

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

ELIZABETH GALLEGOS, *Applicant*

vs.

**NATIONAL MENTOR HOLDINGS;
AMERICAN HOME ASSURANCE, administered by SEDGWICK, *Defendants***

**Adjudication Number: ADJ13970706
Santa Barbara District Office**

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

Defendant seeks removal of the September 9, 2021 Minute Order, wherein the workers' compensation administrative law judge (WCJ) denied defendant's petition for automatic reassignment of the case on the basis that defendant waived the right by failing to seek reassignment at a previous expedited hearing in the case. Defendant contends the WCJ erred because defendant never received notice of that hearing, and only appeared voluntarily to allow the matter to be taken off calendar.

We did not receive an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied.

We have considered the Petition for Removal and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Removal, and return the matter to the trial level for reassignment to a different WCJ.

FACTS

On December 9, 2020, applicant filed an Application for Adjudication of Claim, alleging a specific injury to multiple body parts sustained on November 9, 2020. Defense attorney entered a notice of Representation on December 14, 2020.

On March 5, 2021, applicant filed a Declaration of Readiness to Proceed, seeking an expedited hearing to address issues related to medical treatment, and an expedited hearing was scheduled for March 25, 2021 with WCJ Seiden, the Presiding Judge of the Santa Barbara District Office. However, according to the Petition stated under penalty of perjury, defense counsel never received a Notice of Hearing for this hearing. According to the record in Communications in the Electronic Adjudication Management System (EAMS), the notice of hearing was served by the WCAB via U.S. Mail on March 9, 2021, and sent to applicant, applicant's attorneys, and defendant's third party adjuster Sedgwick. No other persons are listed for service.

On March 25, 2021, applicant appeared before WCJ Seiden. When defense counsel did not promptly appear, applicant's attorney sent an email requesting her appearance, and defense counsel made a remote appearance a few minutes later. The matter was taken off calendar per the joint request of the parties without substantive proceedings. (Minutes of Hearing 3/25/2021, at p 1.)

On August 18, 2021, applicant filed another Declaration of Readiness to Proceed, and a second expedited hearing was set for September 9, 2021; this time, there is no dispute that defendant was properly served with a Notice of Hearing. On August 24, 2021, defendant filed a Petition for Automatic Reassignment pursuant to WCAB Rule 10788 (Cal. Code Regs., tit. 8, § 10788). At the September 9, 2021 hearing, WCJ Seiden denied the Petition for Automatic Reassignment.¹

This Petition for Removal followed. The Report makes clear that WCJ Seiden found defendant waived any right to seek reassignment of the September 9, 2021 expedited hearing when defense counsel appeared at the March 25, 2021 expedited hearing and did not seek reassignment at that time. (Report, at pp. 2–3.)

DISCUSSION

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (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 significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs.,

¹ Because defendant does not contest the substantive actions taken by WCJ Seiden at the hearing, we limit our review to the decision to deny the Petition for Automatic Reassignment.

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).)

WCAB Rule 10788 states:

A party shall be entitled to automatic reassignment of a trial or expedited hearing to another workers' compensation judge in accordance with the provisions of this rule. Consolidated cases are to be considered as one case within the meaning of this rule.

(a) An injured worker shall be entitled to one reassignment of a workers' compensation judge for trial or expedited hearing. The defendants shall be entitled to one reassignment of a workers' compensation judge for a trial or expedited hearing, which may be exercised by any of them. This rule is not applicable to conference hearings. In no event shall any motion or petition for reassignment be entertained after the swearing of the first witness at a trial or expedited hearing.

(b) If the parties are first notified of the identity of the workers' compensation judge assigned for trial at a mandatory settlement conference, at a status conference, at a lien conference, at a priority conference or upon reassignment at the time of trial, to exercise the right to automatic reassignment a party must make an oral motion immediately upon learning the name of the workers' compensation judge to whom the case has been assigned for trial. The motion shall be acted upon immediately by the presiding workers' compensation judge.

(c) If the parties are first notified of the identity of the workers' compensation judge assigned for trial or expedited hearing by a notice of trial served by mail, to exercise the right to automatic reassignment a party must file a petition requesting reassignment not more than 5 days after receipt of the notice of trial or expedited hearing. The presiding workers' compensation judge shall rule on any petition for automatic reassignment.

(Cal. Code Regs., tit. 8, § 10788.) Where a party has notice of the WCJ assigned to a particular expedited hearing or trial but elects not to pursue automatic reassignment, that party forfeits the right to seek reassignment at any future expedited hearings or trials in the same matter as long as the same judge remains assigned to the case. (*Bennett v. County of San Luis Obispo* (1979) 44 Cal.Comp.Cases 835, 836–37 (Appeals Board en banc).)

The key legal question we must resolve is whether any provision of Rule 10788 was triggered with relation to the March 25, 2021 expedited hearing. If defendant was on notice that

WCJ Seiden would be presiding at that hearing pursuant to subdivisions (b) or (c), or if any witnesses were sworn in pursuant to subdivision (a), the failure to seek reassignment at the March 25, 2021 hearing would preclude the August 24, 2021 Petition for Automatic Reassignment.

Because the March 25, 2021 hearing resulted in the matter going off calendar without substantive proceedings, it is clear that the prohibition in subdivision (a) on initiating a petition for reassignment after the swearing in of a witness was not triggered. Similarly, given defendant's statement under penalty of perjury that it did not receive the Notice of Hearing for the March 25, 2021 hearing, and our own EAMS records which appear to corroborate this lack of service, we conclude that defendant did not receive written notice of the March 25, 2021 hearing pursuant to subdivision (c).

Accordingly, the sole question that remains is whether defendant received notice pursuant to subdivision (b) that WCJ Seiden would be presiding over the March 25, 2021 expedited hearing. Although at first glance subdivision (b) appears to require an oral motion for reassignment "immediately upon learning the name of the workers' compensation judge to whom the case has been assigned for trial," a closer reading of the provision makes clear that this requirement applies only "[i]f the parties are first notified of the identity of the workers' compensation judge assigned for trial *at a mandatory settlement conference, at a status conference, at a lien conference, at a priority conference or upon reassignment at the time of trial[.]*" (Cal. Code Regs., tit. 8, § 10788(b), emphasis added). Here, defendant discovered that WCJ Seiden would be presiding at the March 25, 2021 expedited hearing at the expedited hearing itself, not at any prior proceeding. Because an expedited hearing is not among the listed proceedings at which an oral motion is required, discovering the identity of the WCJ at the expedited hearing itself did not trigger an obligation under subdivision (b) to make an immediate oral motion.

We recognize the apparent oddity of ruling that defendant never received notice pursuant to Rule 10788 that WCJ Seiden would be presiding over the March 25, 2021 expedited hearing even though defendant actually appeared at that hearing, where WCJ Seiden presided. However, legal notice is a term of art, and depends upon proper compliance with statutory mandates. (*Bolkiah v. Superior Court* (1999) 74 Cal.App.4th 984, 1000 ["strict compliance with service requirements is required under California law"].) Moreover, we note that subdivision (b) is predicated upon the assumption that *all* parties will receive notice of the WCJ's identity at the same time; where, as here, one party was erroneously deprived of the notice due to them by law,

it would be questionable as a matter of due process to hold them to the strict standards of a provision that does not explicitly apply to the situation.

Finally, we note that there are no concerns here of gamesmanship – defendant appeared at the initial hearing despite the lack of legally required notice, and the hearing was immediately taken off calendar at the request of the parties. This is not a situation where a party has attempted to gain some advantage by not seeking automatic reassignment at the first opportunity; defendant appears to have acted under good faith both in resolving the March 25, 2021 hearing expeditiously despite the lack of notice, and in timely petitioning for automatic reassignment upon receiving the first valid notice under Rule 10788.

We emphasize that our holding in this matter is narrow, applying only to the situation before us where a party does not receive notice of the identity of the WCJ pursuant to either subdivision (b) or (c) of Rule 10788 prior to an expedited hearing or trial, and where the expedited hearing or trial is resolved without the need for witness testimony or other substantive proceedings of the sort that would indicate the party has acquiesced to submitting the matter to the assigned WCJ.

Therefore, under the rare circumstances presented in this case, we conclude that defendant was not required to move for automatic reassignment at or prior to the March 25, 2021 expedited hearing in order to preserve the right to seek reassignment of the September 9, 2021 expedited hearing. Accordingly, the August 24, 2021 Petition for Automatic Reassignment should have been granted, and we will grant the Petition for Removal and return the matter to the trial level for reassignment to a new WCJ.²

² Because we conclude that the Petition for Automatic Reassignment should have been granted pursuant to Rule 10788, we do not consider defendant's alternative argument that WCJ Seiden should not have ruled on the petition himself.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the September 9, 2021 Minute Order denying defendant's Petition for Automatic Reassignment is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that the September 9, 2021 Minute Order denying defendant's Petition for Automatic Reassignment is **RESCINDED** and that the matter is **RETURNED** to the trial level for reassignment to a new WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 4, 2022

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

**ELIZABETH GALLEGOS
WOLFF-WALKER LAW FIRM
LAW OFFICES OF BRADFORD & BARTHEL**

AW/ara

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