

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

ABEL GALINDO GARCIA, *Applicant*

vs.

**CAL FRESH HARVESTING, LLC; STAR INSURANCE COMPANY administered by
MEADOWBROOK INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ16751654
Fresno District Office**

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

Defendant seeks removal in response to the Finding and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) at a Mandatory Settlement Conference (MSC) on December 28, 2023. The WCJ found that the medical record in this case requires further development on an issue in dispute and that the parties need additional medical evaluations to adequately develop the record, in specialties to be determined by the parties, with either party able to file for new panels in whatever specialties they choose, beginning at 5:00 p.m. on January 17, 2024.

Defendant contends that the WCJ abused his discretion in ordering additional non-specific panels without allowing the parties to introduce evidence on the issue in dispute at trial.

We did not receive 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 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 December 28, 2023 Finding and Order regarding additional Qualified Medical Evaluator (QME) panels, and return this matter to the district office for further proceedings.

FACTUAL BACKGROUND

Applicant, while employed by defendant on April 27, 2022, claims to have sustained injury arising out of and in the course of employment (AOE/COE) to his toes, left foot, left knee, as well as a compensable consequence to his right foot, knees, leg and psyche. (Application for Adjudication, September 29, 2022.)

On February 7, 2023, applicant was evaluated by QME James Schmitz, M.D., in the field of internal medicine. On March 3, 2023, defendant filed a Declaration of Readiness to Proceed (DOR) on the issue of permanent disability, in which it states that the “QME indicates applicant’s allegations are non-industrial. WCAB assistance is requested.” (DOR, March 3, 2023.)

Applicant filed a verified objection in which it was alleged that Dr. Schmitz had not been provided all necessary medical records in order to render an informed decision, and that further, an additional panel in podiatric medicine was needed in order to render a decision on injury causation. (Objection to DOR, March 15, 2023, p.2.)

On March 22, 2023, the matter went off calendar by joint agreement for the deposition of the QME. (MOH, March 22, 2023.)

Applicant thereafter filed a DOR on December 5, 2023 requesting an MSC, on the issue of an additional QME, and relying on the PQME reporting of June 5, 2023. The DOR stated the following:

THE INTERNAL MEDICINE PANEL OPINED THAT APPLICANT REQUIRES ADDITIONAL PANELS OR AMES IN PSYCHE AND MUSKULTOSKELETAL. APPLICANT SENT ADDITIONAL PANEL REQUESTS AND AN AME OFFER TO DEFENDANTS. TO DATE THERE HAS BEEN NO RESPONSE.

WCAB ASSISTANCE IS REQUIRED TO OBTAIN ADDITIONAL PANELS.

(DOR, December 5, 2023, p.7.)

On December 11, 2023, defendant filed a verified objection to the DOR stating that the QME indicates that applicant’s injuries are non-industrial, and a supplemental report requested by applicant is pending on the issue of AOE/COE. The defendant further alleges that additional panels would be moot if the QME determines that applicant’s injuries are non-industrial. (Objection to DOR, 12/11/23, p.1.)

The matter was set for an MSC on December 28, 2023, and at that hearing, the parties appeared and provided their respective positions regarding the additional panel dispute to the WCJ. The WCJ then called a court reporter to memorialize the proceedings. The defendant requested the matter be set for trial, and a discussion was held with the parties regarding a joint pre-trial conference statement, and proposed evidence for trial. Thereafter, the WCJ issued a finding that the medical record required further development and that additional medical evaluations were needed in specialties to be determined by the parties, and an order allowing the parties to file for new panels in whatever specialties they choose beginning at 5:00 p.m. on January 17, 2024. (MOH, December 28, 2023, p. 5-8.)

On January 17, 2024, defendant filed the 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 December 28, 2023 Minutes of Hearing in which the F&O issued, the WCJ states as follows:

Pursuant to Section 32.6 of Title 8 of the California Code of Regulations, it's hereby found that:

The medical record in this case requires further development on an issue in dispute and that the parties need an additional medical evaluations to adequately develop the record in specialties to be determined by the parties. The parties shall now be placed on equal footing to file for new panels in whatever specialties they choose beginning at 5:00 p.m. on January 17th, 2024.

(MOH, 12/28/23, p. 7-8.)

The WCJ does not discuss the reasoning for his decision. Additionally, no evidence was offered, identified, or admitted at the hearing. While there was a court reporter taking down the Minutes of Hearing, Finding and Order of the WCJ, the WCJ did not provide a summary of the evidence he relied upon in making his decision.

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].)

Here, it appears that the WCJ based his decision solely on a determination that the applicant was entitled to additional panels, but failed to provide a basis for such decision, nor the evidence upon which he relied. Further, the Finding and Order that issued does not specify the specialty or specialties for which he has determined good cause exists to issue additional panels.

Rule 31.7(b) and (c) provide for an additional QME panel in another specialty as follows in relevant part:

(b) Upon a showing of good cause that a panel of QME physicians in a different specialty is needed to assist the parties reach an expeditious and just resolution of disputed medical issues in the case, the Medical Director shall issue an additional panel of QME physicians selected at random in the specialty requested. For the purpose of this section, good cause means:

1. A written agreement by the parties in a represented case that there is a need for an additional comprehensive medical-legal report by an evaluator in a different specialty and the specialty that the parties have agreed upon for the additional evaluation; or
2. Where an acupuncturist has referred the parties to the Medical Unit to receive an additional panel because disability is in dispute in the matter; or
3. An order by a Workers' Compensation Administrative Law Judge for a panel of QME physicians that also either designates a party to select the specialty or states the specialty to be selected and the residential or employment-based zip code from which to randomly select evaluators;

While the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues, no record was made in this instance as to the basis for the WCJ's finding and order for additional panels.

Thus, we are unable to determine if good cause exists at this juncture due to a lack of an adequate record. Therefore, we must rescind the Finding and Order and return this matter to the trial level for further proceedings consistent with this opinion. However, we note that since applicant claims injury to body parts outside the field of internal medicine, it appears that additional QME panels will be required to fully address the claimed injury.

Accordingly, we grant defendant's Petition for Removal, rescind the December 28, 2023 Finding 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 December 28, 2023 by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Finding and Order of December 28, 2023 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 25, 2024

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

**GILBERTO GALINDO GARCIA
LAW OFFICES OF SEF KRELL
COLEMAN CHAVEZ & ASSOCIATES**

LAS/abs

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