

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS
FROM: JOE TRUCE
DATE: September 12, 2003
RE: TAKING A SECOND DEPOSITION OF A WITNESS

I am enclosing an Opinion and Order Granting Petition for Removal and the Board's Decision After Removal, allowing us to take a second deposition of the applicant, Eileen Dall, with regards to our Petition to Reduce the applicant's 100% permanent disability award.

In connection with the applicant's case in chief, the applicant's deposition was taken in 1996. On May 12, 2000 the Workers' Compensation Judge (WCJ) issued a 100% permanent disability award.

We then filed a timely Petition to Reduce the applicant's permanent disability award and in connection with our petition, arranged to have the applicant examined by Dr. Sanford Kornblum as a defense QME.¹

After obtaining the appropriate QME examinations, we then attempted to take the deposition of the applicant, Eileen Dall, with respect to our Petition to Reopen to Reduce and the applicant's attorney once again attempted to block discovery. The applicant's attorney "claimed" that pursuant to the Code of Civil Procedure 2025(t) we were only entitled to take one deposition of the applicant. The WCJ once again adopted the position of the applicant's attorney and once again we filed a Petition for Removal pursuant to Labor Code §5310 seeking an order from the Board to depose the applicant.

On September 2, 2003 the Board filed its decision stating in relevant part as follows:

"Having timely filed its petition pursuant to Labor Code §5803, defendant carries the burden to establish good cause to reduce her award of permanent disability. We have previously addressed defendant's right to discovery to meet

¹The applicant's attorney, Elliot Berkowitz, advised his client not to attend the Dr. Kornblum exam contending that we had no right to obtain additional medical evaluations and that our Petition to Reopen to Reduce was not timely filed. As Mr. Berkowitz's argument was adopted by the Trial Judge, we had to file our initial Petition for Removal pursuant to Labor Code §5310. Our petition was granted by the Board and the Board ordered that the applicant attend the QME exam with Dr. Sanford Kornblum.

its burden of proof, requiring applicant to comply with defendant's right to obtain medical evidence. Applicant now contends that having had her deposition taken once in this matter, she cannot be compelled to attend a second deposition in the absence of a showing of good cause, citing the requirement of Code of Civil Procedure Section 2025(t). Defendant asserts that it has a right to a second deposition as a matter of course. Considering applicant's argument and the requirement in CCP Section 2025(t), we believe that sufficient good cause has been established to permit defendant to take applicant's deposition without recourse to a hearing on this issue. Applicant's prior deposition was taken in 1996 and is clearly irrelevant to the current issues..."

~~WJT:dab~~

Enclosure - Opinion and Order

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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. MON 204382

EILEEN DALL,

Applicant,

vs.

REGENCY THERMOGRAPHICS;
RISK ENTERPRISE MANAGEMENT LTD.,

Defendants.

OPINION AND ORDER
GRANTING PETITION
FOR REMOVAL AND
DECISION AFTER REMOVAL

12 Defendant, Regency Thermographics, has filed a Petition for Removal challenging the
13 decision of the workers' compensation administrative law judge (WCJ) requiring defendant to
14 present evidence at a hearing to establish good cause to conduct a second deposition of applicant in
15 connection with its Petition to Reopen to reduce applicant's award of 100% permanent disability.

16 Defendant contends that the WCJ erred in refusing to permit defendant to take applicant's
17 deposition. Defendant argues that it has the right to take applicant's deposition, pursuant to its
18 petition to reopen, without having to first establish good cause to conduct discovery.

19 Applicant argues in opposition that defendant is required to establish good cause to reopen
20 a case as well as to take applicant's second deposition.

21 Following our review of the record, and for the reasons set forth herein, we shall grant
22 defendant's petition for removal and require applicant to attend a deposition as set by defendant.

23 Defendant has filed a request to file a supplemental petition to rebut applicant's opposition.
24 In view of our determination herein, defendant's supplemental petition is not necessary and shall
not be accepted nor considered.

26 Statement of the Case

By Findings, Award and Order issued May 12, 2000, applicant, Eileen Dall, was found to

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1 have sustained industrial injury to her neck, back, shoulders, arms, left leg, left foot, both hands,
2 and psyche on July 25, 1995, resulting in total permanent disability and need for further medical
3 treatment. Defendant subsequently filed a timely Petition to Reopen on July 19, 2000, seeking to
4 reduce the award of permanent disability, based upon sub rosa videotape taken of applicant after
5 the issuance of the May 12, 2000 award.

6 The defendant's petition has yet to be heard, applicant having refused to cooperate in
7 defendant's right to further medical evaluations, until she was ordered to attend a defense Qualified
8 Medical Examination by the Appeals Board. Before applicant complied with the order to attend the
9 QME evaluation, defendant provided to defendant's Qualified Medical Examiner, Dr. Sanford
10 Kornblum, sub rosa videotape for viewing and comment. According to defendant, Dr. Kornblum
11 found applicant's condition had markedly improved following the issuance of her award of total
12 permanent disability. When applicant finally appeared for the QME evaluation with Dr. Kornblum
13 in 2002, he evidently noted that her presentation was inconsistent with the functioning she showed
14 on the videotape.

15 The WCJ refused defendant's request to further depose applicant, since she had previously
16 had her deposition taken in 1996 in conjunction with the case in chief. The WCJ required
17 defendant to first establish good cause by submitting the videotape evidence at a hearing. The WCJ
18 would have defendant cross-examine applicant at a hearing to lay a foundation for taking her
19 deposition.

20 Discussion

21 Having timely filed its petition pursuant to Labor Code section 5803, defendant carries the
22 burden to establish good cause to reduce her the award of permanent disability. We have
23 previously addressed defendant's right to discovery to meet its burden of proof, requiring applicant
24 to comply with defendant's right to obtain medical evidence.

25 Applicant now contends that having had her deposition taken once in this matter she
26 cannot be compelled to attend a second deposition in the absence of a showing of good cause,
27 citing the requirement in Code of Civil Procedure section 2025(t). Defendant asserts that it has a

1 right to a second deposition as a matter of course.

2 Considering applicant's argument, and the requirement in CCP section 2025(t), we believe
3 that sufficient good cause has been established to permit defendant to take applicant's deposition
4 without recourse to a hearing on the issue.

5 Applicant's prior deposition was taken in 1996, and is clearly irrelevant to the current
6 issues. Defendant has obtained sub rosa videotape, taken subsequent to the issuance of the award
7 of 100% permanent disability, which defendant's QME asserts is at odds with a finding of total
8 permanent disability. Applicant's testimony concerning her physical functioning is relevant to the
9 issue of defendant's petition to reopen, especially in view of the video evidence. Under these
10 circumstances, it is clear that a further deposition of applicant would be material and relevant to
11 these proceedings, and defendant is entitled to proceed.

12 Accordingly, we shall grant defendant's petition for removal and order applicant to attend a
13 deposition.

14 For the foregoing reasons,

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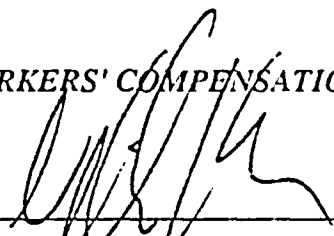
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DALL, EILEEN

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IT IS ORDERED that the June 23, 2003 Petition for Removal be, and hereby is GRANTED, and as our Decision After Removal, the applicant is ordered to attend a deposition to be set by defendant.

WORKERS' COMPENSATION APPEALS BOARD

WILLIAM H. O'BRIEN

I CONCUR,


JAMES G. DUNNE

CONCURRING, BUT NOT SIGNING

JANICE JAMISON MURRAY



DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

SEP 02 2003

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

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