WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA DE LOURDES VALLE (Deceased);
MANUEL SOTO and GUADALUPE SOTO (Dependents), ***Applicants,***

vs.

METRO SERVICES GROUP;
BERKSHIRE HATHAWAY HOMESTATE INSURANCE COMPANY dba
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, ***Defendants***

Adjudication Number: ADJ14757656
Marina Del Rey District Office

OPINION AND ORDER GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL

Defendant Berkshire Hathaway Homestate Companies seeks removal based on the May 8, 2024 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that subpoenaed Kaiser records of alleged dependents Manuel Soto and Guadalupe Soto, widower and daughter of decedent Maria De Lourdes Valle, are not admissible at trial.

Defendant contends that the WCJ erred in determining that the subpoenaed records are not admissible. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that we deny removal. We have considered the Petition for Removal, Applicant's Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant removal, rescind the May 8, 2024 Findings and Order, and issue in its place a finding that the subpoenaed records are admissible at trial, and an Order that Applicant's 1 through 8, and Defendant's A through V, are admitted into evidence.

At the March 20, 2024 trial hearing, the parties submitted only one issue for decision: "Are the Subpoena Duce[s] Tecum Kaiser records of Guadalupe Soto and Manual Soto admissible at trial?" (March 20, 2024 Minutes of Hearing and Summary of Evidence, p. 2.) All other issues were deferred. (*Ibid*.)

At trial, exhibits were marked for identification only as Applicant's 1 through 8 and Defendant's A through V. (March 20, 2024 Minutes of Hearing and Summary of Evidence, pp. 2-

5.) Although the Minutes of Hearing and Summary of Evidence, Findings and Order, and Opinion on Decision all lack a description of the parties' objections to the exhibits, the WCJ's Report does provide an evidentiary determination that Applicant's 1 through 8 are admissible over the objections of defendant regarding their evidentiary value, and Defendant's D through V are admissible over the objections of applicant questioning the evidentiary value of those exhibits. (Report, p, 3.) To the extent that the parties' objections and rulings thereon were not adequately described and discussed in the opinion as required by Labor Code section 5313, they were described and discussed in the Report to cure that defect. (See *City of San Diego v. Workers' Comp. Appeals Bd. (Rutherford*) (1989) 54 Cal.Comp.Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd*. (1980) 45 Cal.Comp.Cases 1026 (writ den.).)

Defendant's A, B, and C, which were excerpts from the subpoenaed Kaiser records of the decedent, Guadalupe Soto, and Manuel Soto, respectively, were not admitted into evidence. The Opinion on Decision and Report cite California Labor Code section 5502[1] subdivision (d)(3) as the basis for not admitting the records of Guadalupe Soto and Manuel Soto, but do not specifically address why the records of decedent Maria De Lourdes Valle were not admitted into evidence. We find that Defendant's A, B, and C should all be admissible at trial.

The relevant portion of section 5502, subdivision (d)(3) provides as follows:

> Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference.

In this case, it appears that the subpoenaed records that defendants seek to admit as Defendant's A, B, and C meet the requirements of section 5502 for admissibility. All of the subpoenaed records were listed on the first amended pre-trial conference statement, showing that they were in fact both obtained and disclosed prior to the date of the mandatory settlement conference (MSC) of November 9, 2023, which is the MSC from which a trial hearing was set, then continued to March 20, 2024, when the issue of the admissibility of Kaiser records was submitted.

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

The subpoenaed records of the decedent, Maria De Lourdes Valle, marked as Defendant's A, appear to have been produced on July 15, 2021, and their relevance and timeliness cannot reasonably be disputed. With respect to the medical records of Guadalupe Soto and Manuel Soto, marked as Defendant's B and C, respectively, even though the Report correctly notes that there was a delay of more than one year between taking the dependent applicants' depositions and issuing subpoenas for their records, marked as Defendant's B and C, the Report also correctly acknowledges that Defendant's E through K and Q through S show the difficulty encountered by the defendant in procuring those records. Even though both Guadalupe Soto and Manuel Soto are parties to this case as alleged dependents, and as household members of the decedent, the date of their respective COVID symptoms and diagnosis have obvious relevance, their counsel fought defendant's efforts to obtain a release for relevant medical records. Although it is unclear how the defendants ultimately obtained those records without the applicants' cooperation, there is no reason to think that this refusal to sign releases would not have caused an indefinite amount of delay pending adjudication of the discovery dispute, even if defendants had been more diligent. Considering the dispute over the production of these records, it would be at best speculative to conclude that these records could have been discovered earlier through unilateral due diligence.

The January 1, 2024 repeal of the COVID presumption in Labor Code section 3212.86 does nothing to change this analysis. Any finding of industrial injury, regardless of whether it is based on a presumption or based on evidence, may be rebutted using evidence to the contrary, so the defendants were always entitled to the medical records of Gudalupe Soto and Manuel Soto showing when they were first diagnosed with COVID. It appears from the evidence that defendants were unable to obtain such rebuttal evidence any sooner than they did because of applicants' attorney's refusal to cooperate with what was by any measure a reasonable discovery request both before and after the repeal of section 3212.86.

The Report appears to inappropriately rely upon an unpublished opinion, *Shank v. Workers' Comp. Appeals Bd.*, 2006 Cal. App. Unpub. LEXIS 11299, citing its holding that a medical report that was listed on a pretrial conference statement, but not completed until after the MSC, was inadmissible without a showing of good cause. While California Rules of Court, rule 8.1115(a), prohibiting the citation of unpublished opinions, does not apply directly to proceedings before the Workers' Compensation Appeals Board, and the Appeals Board's Court Rules and Policy and Procedure Manual are currently tacit on this subject, past Appeals Board panels have reasoned that

a judge should not rely on an unpublished case to support a decision. (See, e.g., *Facundo v. Workers' Compensation Appeals Bd.* (2006) 71 Cal.Comp.Cases 834, 835 [2006 Cal. Wrk. Comp. LEXIS 174] (writ den.).)

All citable cases referenced in the petition, answer, and Report either support the admissibility of the Kaiser records or can be distinguished based on the facts. The petition cites *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264] (hereafter *Kuykendall*), which permitted evidence to be admitted not only after the MSC, but after trial, when it was necessary to accomplish substantial justice. In *Kuykendall*, the Second Appellate District of the California Court of Appeal rejected the arguments raised in the answer and Report that County of *Sacramento v. Workers' Comp. Appeals Bd. (Estrada)* (1999) 68 Cal. App. 4th 1429 [64 Cal.Comp.Cases 26] and *San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986] require strict application of the section 5502, subdivision (d)(3) discovery cutoff, even where it would deprive the parties of substantial justice. (*Kuykendall., supra,* 79 Cal.App.4th 396 at p. 406.) The Court in *Kuykendall* cited *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924], *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261], and *M/A Com-Phi v. Workers' Comp. Appeals Bd.* (1998) 65 Cal.App.4th 1020 [63 Cal.Comp.Cases 82] to support its conclusion that a WCJ's duty to base decisions on substantial evidence makes augmentation of the record necessary, even where the requirements of section 5502, subsection (d)(3) would otherwise prohibit it.

Unlike most cases enforcing a strict discovery cutoff under section 5502, subsection (d)(3), the present case involves evidence that was in fact disclosed and obtained prior to the final MSC, with substantive issues deferred to ensure that the admission of such evidence in no way prejudices any party. In the case of *Bentley v. Workers Compensation Appeals Bd.* (1996) 61 Cal.Comp.Cases 610, 612, [1996 Cal. Wrk. Comp. LEXIS 3188] (writ den.), which was cited but not discussed in the Report, a writ was denied where a medical report issued about nine months prior to the MSC was not listed on the pre-trial conference statement. The report was excluded under section 5502, subdivision (d)(2). That case is distinguishable from the present case, where records were in fact disclosed on the pre-trial conference statement, and opposing counsel had notice and an opportunity to order a copy of the records when the subpoena was issued but instead opposed production and refused to cooperate with efforts to obtain those records. The facts in this case are

similarly distinguishable from the facts in *Telles Transp., Inc. v. Workers' Compensation Appeals Bd. (Zuniga)* (2001) 92 Cal. App. 4th 1159 [66 Cal.Comp.Cases 1290], where applicant's counsel strategically choose not to disclose medical records at an MSC.

The discovery cut-off contained in subdivision (d)(3) of section 5502 must be applied in a manner consistent with the requirement of the California State Constitution that the administration of all workers' compensation legislation "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., Art. XIV § 4.) The clear purpose of this constitutional mandate is to achieve justice in a timely, resourceful, and efficient manner, and not to permit injustice simply because it would save time, money, and effort. To this end, while all hearings before the Appeals Board or a WCJ are governed by Division 4 of the Labor Code, including section 5502, in their conduct they "shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division." (Lab. Code, § 5708.)

Furthermore, it is well established that decisions by 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].) Substantial evidence must be based upon an adequate history that includes all germane facts. (*Escobedo v. Marshalls* (2007) 70 Cal.Comp.Cases 604, 620 (Appeals Board en banc); *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd.,* 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].) The Workers' Compensation Appeals Board "may not leave undeveloped matters as which its acquired specialized knowledge should identity requiring further evidence." (*Raymond Plastering v. Workmen's Comp. Appeals Bd.* (1967) 252 Cal.App.2d 748, 753 [32 Cal.Comp.Cases 287, 291].) Accordingly, if the evidentiary record in this case did not include available documents showing when the decedent and the members of her household were diagnosed with COVID, the record would then require development by the WCJ irrespective of any discovery cutoff in order to ensure an adequate history, substantial evidence, and substantial justice.

While the medical records in Defendant's B and C should be directly admissible based on their highly relevant factual content, those facts must also be presented to a medical expert to determine their role in the causation of injury. It appears that Qualified Medical Evaluator (QME) Alvin Markovitz, M.D., has already reviewed the relevant Kaiser records, but his report has not yet been offered into evidence, nor have potential issues regarding the admissibility of the report been addressed in this case. If the parties cannot reach an agreement regarding the admissibility of medical evidence, including but not limited to the question of whether the report of QME Dr. Markovitz was obtained in compliance with the requirements of Labor Code section 4062.3 as explained in *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803 [2018 Cal. Wrk. Comp. LEXIS 100] (Appeals Board en banc), those issues will require further litigation. To minimize further encumbrance, the parties are encouraged to try future evidentiary issues together with the substantive issues on which the evidence is offered.

As pointed out in the answer to the petition, the Appeals Board will grant removal only if substantial prejudice or irreparable harm will result if removal is not granted, and reconsideration of a future final decision will not be an adequate remedy. (Cal. Code Regs., tit. 8, § 10955(a); *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].) In this case, for the reasons set forth above, we are persuaded that defendant will sustain significant prejudice if forced to proceed to trial on the case-in-chief issue of causation of injury without being permitted to introduce evidence that includes facts essential to a just decision of that issue.

Accordingly, for the foregoing reasons,

IT IS ORDERED that defendant's Petition for Removal based on the May 8, 2024 Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Appeals Board that the May 8, 2024 Findings and Order is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. The subpoenaed Kaiser records of Guadalupe Soto and Manuel Soto are admissible at trial.

ORDER

IT IS HEREBY ORDERED that the exhibits marked for identification at trial as Applicant's 1 through 8, and Defendant's A through V, are admitted into evidence over objection.

IT IS FURTHER ORDERED that this matter is returned to the trial level for further proceedings consistent with this Opinion and Decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 9, 2025

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

MARIA DE LOURDES VALLE (DECEASED)
GORDON, EDELSTEIN, KREPACK, GRANT, FELTON & GOLDSTEIN
LAW OFFICES OF KAPLAN & BOLDY

CWF/*cs*

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