 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/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 4, 2024

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

**TOMAS PEREZ
LAW OFFICE OF JESSE MARINO
STATE COMPENSATION INSURANCE FUND
CHERNOW, PINE & WILLIAMS
LAW OFFICES OF PARKER & IRWIN**

LAS/ara

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