WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JESUS HERNANDEZ, *Applicant,* **vs.** **WARNER BROS. STUDIOS, Permissibly self-insured, with claims administered by WARNER BROTHERS WORKERS' COMPENSATION, claims administered by ZURICH INSURANCE COMPANY; and claims insured by ZURICH INSURANCE COMPANY,** *Defendants.*	**Case Nos. ADJ2996723 (LAO 0841594)** **ADJ4157903 (LAO 0848595)** **ADJ4177198 (LAO 0848596)** **OPINION AND ORDER GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL**

Defendant Warner Bros. Workers' Compensation (defendant) seeks removal of the order appointing regular physicians pursuant to Labor Code section 5701 (Order) issued at trial on October 27, 2011, wherein the workers' compensation administrative law judge (WCJ) appointed two physicians to review the medical record and the summaries of evidence from trial. Defendant contends that when the WCJ ordered the appointment of the physicians to review the record rather than proceeding with trial, defendant was denied its right to cross-examine applicant or to offer its medical reports into evidence, and thus, the Order should be set aside and it should be allowed to proceed with trial.

We have not received an answer from applicant. We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ which recommends that the petition be denied.

We have reviewed the record and 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 discussed below, we will grant removal, rescind the Order, and return the matter for further proceedings.

///

///

RELEVANT FACTS

Applicant was employed by defendant as a janitor from to January 21, 2004. His pending claims are: specific injury of June 27, 2003 (ADJ2996723) to his low back; cumulative trauma injury from 2003 to January 21, 2004 (ADJ4177198) to his back and bilateral lower extremities; cumulative trauma injury from 1988 to January 21, 2004 (ADJ4157903) to his psyche and internal system.

Applicant had filed five claims for injury. The cases were consolidated and tried over five days: October 21, 2008, November 12, 2008, December 23, 2008, February 24, 2009, and March 26, 2009.

Applicant submitted Qualified Medical Examiner (QME) reports in orthopedics, psychology, and internal medicine. Applicant's QMEs were: orthopedic surgeon Michael Smith, M.D., (Exhibit 1, Report of August 28, 2008; Exhibit 2, Report of June 30, 2008; Exhibit 3, Report of July 24, 2006), psychologist Ted Tribble, PsyD., (Exhibits 5, 6, Reports of August 15, 2007), and internal medicine specialist Darrel H. Burstein M.D., (Exhibit 17, Report of July 5, 2007; Exhibit 18, Report of December 27, 2007). Applicant also submitted medical reports from applicant's treating physicians. (Exhibits 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16.)

Defendant submitted QME reports in orthopedics, but did not submit any QME reports in psychiatry or internal medicine. Defendant's QME was orthopedic surgeon Richard Feldman, M.D., (Exhibit A, Report of May 21, 2008; Exhibit B, Report of December 19, 2005; Exhibit C, Report of November 30, 2005; Exhibit D, Report of March 16, 2005; Exhibit E, Report of October 3, 2003; Exhibit F, Report of July 23, 2003.) Applicant provided testimony over four days of hearing, including on direct, on cross-examination by both defendants, and on re-direct. One witness also testified on behalf of defendant Warner Bros. on the last afternoon of hearing.

A Joint Findings of Fact and Order (F&O) issued on April 24, 2009. In that F&O, the WCJ found in pertinent part that in: ADJ2996723, applicant sustained injury arising out of and in the course of his employment to his low back on June 27, 2003; ADJ4177198, applicant claimed injury to his back and bilateral extremities from 2003 to January 9, 2004 and that objective evidence supported "medical problems to the back and right knee"; and, ADJ4157903, applicant claimed injury to his psyche and internal systems from 1988 to January 21, 2004 and that objective evidence supported "filing a claim" for

injury but that "insufficient evidence was brought forward to determine if [an industrial] continuous trauma exists." In all three of those claims, the WCJ ordered that the medical record be developed pursuant to Labor Code sections 5701 and 5906 and in conjunction with *McDuffie v. Los Angeles Co. Metro. Transit Authority (McDuffie)* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc). Applicant took nothing in his other two claims (ADJ1564577 and ADJ333588).

In a lengthy Joint Opinion on Decision (Opinion), the WCJ found that the medical reports failed to constitute substantial evidence. She stated that she found the "medical record to be grossly inadequate." (Joint Opinion on Decision of April 24, 2009, p. 6.) She noted that applicant failed to provide an accurate history, both applicant and defendant failed to obtain final reports with respect to some disputed body parts or ensuring that the doctors received all of the medical records, and that the doctors created inconsistencies or anomalies themselves in their reporting. (Joint Opinion on Decision of April 24, 2009, p. 6.) She then went onto highlight numerous deficiencies in the reports. (Joint Opinion on Decision of April 24, 2009, pp. 6-7.) She concluded that since neither side had brought forth substantial evidence, as set forth in *McDuffie*, development of the medical record was appropriate and the parties could obtain supplemental or additional reports, including from QMEs. (Joint Opinion on Decision of April 24, 2009, pp. 8-9.)

Defendant filed a petition for reconsideration of the F&O of April 24, 2009. In that petition, defendant contended that the WCJ's order to develop the record was in error and that instead, she should have found that applicant's claimed injuries were not compensable. In our Opinion and Order Granting Reconsideration and Decision After Reconsideration of July 9, 2009,[1] we affirmed the WCJ's F&O of April 24, 2009.[2]

---

[1] Commissioner Cuneo, who was on the panel which granted defendant's petition for reconsideration and issued the opinion and decision after reconsideration on July 9, 2009 no longer serves on the Appeals Board. Another commissioner is now assigned to take his place.

[2] Except that we amended the finding of fact in ADJ4157903, applicant's cumulative trauma injury claim from 1988 to January 21, 2004, as recommended by the WCJ, to clarify that applicant's Kaiser records contained evidence of injury prior to applicant's termination to applicant's psyche and respiratory system (rather than to his internal system as discussed in the WCJ's Opinion), and thus, compensability to those body parts was not barred by Labor Code section 3600, subdivision (a)(10).

1 On January 5, 2011, the parties appeared for a status conference. The minutes of hearing state
2 that: "per WCJ Fireman's order, the parties have developed the record. OK to set for trial..."
3 On March 22, 2011, the parties appeared for trial. The minutes of hearing indicate that at
4 applicant's request, although opposed by defendant, the matters were taken off calendar. The minutes
5 also state that: "Dr. Smith is ordered to complete re-eval within 50 days."
6 On May 26, 2022, a conference was held, and the minutes state that: "[d]iscovery is complete."
7 On July 5, 2011, the parties appeared for trial. The minutes state that: "The WCAB upheld WCJ
8 Fireman's order to develop the record. Dr. Smith is ordered to produce a final report in 30 days.
9 Otherwise discovery will close." The cases were continued to a conference on August 31, 2011.
10 On August 31, 2011, the parties appeared for the conference. The minutes state that: "The
11 parties are requesting trial. Discovery is complete." The cases were set again for trial on October 11,
12 2011.
13 On October 11, 2011, the parties appeared for trial. According to the transcript from the minutes
14 of hearing, applicant had obtained further reports from Dr. Smith and Dr. Burstein, and from Dr.
15 Nogales, a psychiatrist, and defendant had obtained further reports from Dr. Feldman, and from Dr.
16 Zigelbaum, an internist, and Dr. O'Brian, a psychiatrist. (Further Minutes of Hearing, p. 2.) Those
17 reports are not in the record and are not in evidence. The WCJ determined after he had "informally
18 reviewed" them, that "further development of the record [was] appropriate." (Further Minutes of
19 Hearing, pp. 2, 3.) Since the parties would not agree to any Agreed Medical Examiners (AMEs), he
20 ordered the appointment of a QME in orthopedics and a QME in psychiatry "to review the record as well
21 as the Summar[ies] of Evidence at trial." (Further Minutes of Hearing, p. 3.) Because he believed that
22 the QME reports in internal medicine presented to him at that time were "sufficient to make a decision
23 should the matter be submitted," he did not appoint a QME in internal medicine. (Further Minutes of
24 Hearing, p. 3.) He also ordered that the evidence previously admitted as exhibits and in the record (as
25 discussed above), together with all of the subsequent medical reports (not in the record), should be
26 provided to the court-appointed QMEs. (Further Minutes of Hearing, p. 3.)
27 Defendant filed the petition for removal on November 17, 2011. Defendant alleges that after the

F&O of April 24, 2009 directing the parties to further develop the medical record, in compliance with that order, applicant obtained a further report from Dr. Smith dated August 15, 2011, Dr. Burstein dated July 15, 2011, and a report from new psychologist, Ana Nogales, Ph.D., dated July 1, 2010, and that defendant obtained a further report from Dr. Feldman of December 2, 2009, and new reports from internist Gary Zagelbaum, M.D., of February 10, 2010 and psychiatrist James O'Brien M.D., of January 29, 2010. (Petition for Removal, p. 3.) Defendant alleges that the parties then appeared for trial and offered the six reports into evidence, and defendant then asked to further cross-examine applicant. (Petition for Removal, p. 3.) Defendant contends that the WCJ violated defendant's rights by: refusing to accept the doctors' reports that it obtained pursuant to the previous WCJ's order into evidence, refusing to allow defendant to cross-examine applicant, appointing the new doctors without making any findings, and failing to create an adequate record on appeal.

DISCUSSION

As set forth in our en banc decision in *McDuffie*, "[b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie v. Los Angeles County Metropolitan Transit Authority supra* 67 Cal.Comp.Cases 138, 141, citing *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 68 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) But, even before explaining the procedure for developing the medical record, *McDuffie* begins with the plain statement that **it applies** "*where the medical record requires further development* ***either after trial or submission of the case for decision***." (italics and bold added.) (*Id.*, p. 139.)

McDuffie holds that:

> "[W]here the WCJ determines after trial or submission of a case for decision that the medical record requires further development, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. Each side should be allowed the opportunity to obtain supplemental or additional reports and/or depositions with respect to the area or areas requiring further development, i.e., the deficiencies, inaccuracies or lack of completeness previously identified by the WCJ and/or the Board. [citation omitted] Only if the supplemental opinions of the previously reporting physicians do not or

> cannot cure the need for development of the medical record, should other physicians be considered." (*Id.*, p. 142.)

Thus, the *McDuffie* determination that the medical record be further developed is only to be made after trial or submission of the case for decision and after first considering the medical evidence submitted by the parties. Here, there was no trial or submission of the case for decision, and no evidence admitted to support finding that the medical reports, which had been obtained by the parties pursuant to the previous order, were insufficient.

Labor Code section 5313 *requires* the WCJ to "make and file findings upon all facts involved in the controversy and [make and file] an award, order or decision stating the determination as to the rights of the parties. . . [and include] a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made" after the case is submitted. The WCJ's determination "must be based on *admitted evidence* in the record" (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Board en banc.) (italics added)), and, the determination must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952 subd. (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. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d. 627 [35 Cal.Comp.Cases 16].).)

Here, despite the fact that the parties submitted the six medical reports at trial as ordered, the evidence is not in the record, and there is no explanation as to how that medical evidence was deficient or was not substantial evidence.

As *Hamilton* states:

> "The evidence submitted by the parties must be formally admitted and must be included in the record to enable the parties to comprehend the basis for the decision. Furthermore, a proper record enables any reviewing tribunal, be it the Board on reconsideration or a court on further appeal, to understand the basis for the decision. . .[Under section 5313], 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 v. Lockheed Corporation supra* 66 Cal.Comp.Cases 473, 475.)

The WCJ's 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." (*Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753 [22 Cal.Comp.Cases 350].) Here, the WCJ ordered that the medical record be further developed, without admitting any of the evidence submitted to him or explaining whether it was substantial evidence, and without setting forth his reasoning in his order *in relationship to the evidence* as required by Labor Code section 5313.

The Appeals Board is authorized pursuant to Labor Code section 5310 to remove to itself, as it deems necessary in any workers' compensation matter, "the proceedings in any claim." This power of removal is discretionary and is generally employed only as an extraordinary remedy which must be denied absent a showing of substantial prejudice or irreparable harm, or that reconsideration will not be an adequate remedy after issuance of a final order, decision or award. (Cal. Code Regs., tit. 8, § 10843, subd. (a); *Castro v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 1460 (writ den.); *Swedlow, Inc. v. Workers' Comp. Appeals Bd. (Smith)* (1985) 48 Cal.Comp.Cases 476 (writ den.).)

Here, according to the minutes of the various hearings, the parties had already appeared on five occasions in 2011, including for two scheduled trials, and the issue of the medical reports was addressed and discovery was closed, all before the trial date of October 11, 2011. Then, when they appeared to proceed with trial, although the evidence is not in the record, it is apparent that the parties believed that they had already complied with the order of April 24, 2009 to develop the record and, as ordered, had brought medical reports from the six QMEs. Yet, on October 11, 2011, the WCJ did not take the six medical reports into evidence or make any finding based on that evidence as to whether the medical reports were sufficient or complied with the WCJ's order of April 24, 2009.

The question of whether the existing medical evidence is sufficient must be resolved before the parties can proceed and before an order can be issued to further develop the record. Otherwise, both parties will suffer significant prejudice, because although it appears that the WCJ *may* have found the evidence to be insufficient on the part of either applicant or defendant or both after his "informal" review, *there is no finding based on admitted evidence in the record,* so that the question of sufficiency of the medical evidence has not been decided, and neither party has any guidance as to what the

insufficiency in the record might be. Moreover, if the current evidence were later found to have been sufficient, it would not be in the interests of judicial economy if the record had already been further developed, and the evidence already reviewed by the newly appointed physicians. Thus, not only is the WCJ required to make his decision based on admitted evidence in the record, and set forth his decision thereon, but *McDuffie* itself contemplates that the assessment as to sufficiency of the medical record and the development of the record thereafter shall only be made *after* submission or trial. Therefore, we conclude that removal is warranted so that defendant's request may be granted.

We also point out that these requirements are significant not just for the convenience of the Appeals Board and the parties, but also because they comport with due process. (*Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710-712 [57 Cal.Comp.Cases 230].) Due process requires that all parties "must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. [Citations.]" (*Id.*, p. 711.)

Here, once the parties appeared for trial, the WCJ was required to begin anew, and consider the evidence before him to render a new decision, rather than incorporating the previous findings and order of April 24, 2009. The new reports should have been submitted into evidence, and the testimony of applicant allowed if appropriate, and after submission or trial, a decision could then have been made as to whether the medical record needed to be developed.

Accordingly, we rescind the WCJ's Order appointing physicians to review the medical record and the summaries of evidence from trial and return this matter to the WCJ for trial and further proceedings as appropriate consistent with this opinion.

///

///

///

///

///

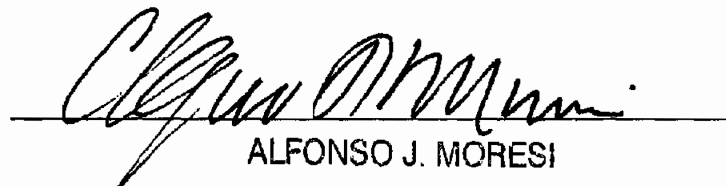
///

For the foregoing reasons,

IT IS HEREBY ORDERED that defendant's Petition for Removal is **GRANTED**.

IT IS FURTHER ORDERED that as the Decision After Removal of the Workers' Compensation Appeals Board, that the October 27, 2011 Order appointing a physician in orthopedics and a physician in psychiatry is **RESCINDED**, and the matter is **RETURNED** to the WCJ for further proceedings and a new decision from which any party can timely seek reconsideration.

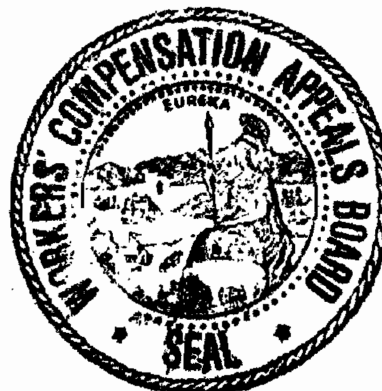
WORKERS' COMPENSATION APPEALS BOARD



ALFONSO J. MORESI

I CONCUR,

RONNIE G. CAPLANE



CONCURRING, BUT NOT SIGNING

DEIDRA E. LOWE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JAN 13 2012

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

JESUS HERNANDEZ
LAW OFFICES OF SOLOV TEITEL, ATTN: JAMEY TEITEL
LAW OFFICES OF PATRICK J. BRAULT, ATTN: PATRICK J. BRAULT
GURVITZ, MARLOWE & MILLER

AS/jp