

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **JAMIE SIMMONS,**

5 *Applicant,*

6 **vs.**

7 **JUST WINGIN' IT, INC.; PROCENTURY**
8 **INSURANCE COMPANY, Administered By**
9 **ILLINOIS MIDWEST INSURANCE**
10 **AGENCY, LLC,**

11 *Defendants.*

Case No. ADJ9638487
(Stockton District Office)

OPINION AND ORDER
GRANTING PETITION FOR
REMOVAL
AND DECISION AFTER
REMOVAL

12 Defendant seeks removal of the November 22, 2016 Minute Order, wherein the workers'
13 compensation administrative law judge (WCJ) ordered the out-of-state adjuster who administered
14 applicant's temporary disability indemnity benefits to appear physically at trial. Applicant alleged that,
15 while employed as a cook on September 22, 2014, he sustained an industrial injury to his right foot and
16 right ankle.

17 Defendant contends that the WCJ's Minute Order will cause it to suffer significant prejudice and
18 irreparable harm, because the insurance adjuster is based in Illinois.

19 We have considered the Petition for Removal (Petition), and we have reviewed the record in this
20 matter. The WCJ prepared a Report and Recommendation on Petition for Removal (Report),
21 recommending that the Petition be denied. We have not received an Answer from applicant.

22 For the reasons discussed below, we will grant defendant's Petition and rescind the WCJ's
23 Minute Order.

24 Removal of a case to the WCAB "is an extraordinary remedy, rarely exercised[.]" (*Castro v.*
25 *Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 1460, 1462 (writ den.)) The party seeking
26 removal must show that the order it appeals "will result in significant prejudice [or] ... irreparable harm."
27 (Cal. Code Regs., tit. 8, § 10843.) Here, the WCJ has ordered that defendant's claims adjuster, who lives

1 in Illinois, must appear in person for trials. Defendant argues that it would suffer substantial prejudice if
2 it were required to produce the claims adjuster at trial “where alternative means of obtaining testimony
3 exists,” noting that verbal testimony can be obtained by courtcall or video conferencing. (Petition, pp.
4 3:25-4:2.) Defendant also points out that the purpose of taking the claims adjuster’s testimony would be
5 to elicit the claims adjuster’s verbal response, and the claims adjuster’s “physical presence adds nothing
6 to the verbal testimony that he/she may provide.” (*Id.* at p. 4:11-13.) Defendant states that producing the
7 claims adjuster in person for “one or more hearings” would place a “significant burden” on defendant, in
8 addition to the additional costs required. (*Id.* at p. 4:18-21.)

9 We agree with defendant, and see no reason not to use the alternative means of obtaining the
10 claims adjuster’s testimony. We further note that the California Code of Civil Procedure explicitly
11 provides for the taking of depositions by remote electronic means, as do the California Rules of Court.
12 (Cal. Code Civ. Proc. § 2025.310(a) (“A person may take, and any person other than the deponent may
13 attend, a deposition by telephone or other remote electronic means”); Cal. Rules of Court, rule 3.1010(a)-
14 (b) (“Any party may take an oral deposition by telephone, videoconference, or other remote electronic
15 means [... and] [a]ny party may appear and participate in an oral deposition by telephone,
16 videoconference, or other remote electronic means[.]”).)¹

17 Accordingly, we will grant defendant’s Petition and rescind the WCJ’s Minute Order.

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26 ¹ Although the WCAB is “not bound by the common law or statutory rules of evidence and procedure” (Lab. Code, § 5708), it
27 may “cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for
like depositions in civil actions in the superior courts of this state under [the Civil Discovery Act of 1986].” (Lab. Code, §
5710). (See, e.g., *Nat’l Convenience Stores v. Workers’ Comp. Appeals Bd* (1981) 121 Cal. App. 3d 420, 427; *Allison vs.*
Workers’ Comp. Appeals Bd. (1999) 72 Cal. App. 4th 654, 662 & n.7.)

1 For the foregoing reasons,

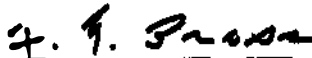
2 **IT IS ORDERED** that defendant's Petition for Removal of the November 22, 2016 Minute Order
3 is **GRANTED**.

4 **IT IS FURTHER ORDERED**, as the Decision After Removal of the Workers' Compensation
5 Appeals Board, that the November 22, 2016 Minute Order is **RESCINDED**.

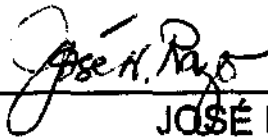
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7 **WORKERS' COMPENSATION APPEALS BOARD**

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9 _____
10 **MARGUERITE SWEENEY**

11 **I CONCUR,**

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16 **FRANK M. BRASS**

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18 _____
19 **JOSÉ H. RAZO**



20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

21
22 **JAN 27 2017**

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

25 **JAMIE SIMMONS**
26 **LAW OFFICES OF ROCKWELL, KELLY & DUARTE, LLP**
27 **YRULEGUI & ROBERTS**

RB/pc

SIMMONS, Jamie

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

Case No. ADJ9638487

**JADME SIMMONS v. JUST WINGIN IT, INC., and PROCENTURY INSURANCE
COMPANY**

**Workers' Compensation Administrative Law Judge:
Deborah A. Whitcomb**

REPORT AND RECOMMENDATION ON PETITION FOR REMOVAL

I. INTRODUCTION

The applicant Jaime Simmons, a cook, who was thirty years old on the date of injury, 22 March 2014, sustained injury to his right foot and ankle while in the employment of defendant, Just Wingin It, Inc. insured by Procentury Insurance Company, on the date of injury. By a timely and verified Petition for Removal ("Petition"), the defendant seeks relief from an order made in this case at the time of the Mandatory Settlement Conference ("MSC") on 22 November 2016 wherein the adjuster of the claim was Ordered to appear at the upcoming trial on 31 January 2017. It is recommended that the defendant's Petition be denied as the Petition lacks merit, as more fully discussed below.

II. FACTS ON DISPUTED ISSUES

The applicant sustained an industrial injury on 22 March 2014; as the result of said injury the applicant has been found totally temporarily disabled ("TTD") for various periods of time. The parties appeared at least twice to resolve issues related to payment of TTD and as a result entered into a Stipulation and Order to resolve the issues on 28 March 2016 and 22 November 2016; the last MSC appearance resulted in the matter being set for trial to resolve the issue regarding how TTD was paid to the applicant. After discussion with the parties at the MSC of 22 November 2016, it was clear that there was a disagreement on the method of providing payment to the applicant such that the adjuster would be necessary to testify at the upcoming trial. The adjuster works in Illinois, and is,

more likely than not, a resident of Illinois, or an adjacent state, and as a result cannot be placed under subpoena, thus an Order issued requiring the adjuster to be present for trial on the appointed day.

III. DISCUSSION

The defendant properly states the basis for granting a petition for removal pursuant to Title 8, California Code of Regulations Section 1018.43 where the petitioner can show the Order will result in substantial prejudice or irreparable harm such that Reconsideration would not be an adequate remedy. Unfortunately, the defendant provides only opinion in support of the argument that it will suffer substantial prejudice in having the handling adjuster travel from Illinois to California for trial. Further, there is no discussion regarding why the provisions of California Code of Civil Procedure Section 19.89, and Title 8, California Code of Regulations Section 10563(d) should not be followed.

In general there are two ways a witness will appear at trial to provide testimony, voluntarily or under order of a subpoena. However, the power of the subpoena is only available if the trial witness is a resident within the state at the time of service of the subpoena. *Cal. Civ. Proc. Code §1989*. Thus, an out of state witness can only be pulled into the State of California for trial voluntarily, or by Order of the Workers' Compensation Judge. *Cal. Code Regs. Tit. 8, §10563(d)*. In the present matter, the applicant's counsel is requesting the appearance of the adjuster for direct examination at trial. If the adjuster was within the state of California, the applicant's attorney could personally serve the adjuster a subpoena within the state and thereby obtain jurisdiction over the witness to assure their appearance. However, that is not the case here. The adjuster is not a resident of the State of California and is adverse to the applicant and thus, unlikely to appear voluntarily. Therefore, the appropriate method of ensuring the adjuster appear for trial, absent an alternative agreement by the parties, is to Order the adjuster appear at trial.

The defendant cites multiple ways in which the adjuster could be allowed to testify at trial. However, the defendant fails to appreciate that the witness' credibility is being assessed at trial and it is often difficult for the trier of fact to assess credibility if the witness is not present in the courtroom while providing testimony.

The defendant also claims it will suffer prejudice if having to sustain the expense of having the adjuster travel from Illinois to California. However, the defendant- carrier, is fully aware there will be costs of proceeding with litigation and adjusting claims when doing business in California. The expense of having the adjuster travel to California is one of the costs of doing business in California and adjusting claims outside of California. It is to be expected that a personal appearance by the adjuster may be necessary for proper adjudication of the claim at trial in California. Further, there is no reason to treat adjusters outside of the State of California any differently than the adjusters within the State of California; there are times that adjusters handling claims while residing in Southern California are required to appear in Northern California for trial, and vice versa.

Since the defendant has not established that the Order of 22 November 2016 will result in substantial prejudice and/or irreparable harm such that Reconsideration will not be an adequate remedy the Petition should fail.

IV. RECOMMENDATION

For the reasons given above, it is respectfully recommended that the defendant's Petition for Removal be denied.



Deborah A. Whitcomb
Workers' Compensation Judge

Served by mail this date: _____
on the attorneys of record.

By: _____