

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SEAN WILSON, *Applicant*

vs.

**COSTCO WHOLESALE CORPORATION; LIBERTY MUTUAL, administered by
HELMSMAN MANAGEMENT SERVICES, LLC, *Defendants***

**Adjudication Number: ADJ9349870
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITION
FOR REMOVAL**

We have considered the allegations of the Petition for Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and based upon the WCJ's analysis of the merits of petitioner's arguments in the WCJ's report, we will deny removal.

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 substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., 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).) Here, based upon the WCJ's analysis of the merits of petitioner's arguments, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

On May 17, 2023, the WCJ took the case in chief under submission, but vacated the submission on July 3, 2023, following the issuance of our en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp.

LEXIS 30].) The WCJ’s Report and Recommendation on Petition for Removal (Report) observes that following her review of the record, she determined that the vocational expert reporting in evidence did not appear to be compliant with the holdings in *Nunes*. The WCJ therefore ordered development of the record in the form of supplemental reporting from the vocational experts to enable the issuance of “a just and reasoned decision based upon substantial medical evidence and in compliance with *Nunes* – a case that is binding¹ on all WCJ’s.” (Report, at p. 3.)

Applicant contends that because a Petition for Reconsideration was filed and is pending in *Nunes*, and because the underlying case in chief in the present matter has a protracted history of litigation, the matter should be decided on the current record without development. Applicant further avers that “it is patently unfair to have an injured worker whose case is approximately eight years old held hostage by the current California workers’ compensation reconsideration process, which allows for granting of petitions for further study without a specific time period in which a decision must issue.” (Petition for Removal, at p. 2:25.)

To the extent that applicant’s argument is predicated on a pending appeal of our decision in *Nunes*, the argument is moot because the Petition for Reconsideration in *Nunes* was denied on August 29, 2023. (*Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023, ADJ8210063; ADJ8621818) [2023 Cal. Wrk. Comp. LEXIS 46].)

Irrespective of the status of the appeal in *Nunes*, however, we observe that the WCJ is vested with the authority and discretion to order development of the record in those instances where, following a review of the record, the WCJ determines that there is insufficient evidence upon which reach a just and reasoned decision. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924, 926–927] (*Tyler*); *Lundberg v. Workmen’s Comp. Appeals Bd.* (1968) 69 Cal.2d 436 [33 Cal.Comp.Cases 656, 659]; *King v. Workers’ Comp. Appeals Bd.* (1991) 231 Cal.App.3d 1640 [56 Cal.Comp.Cases 408, 414]; *Raymond Plastering v. Workmen’s Comp. Appeals Bd. (King)* (1967) 252 Cal.App.2d 748 [60 Cal. Rptr. 860] [32 Cal.Comp.Cases 287, 291].) The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers’ compensation claims. (*Tyler, supra*, at p. 928.)

¹ En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers’ compensation administrative judges. (Cal. Code Regs., tit. 8, § 10325; *City of Long Beach v. Workers’ Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 316, fn. 5 [23 Cal. Rptr. 3d 782, 70 Cal.Comp.Cases 109]; *Gee v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [118 Cal.Rptr.2d 105, 67 Cal.Comp.Cases 236].)

In addition, the WCJ and the Appeals Board may not rely on medical or vocational reports known to be erroneous, or that are no longer germane, or are predicated upon an incorrect legal theory. (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 801 [33 Cal.Comp.Cases 358, 363].)

Here, the WCJ has reviewed the evidentiary record, and following that review, has determined that there is insufficient evidence upon which to reach a just and reasoned decision that is based on cogent facts and correct legal principles. (*Zemke v. Workmen's Comp. Appeals Bd.*, *supra*, 68 Cal.2d 794, 801; *Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93].) The WCJ has ordered development of the record pursuant to Labor Code section 5701, accordingly.

Following our review of the record we agree with the WCJ's determination that applicant has failed to establish substantial prejudice or irreparable harm arising out of the order for development of the record, or 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).) We deny applicant's petition, accordingly.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 21, 2023

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

**SEAN WILSON
LAW FIRM OF ROWEN, GURVEY & WIN
EMPLOYER DEFENSE GROUP**

SAR/abs

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