

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SANDY CHAIDES,

Applicant,

vs.

**THE KROGER COMPANY dba RALPHS
GROCERY COMPANY, permissibly
self-insured, administered by SEDGWICK,**

Defendants.

Case No. ADJ8128486
(Oxnard District Office)

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

Defendant seeks removal in response to an Order issued by the workers' compensation administrative law judge (WCJ) at a mandatory settlement conference (MSC) on September 22, 2015, which granted applicant's request for the replacement of the orthopedic qualified medical evaluator (QME) Dr. Michael Klassen and directed the Medical Director to issue a new QME panel in the same specialty.

Defendant contends the Order is in error and subject to removal because replacing Dr. Klassen as the QME based on his improper demand for advance payment of deposition fees is an inappropriate and excessive remedy, would reward doctor shopping on the part of applicant, and is contrary to the goals of timely and efficient resolution of the case since he has already examined applicant twice, and has issued five reports over the last two plus years. Defendant further contends that a failure to set aside the order would result in significant prejudice and/or irreparable harm.

We have received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Removal (Report), recommending the petition be denied.

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

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1 **BACKGROUND**

2 Applicant was employed by defendant as a baker. She claims cumulative industrial injury to her
3 hands, right elbow, right shoulder, neck/cervical spine, thoracic outlet syndrome, and hypertension as a
4 compensable consequence, from January 1, 1992 through December 13, 2011. In 2013, the parties
5 obtained a QME panel in orthopedics but the doctor remaining after the exercise of the parties' respective
6 strikes was not available. As a result, the parties entered into a joint request and stipulation that was
7 approved as an order dated June 18, 2013, for the issuance of a new QME panel. It appears that
8 Dr. Klassen was the resulting QME from that panel after the exercise of strikes. He is not an agreed
9 medical evaluator or an agreed panel QME. Dr. Klassen examined applicant and issued a first report
10 dated September 26, 2013. He issued supplemental reports dated February 6, 2014, July 28, 2014, and
11 March 3, 2015. He re-examined applicant and issued a related report dated September 11, 2014. Those
12 reports have not been filed and are not in evidence.

13 It appears from the pleadings that defendant obtained sub rosa surveillance video of applicant
14 which was sent to Dr. Klassen for review and who in turn issued the supplemental report dated
15 March 3, 2015. Applicant notes in a letter sent to the WCJ dated April 9, 2015 that although defendant
16 claimed it had served a copy of the sub rosa video sent to Dr. Klassen, she had yet to receive any video
17 despite an oral request for a copy and a follow-up a written request dated March 3, 2015. That same letter
18 argues that applicant will be severely prejudiced if she does not receive the video and is not able to take
19 the deposition of Dr. Klassen with respect to issues and opinions potentially affected by the video.

20 Applicant subsequently noticed the deposition of Dr. Klassen for October 16, 2015. Dr. Klassen
21 in response sent a "Medical-Legal Deposition Policy and Agreement Industrial Injuries" to applicant's
22 attorney dated July 7, 2015. The agreement provided for pre-payment of a \$1,000.00 deposition fee
23 which must be received "at least 11 business days before the deposition" or his office would
24 "automatically cancel" the deposition. The agreement requires the scheduling party's signature reflecting
25 agreement to the terms, and referenced the specific date and location of the scheduled deposition. The
26 implication of the document is that without a returned signed copy, Dr. Klassen would not schedule or
27 cooperate with efforts to take his deposition as the QME in the case.

1 Applicant e-filed a Declaration of Readiness to Proceed on August 11, 2015, requesting a MSC
2 on its claim that it was entitled to replacement of Dr. Klassen as the QME and a new QME panel based
3 on his deposition policy, which was attached, and which she asserted was contrary to Code of Civil
4 Procedure section 2034.450(a). The matter was set for MSC on September 22, 2015. After oral argument
5 by the parties at the MSC, the WCJ granted applicant's request for a new QME panel in orthopedics and
6 issued the Order directing the Medical Director to issue such a panel on the basis that Dr. Klassen's
7 demand and policy requiring advanced payment of deposition fees violated Code of Civil Procedure
8 section 2034.450 and Rule 35.5(f) (Cal.Code Regs. tit. 8, § 35.5(f)).¹ Because the Order in question
9 issued at the MSC without a formal submission, there are no exhibits. Although the Minutes of Hearing
10 for the September 22, 2015 MSC indicate in a handwritten note that the parties stipulated to facts, there is
11 no indication or documentation as to exactly what those were.

12 Defendant filed a timely Petition for Removal in response to the Order. Applicant filed an answer.
13 The WCJ issued a Report recommending the petition be denied.

14 DISCUSSION

15 A request for removal will be granted only if the petitioner shows that significant prejudice or
16 irreparable harm will result if removal is not granted and reconsideration will not be an adequate remedy
17 after the issuance of a final order, decision or award. (WCAB Rule 10843(a); see also *Cortez v. Workers'*
18 *Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5];
19 *Kleeman v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases
20 133, 136, fn. 2].)

21 Labor Code section 5710 provides that depositions by any party before the Workers'
22 Compensation Appeals Board "shall be taken in the manner prescribed by law for like depositions in
23 civil actions" outlined in Code of Civil Procedure section 2016.010 et seq. Code of Civil Procedure
24 section 2034.450(a) provides "[t]he party taking the deposition of an expert witness shall either
25 accompany the service of the deposition notice with tender of the expert's fee based on the anticipated
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27 ¹ All further references to administrative rules and regulations are to the California Code of Regulations.

1 length of the deposition, or tender that fee on the commencement of the deposition.” Rule 35.5(f)
2 provides in relevant part “[u]nless the Appeals Board or a Workers’ Compensation Administrative Law
3 Judge orders otherwise or the parties agree otherwise, whenever a party is legally entitled to depose the
4 [QME] evaluator, the evaluator should make himself or herself available for deposition within at least
5 one hundred twenty (120) days of the notice of deposition . . .”

6 In this case, it appears that Dr. Klassen’s mandatory deposition policy and the associated
7 “agreement,” which includes a requirement that he receive a deposition fee payment of \$1,000.00 at least
8 11 business days in advance of any scheduled deposition as a condition of proceeding with the
9 deposition, may conflict with both Code of Civil Procedure section 2034.450(a), which allows for
10 payment of the deposition fee at the commencement of the deposition, and Rule 35.5(f) which states
11 QMEs shall make themselves available for deposition within 120 days of a request or notice from a
12 party. Additionally, to the extent that Dr. Klassen’s deposition policy and agreement requires advance
13 payment of a \$1,000.00 fee, it also fails to comply with the applicable QME deposition rate of \$250.00
14 an hour provided for in the Medical Legal Fee Schedule adopted pursuant to WCAB Rule 9795. (See
15 summary in Table 12 of the Workers’ Compensation Laws of California 2016 Edition p. 1344
16 (LexisNexis).)²

17 If Dr. Klassen’s deposition policy and its terms are inconsistent with and contrary to statute
18 and/or administrative rules, he may be subject to sanction, discipline, or other regulatory action by the
19 Medical Director under Administrative Director Rules 60 and 65. However, the question presented in this
20 case is whether Dr. Klassen’s deposition policy in itself, entitles either party to replace him with a new
21 QME panel from the Medical Director, without consideration of any other factors. We conclude it does
22 not, and we will therefore grant removal and rescind the Order directing the Medical Director to issue a
23 new QME panel in orthopedics.

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25 ² Those rules provide that the fee for medical-legal testimony shall include payment of an hour of preparation and an hour of
26 deposition testimony, which at an hourly rate of \$250.00 for non-agreed upon QME’s, comes to an initial fee of \$500.00,
27 subject to later payment of additional amounts if the deposition goes longer than one hour or if additional preparation was
required.

1 Dr. Klassen has been the reporting orthopedic QME in this case since September of 2013. He has
2 issued multiple reports and has examined applicant twice. It appears the contemplated deposition noticed
3 by applicant was intended to question him with regard to the sub rosa video taken by defendant which he
4 reviewed and commented on in his supplemental report of March 3, 2015. In other words, discovery
5 would seem to be nearly complete and once the deposition is concluded, the case should be at or close to
6 the point at which it can be appropriately set for MSC. We are mindful of both the time invested by the
7 parties with this QME and the desire to avoid the use of technical procedures to obtain a new
8 medical-legal evaluation which might be more favorable than the opinions of the existing QME.

9 Applicant cites no authority to support her contention that the QME may be replaced and that she
10 is entitled to a new QME panel based on the deposition policy of the reporting QME, even if that policy
11 could be shown to conflict with the Code of Civil Procedure and/or WCAB medical-legal discovery
12 rules. Although applicant's answer asserts that she is entitled to a replacement QME when "a QME
13 cannot comply with the QME rules" pursuant to Rule 31.5 generally and without citation to a subsection,
14 we do not believe that any individual provision of that rule provides for such relief where the alleged rule
15 violation is based on an improper deposition policy alone.

16 In contrast, defendant's Petition for Removal notes the panel decision of *Rodas v. Travelers Cas.*
17 *And Surety Co.* (2007) 35 CWCR 156, which on similar facts held that although the QME's deposition
18 policy in that case requiring advanced payment of a deposition fee might be inconsistent with the law,
19 applicant petitioner had not established significant prejudice and/or irreparable harm when the WCJ
20 declined applicant's request to strike the QME's prior reports and denied removal. A similar situation
21 exists in this case. Replacement of a QME years after an initial evaluation and after multiple reports and
22 examinations is not to be taken lightly when considering the goal of promoting timely resolution of
23 claims and the constitutional imperative that California workers' compensation law be administered in
24 such manner as to "accomplish substantial justice in all cases expeditiously, inexpensively, and without
25 incumbrance of any character." (Cal. Const., art. XIV, § 4.) Likewise, actual or perceived doctor
26 shopping via the use of procedural challenges should be discouraged. To have applicant evaluated by a
27 new QME at this late point in the proceedings, even though Dr. Klassen's prior reports are still

1 admissible, will increase costs and significantly delay the ultimate resolution of this case. Thus, we
2 conclude that the replacement of Dr. Klassen as the QME solely for an improper deposition policy is not
3 warranted as a remedy under the circumstances of this particular case.

4 Accordingly, we find that defendant has shown it will suffer significant prejudice or irreparable
5 harm and that reconsideration of a final order will not be a sufficient remedy if the WCJ's Order
6 replacing Dr. Klassen as the QME is not set aside. We therefore grant removal and rescind the Order.

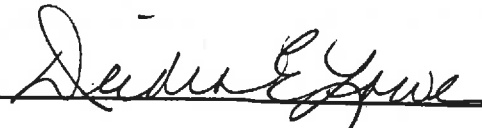
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1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's Petition for Removal of the Order issued on
3 September 22, 2015, which granted applicant's request to replace Dr. Michael Klassen as the QME and
4 for a new QME panel in the specialty of orthopedics, is **GRANTED**.

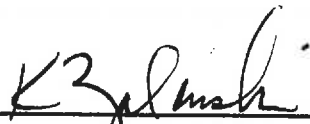
5 **IT IS FURTHER ORDERED** as the Decision After Removal of the Workers' Compensation
6 Appeals Board, that the Order directing the Medical Director to issue a replacement QME panel in
7 orthopedics is **RESCINDED**.

8 **WORKERS' COMPENSATION APPEALS BOARD**

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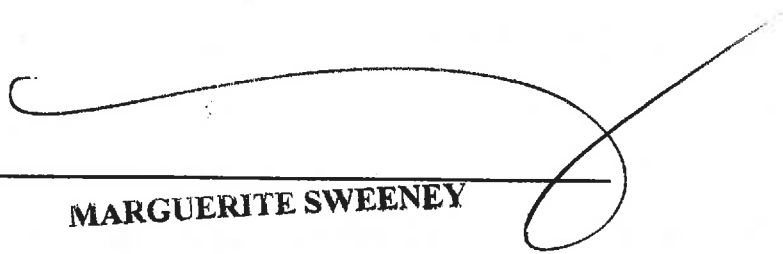
11 **DEIDRA E. LOWE**

12 **I CONCUR,**

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15 **KATHERINE ZALEWSKI**

16 **I DISSENT (See attached dissenting opinion.),**

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20 **MARGUERITE SWEENEY**



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

22 **APR 01 2016**

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

25 **BRADFORD & BARTHEL**
26 **GORDON, EDELSTEIN, KREPAK, GRANT, FELTON & GOLDSTEIN**
27 **SANDY CHAIDES**

TR:mm

CHAIDES, Sandy

1 **DISSENTING OPINION OF COMMISSIONER SWEENEY**

2 I respectfully dissent from the panel's decision to grant removal since I agree with the WCJ's
3 conclusion in his Report, which I would adopt and incorporate, that defendant has failed to show it will
4 suffer significant prejudice or irreparable harm absent removal, and that reconsideration from a final
5 order will not be an adequate remedy. This is the legal standard for removal and it has not been met.
6 Therefore, I would affirm the WCJ who appropriately exercised his discretion under the circumstances.
7 Additionally, although granting removal, the panel does not dispute that Dr. Klassen's demand for
8 prepayment of his deposition fee was improper and contrary to the law and to administrative rules, both
9 as to the amount sought and his demand for payment at least 11 business days before the deposition.

10 In my judgment, defendant has not met its burden with respect to removal of the WCJ's Order in
11 this case, and I would deny removal.



WORKERS COMPENSATION APPEALS BOARD


MARGUERITE SWEENEY, Commissioner

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

18 **APR 0 1 2016**

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26 
BRADFORD & BARTHEL, LLP

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27 **TR:mm**

CHAIDES, Sandy