

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **THURMAN FRY,**
5 *Applicant,*
6 **vs.**
7 **NORTHROP CORPORATION;**
8 **CONSTITUTION STATE SERVICE,**

9 *Defendant(s).*

Case No. NOR 197297

**OPINION AND ORDERS
DISMISSING PETITION FOR
RECONSIDERATION, GRANTING
PETITION FOR REMOVAL
AND DECISION AFTER REMOVAL**

10 **THURMAN FRY,**
11 *Applicant,*
12 **vs.**
13 **NORTHROP CORPORATION;**
14 **INDUSTRIAL INDEMNITY COMPANY,**

15 *Defendant(s).*

Case No. NOR 187527

16 Both, defendant employer Northrop Corporation, and defendant insurance
17 carrier Industrial Indemnity seek reconsideration of the "Order Overruling Objection
18 to Examination by Dr. Geoffrey Miller and Ordering that Applicant Appear for
19 Examination by Dr. Miller" issued May 1, 1995. Defendants essentially contend that
20 the WCJ exceeded his authority in ordering the applicant be examined by an
21 Independent Medical Examiner (IME), asserting that the WCJ has no statutory
22 authority to refer the applicant to an IME for examination absent the agreement of a
23 party to pay the cost. Moreover, defendants object to the WCJ's statement in his
24 decision, wherein he indicates that he will order defendants to pay the expense of the
25 IME as medical-legal costs. Defendants request, in the alternative, that the Appeals
26 Board remove this matter to itself pursuant to Labor Code section 5310.

27 After reviewing the record, and for the reasons set forth below, we will dismiss

1 the Petitions for Reconsideration. However, we will grant the removal, rescind the
2 WCJ's Order, and return this matter to the WCJ for further proceedings and decision.

3 At the outset, we note that a Petition for Reconsideration may be properly
4 made only from a final order, decision, or award. (Lab. Code, §§ 5900, 5903.)
5 Procedural orders, which are issued before a decision is made on a substantive
6 question, are not subject to attack by a Petition for Reconsideration. (California
7 Workers' Compensation Practice [Cont.Ed.Bar 1985] § 10.4, p. 353.) The WCJ's Order
8 in the present case is an interim or procedural order, and is not subject to
9 reconsideration. (See e.g., Beck v. Workers' Comp. Appeals Bd. (1979) 44
10 Cal.Comp.Cases 190 (writ denied).) Insofar as no final order has issued in the present
11 matter, we will dismiss the Petitions for Reconsideration.

12 Nevertheless, for the reasons that follow, we will grant defendants' Petitions
13 for Removal. In that regard, we note that removal is an extraordinary remedy, rarely
14 exercised by the Board. However, removal has been granted in certain instances,
15 including instances relating to the propriety of decisions at the trial level. (*Hardesty*
16 *v. McCord & Holdren, Inc., et al.*, (1976) 41 Cal.Comp.Cases 111 (Board En Banc); *Lubin*
17 *v. Berkeley East Convalescent Hospital* (1976) 41 Cal.Comp.Cases 283 (Board Panel).
18 Furthermore, the Board will exercise its power of removal where failure to do so will
19 result in substantial prejudice or irreparable injury. (*Swedlow, Inc. Workers' Comp.*
20 *Appeals Bd. (Smith)* (1985) 48 Cal.Comp.Cases 476 (writ denied).

21 It is noted that in the May 1, 1995 Order, the WCJ requests Dr. Miller's opinion
22 on the following questions:

23 "[W]hether applicant was temporarily totally disabled after
24 the February 12, 1993 injury, and if so, how long?

25 "[W]hether he suffered any permanent disability and, if so,
26 how much from either injury?

27 "[W]hether any apportionment is indicated from either
injury[?]

1 "[W]hether applicant is in need of future medical treatment
2 from the effects of either injury[?]

3 In his Report and Recommendation on Petition for Reconsideration (Report),
4 the indicates that he relied on Labor Code sections 5703(b), and 5708 to refer the
5 applicant to Dr. Miller. The WCJ further explains his decision as follows:

6 "Petitioner states they don't give authority for the
7 appointment of an I.M.E., but, as pointed out above, an
8 I.M.E. appointment is not involved here, as it was in the
9 case they cite. Here I selected the doctor after defendant
10 refused to select an A.M.E., arranged [sic] for an
11 examination of Applicant by the doctor and for the
evidence presented at trial to be presented to him, and set
out the question I wished to address by him. I did so so I
could hopefully render a reasonable decision after his report
is received."

12 After reviewing the record, we disagree with the WCJ statement that Labor
13 Code sections 5703(b), and 5708 are applicable to the present matter. We do not
14 believe the questions as presented by the WCJ in the May 1, 1995 Order merit
15 appointment of a "special investigator ... to investigate or report upon [a] medical or
16 scientific question." (Lab. Code, §5703(b).)

17 We are not persuaded that situations where the WCJ is dissatisfied with the
18 medical reports in the record, or where the WCJ attempts to conduct the
19 hearing/proceedings in a manner "which is best calculated to ascertain the substantial
20 rights of the parties" (Lab. Code § 5708), require appointment of a "special
21 investigator" on the regular issues of temporary disability, permanent disability,
22 apportionment, and need for further medical treatment. Thus, we find that Labor
23 Code sections 5703(b), and 5708 are inapplicable to the present case.

24 Moreover, we note that Labor Code section 139.1, and California Code of
25 Regulations, title 8, section 10700 (WCAB Rules), which allow for the appointment of
26 IMEs "upon the agreement of a party to pay the cost," are applicable to injuries
27 occurring before January 1, 1991. Thus, there is no authority in the Labor Code for the

1 Appeals Board to refer applicants to IMEs for injuries occurring after January 1, 1991.
2 The only exception to Labor Code section 139.1 and WCAB Rule 10700 is Labor Code
3 section 5703.5 which allows for appointment of a Qualified Medical Examiner (QME)
4 by the Appeals Board for injuries occurring after January 1, 1991, in situations where
5 the injured employee is unrepresented.

6 In this case, the dates of the alleged industrial injuries are February 13, 1991,
7 and February 12, 1993, thus Labor Code section 139.1 and WCAB Rule 10700 are
8 inapplicable. Furthermore, applicant is represented by counsel and therefore Labor
9 Code section 5703.5 is not applicable. Thus, we find that the WCJ is without statutory
10 authority to appoint an IME in the present matter, and his May 1, 1995 Order is in
11 error.

12 Accordingly, we will grant removal, rescind the May 1, 1995 Order, and return
13 this matter to the WCJ for further proceedings and decision.

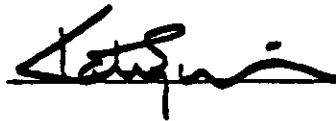
14 For the foregoing reasons,

15 **IT IS ORDERED** defendants' Petitions for Reconsideration filed May 4, 1995, and
16 May 9, 1995, be, and they hereby are, **DISMISSED**, and the Petitions for Removal filed
17 May 4, 1995, and May 9, 1995, be, and they hereby are, **GRANTED**.

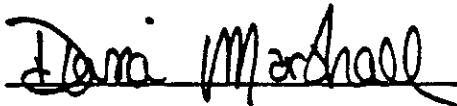
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1 IT IS FURTHER ORDERED that this matter, be, and it hereby is REMOVED to
2 the Appeals Board (Lab. Code, § 5310), and the Order overruling Objection to
3 Examination by Dr. Geoffrey Miller, and Ordering that Applicant Appear for
4 Examination by Dr. Miller, be, and it hereby is, RESCINDED, and this mater is
5 REMANDED to the workers' compensation judge for further proceedings and
6 decision.

7 WORKERS' COMPENSATION APPEALS BOARD

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10 I CONCUR,

11 

12 PARTICIPATING BUT NOT SIGNING

13 J. S. Wiegand
14



15 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

16 'JUN 28 1995

17 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES
18 LISTED ON THE OFFICIAL ADDRESS RECORD EXCEPT
19 LIEN CLAIMANTS.

20 vp 