

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **DERRICK BURFORD,**

5 *Applicant,*

6 **vs.**

7 **COOK CONCRETE PRODUCTS; EVEREST**
8 **NATIONAL INSURANCE COMPANY,**
9 **administered by AMERICAN CLAIMS**
10 **MANAGEMENT, INC.; CLARENDON**
11 **NATIONAL INSURANCE COMPANY,**
12 **administered by SEABRIGHT INSURANCE**
13 **COMPANY,**

14 *Defendants.*

Case Nos. ADJ2688453 (RDG 0198704)
ADJ6688904
ADJ7542534
(Redding District Office)

OPINION AND ORDER
GRANTING PETITION FOR
REMOVAL AND DECISION
AFTER REMOVAL

15 Defendant Everest National Insurance Company administered by American Claims Management
16 (Everest), seeks removal in response to a minute order (Order) issued by the workers' compensation
17 administrative law judge (WCJ) at a mandatory settlement conference on October 13, 2015, which orders
18 defendant's claim adjuster *to personally appear at all future hearings* in these consolidated cases, unless
19 otherwise excused by the WCJ in advance.

20 Defendant Everest contends that the Order is vague, overbroad, and unnecessary, that the WCJ
21 abused her discretion, and that it will result in significant prejudice and/or irreparable harm to defendant.
22 Defendant also contends that the order compelling the adjuster on the file to appear at all hearings will
23 jeopardize the current adjuster's health and result in unreasonable expenses of time and resources.

24 We received an answer from the unrepresented applicant in the form of an "objection" letter. The
25 WCJ filed a Report and Recommendation on Petition for Removal (Report), recommending the petition
26 be denied. We have not received an answer from co-defendant Clarendon National Insurance Company
27 administered by Seabright Insurance Company (Clarendon).

We have reviewed and considered Everest's Petition for Removal, applicant's answer, and the
WCJ's Report. For the reasons discussed below, we will grant removal, rescind the Order of October 13,

1 2015, and return the matter to the trial level for the upcoming mandatory settlement conference
2 previously scheduled for January 12, 2016.

3 **BACKGROUND**

4 These consolidated cases have a long history of contested and protracted litigation over many
5 issues. Applicant was represented through most of the process. However, prior to the June 4, 2014, trial,
6 applicant dismissed his attorney. Most of the disputed issues were resolved in a Joint Findings and
7 Award (Joint F&A) which issued on June 13, 2014, wherein a prior WCJ found that applicant, while
8 employed by Cook Concrete Products as a yardman, sustained an injury on: (1) December 14, 2001
9 (ADJ2688453, designated the master file) to his back, left upper extremity, hernia and excretory system;
10 and (2) during the period December 15, 2001 to November 25, 2002 (ADJ7542534), to his back, left
11 upper extremity, hernia and excretory system, resulting in combined additional temporary disability at a
12 rate of \$485.24, from December 23, 2008 through October 3, 2009, less credit for temporary disability
13 and less reimbursement of Employment Development Department (EDD) payments, and permanent
14 disability of 50% (\$45,262.50 at the weekly rate of \$170.00 for 266.25 weeks), after apportionment, less
15 credit for sums paid, and an attorney fee award of 12%. Defendant was found to be liable on EDD's lien
16 for payments from December 23, 2008 through March 5, 2009, plus interest. The Joint F&A found the
17 reasonable dollar value of the attorney award was \$5,431.50, ordered that amount commuted from the
18 end of the award, and awarded future medical treatment in both cases.

19 The Joint F&A also found applicant sustained a third injury to his back, left upper extremity,
20 hernia and excretory system from June 23, 2003 through March 24, 2004 (ADJ6688904), while
21 employed by Cook Concrete Products as a yardman, resulting in an additional period of temporary
22 disability from December 23, 2008 through October 3, 2009 at the rate of \$485.24, less credit for
23 amounts paid and less any applicable reimbursement to EDD, and caused permanent disability of 21%
24 (\$19,050.00 at the weekly rate of \$200.00 for 75.5 weeks), less credit for permanent disability advances
25 paid and an attorney fee award of 12%. An attorney fee of \$2,286.00, was also awarded.

26 On December 30, 2014, the pro per applicant filed a Petition for Reconsideration along with a
27 supporting cover letter alleging that the Joint F&A of June 13, 2014, was in error and should have been

1 based on more recent reporting and that his condition had worsened. We issued an Order Dismissing
2 Petition for Reconsideration dated February 25, 2015, finding the Petition for Reconsideration to have
3 been untimely filed.

4 Everest is the sole defendant with respect to the first two cases. However, the third case,
5 ADJ6688904, involving cumulative trauma from June 23, 2003 through March 24, 2004, implicates
6 coverage by both Everest and Clarendon. Since the Joint F&A in the summer of 2014, there have been a
7 number of hearings and conferences on issues related to medical treatment requests and authorization
8 denials. By the WCJ's minute order of August 26, 2014, handwritten on the Minutes of Hearing, Everest
9 was to continue to administer the medical award in all three cases, subject to contribution by Clarendon.
10 As a result, all of the medical treatment disputes have involved only Everest.

11 We note that EAMS includes a recent unverified letter from Everest's adjuster at American
12 Claims Management, Marhia Stinnett, dated December 28, 2015, addressed to the WCJ, and filed by
13 defense counsel on December 31, 2015, which requests she be excused from attending the mandatory
14 settlement conference scheduled for January 12, 2016, citing health issues of her own.

15 DISCUSSION

16 A petition for removal will be granted only if the petitioner shows that significant prejudice or
17 irreparable harm will result if removal is not granted and reconsideration will not be an adequate remedy
18 after the issuance of a final order, decision or award. (Cal. Code Regs., tit. 8, § 10843(a); see also *Cortez*
19 *v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600 fn. 5 [71 Cal.Comp.Cases 155, 157, fn.
20 5]; *Kleeman v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases
21 133, 136, fn. 2].) After reviewing the record in this case, we conclude that defendant has shown it will
22 suffer significant prejudice or irreparable harm if removal is not granted and that reconsideration will not
23 be an adequate remedy.

24 Specifically, we believe that the WCJ's blanket Order, which covers all future hearings involving
25 these cases, is excessive and overbroad, since the WCJ did not adequately explain why it is necessary to
26 have the adjuster appear for *every* future conference or hearing. The minute order of October 13, 2015, as
27 reflected in the Minutes of Hearing of that date, does not address or document why there is need for a

1 broad order that the adjuster *physically appear at all* future conferences. We believe that it is more
2 appropriate and avoids significant prejudice to defendant, to determine whether there is a need for the
3 adjuster to personally appear at a given conference, on a hearing by hearing basis, which balances the
4 nature of the dispute, the relief sought, the utility of the adjuster appearing in person versus appearing by
5 phone, and the practical hardship and burden on both the defendant and the adjuster personally of having
6 to appear in person, factoring in the distance and nature of the travel required. Defendant's verified
7 Petition for Removal indicates that at the last conference, although the adjuster Ms. Stinnett was
8 unexpectedly unavailable that day, apparently due to an unscheduled hospitalization of her own, a
9 covering supervisor was consulted by defense counsel and was available by phone. The petition further
10 represents that Ms. Stinnett and/or another representative from American Claims Management will be
11 available by phone for all future hearings, as required by WCAB Rule 10563(b) (Cal. Code Regs., tit. 8,
12 § 10563(b)), and we note that rule requires such a person be able to provide *immediate* settlement
13 authority to defense counsel.

14 Although we rescind the Order, the WCJ retains the authority to order the adjuster to appear in
15 person, for good cause, for a particular hearing or conference if the circumstances warrant it. While the
16 WCJ's Report summarizes the background giving rise to the Order, provides her rationale, and expresses
17 understandable frustration with the recurrent medical authorization disputes in this case and the specific
18 adjuster's lack of availability by phone at the last conference on October 13, 2015, we do not believe it is
19 appropriate or necessary, on this record, to order the adjuster to personally appear at *all* future
20 conferences without consideration of the subject or the nature of those conferences. Although the Report
21 also notes that defendant can request the adjuster be excused in advance of a given conference, that can
22 be a burdensome and inefficient process. Instead, we recommend that if the WCJ believes a physical
23 appearance of the adjuster is necessary or required, based on the circumstances of a particular dispute and
24 the utility of a personal appearance at a given conference or hearing, that she make a specific finding and
25 order to that effect on a hearing by hearing basis, with a clear explanation as to why the order issued.

26 For these reasons, we grant removal, rescind the Order, and return the matter to the WCJ. The
27 parties should proceed with the mandatory settlement conference scheduled for January 12, 2016.

1 For the foregoing reasons,

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

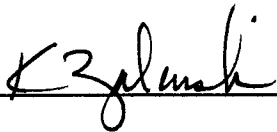
3 **IT IS FURTHER ORDERED** as the Decision After Removal of the Workers' Compensation
4 Appeals Board, that the Order directing defendant's claims adjuster to personally appear at all future
5 conferences in these cases, unless otherwise excused, which issued on October 13, 2015, is
6 **RESCINDED**, and the matter is **RETURNED** to the WCJ.

7 **WORKERS' COMPENSATION APPEALS BOARD**

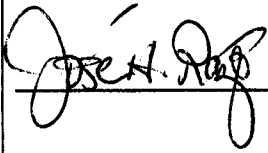
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10 **I CONCUR,**

11 **RONNIE G. CAPLANE**

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14 **KATHERINE ZALEWSKI**

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17 **JOSÉ H. RAZO**



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

20 **JAN 0 8 2016**

21
22 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
23 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

24 **DERRICK BURFORD**
25 **MULLEN & FILIPPI**
26 **PURSLÉY LAW OFFICE**

27 **TR/abs**

BURFORD, Derrick