

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **KRISTIAN VON RITZHOFF,**

5 *Applicant,*

6
7 *vs.*

8 **OGDEN ENTERTAINMENT FOOD**
9 **SERVICES; AMERICAN INTERNATIONAL**
10 **GROUP, INC., administered by**
11 **BROADSPIRE,**

12 *Defendants.*

Case Nos. **ADJ4599548 (MON 0212034)**
ADJ1776170 (MON 0224335)
ADJ1414058 (MON 0246016)

OPINION AND ORDER
GRANTING PETITION FOR REMOVAL
AND DECISION AFTER REMOVAL

13 Defendant seeks removal in response to the Order issued by the workers' compensation
14 administrative law judge (WCJ) on May 10, 2016, wherein the WCJ ordered as follows:

15 1. As to the deposition of Dana Kasova [applicant's former spouse],
16 sufficient argument has been put forth in which to allow the lifting of the
17 Stay. Should defendant feel said deposition is still necessary discovery, it
18 may proceed. Therefore, the Stay in effect is **HEREBY LIFTED**.

19 2. However, based on the prior objection by the witness, the interests
20 of privacy, and to avoid the potential for harassment (as are the concerns
21 of this unusual request for discovery), a Special Master is hereby assigned
22 to monitor any deposition which may materialize. Jaime Berenson of the
23 Law offices of Glauber Berenson is **HEREBY ASSIGNED** as the Special
24 Master. Coordination shall be made through her office as to time and
25 place of the deposition and she shall preside over the deposition to rule on
26 objections and ensure the questioning is limited to those issues presented
27 by defendant as the basis for the discovery request, namely: applicant's
earnings since the injury in 1996, applicant's level of activity and ability
to function physically and mentally from March 1996 and that said
questioning, on balance, does not encroach on the witness' right to
privacy. Jaime Berenson shall be paid at the rate of \$400.00 per hour.

3. Defendant has attempted to schedule Dr. Gilberg's deposition
within the parameters set by the Court. Defendant has taken the doctor's
deposition on two prior occasions, 5/30/07 and 4/13/09, making this the
third and final cross-examination. Thus, defendant may wait until receipt
of the social security earnings and the Kasova deposition, if any, prior to

1 scheduling. Dr. Gilberg's deposition is to be taken at the WCAB, in the
2 afternoon, on a day as mutually agreeable between defendant and with Dr.
3 Gilberg's office, i.e., not on notice. The undersigned's staff is to be
4 notified to ensure CHP is present. To afford equal opportunity, the
deposition transcript and any subsequent report shall be sent by the
WCAB to Dr. Curtis for any comment as well.

5 Defendant alleges that the Order will result in significant prejudice or irreparable harm because it
6 limits the scope of questioning of applicant's former spouse. Defendant also alleges that the appointment
7 of Jaime Berenson as special master is prejudicial because she may not be impartial, as she is an
8 applicant's attorney who makes frequent appearances opposite defense counsel at the Van Nuys District
9 Office of the WCAB. Finally, defendant alleges that a different special master should be appointed to
10 preside over the deposition of Dr. Gilberg, the Independent Medical Evaluator (IME) in psychiatry.

11 The WCJ submitted a Report and Recommendation ("Report") on defendant's petition for
12 removal.

13 Preliminarily, we note that on May 27, 2016 the WCJ issued a finding that the "WCAB has no
14 jurisdiction to act on the request for Ambien or Neurontin based on the evidence submitted." In his
15 Report, the WCJ suggests that his May 27, 2016 finding may have been based on misrepresentations of
16 the record by defendant concerning a Request for Authorization (RFA) for various medications
17 apparently mailed by Dr. Curtis on May 12, 2016 and received by defendant's claims adjuster on May
18 17, 2016. However, we decline to adopt the WCJ's recommendation that we grant removal to address
19 this issue, as the time for reconsideration or removal concerning the May 27, 2016 finding has passed.
20 Nevertheless, we grant removal concerning the WCJ's appointment of Ms. Berenson as special master.

21 **BACKGROUND**

22 Although we do not adopt or incorporate the WCJ's Report, it provides a succinct description of
23 the circumstances that gave rise to the WCJ's Order of May 10, 2016:

24 Objection having previously been filed by the witness via correspondence
25 of 5/15/15 (EAMS #s 56572762, 56572761) and skepticism concerning
26 defendant's true motives, a Special Master was appointed to oversee the
27 deposition to assuage the WCJ's reservations and to ensure defendant does
not engage in over-reaching, harassment, or invasion of the witness's
privacy as well as [to] ensure the deposition proceeds without
encumbrance in light of applicant's history of obstruction. In short, the

1 WCJ is ensuring the witness' rights are protected as well as those of both
2 parties. (Defendant claims the witness can have an attorney represent her
3 but knows full that any attorney would not receive a LC §5710 fee nor LC
4 §5811 reimbursement as the witness is not a party to the case and
5 requiring retaining of an attorney for the sole task of representing at a one-
6 time appearance for deposition would be costly and unduly burdensome as
7 the request for said deposition of an ex-spouse is *highly unusual*, if not
8 unheard of in workers' compensation proceedings where matters are to be
9 inexpensive and unencumbered.) Further, the remittitur [issued by the
10 Court of Appeal] addressed the due process concerns espoused by
11 defendant allowing further opportunity for another cross - examination of
12 Dr. Gilberg and requiring testimony of the applicant. There was nothing
13 in the Court of Appeal's decision addressing the taking of Dana Kasova's
14 deposition and any reference thereto is out of context and out of the sphere
15 of the specific issues addressed.

16 ...

17 Regarding the appointment of the Special Master, defendant charges the
18 WCJ with characteristics which are, ironically, completely
19 uncharacteristic. Defendant avers Jamie Berenson was chosen because
20 she has "an ongoing axe to grind" but has failed to state any reason she
21 would harbor hidden resentment or motives, or why it believes there is
22 collusion between counsel and the WCJ simply because she is someone
23 who regularly appears before the WCJ. In actuality, Ms. Berenson *was*
24 *indeed* chosen because she *does* come before the undersigned and in so
25 doing has displayed a reputation of being: fair, reasonable, intelligent,
26 decisive, knowledgeable, organized, and focused. These attributes make
27 her the proper choice to serve as the Board's [special master]. That is
the limit of forethought for qualifications this WCJ gave to the matter.

Further, as to regularly appearing at the Van Nuys District Office,
appointing Ms. Berenson as Special Master is no different than appointing
any counsel who is routinely utilized as judge pro tems to assist the
burdened court calendar and make discovery Orders during MSCs at the
very district office wherein those applicant and defense attorneys regularly
appear. If this WCJ wanted to hamper defendant's deposition, he could
preside over the deposition himself. Instead, it was determined more
reasonable to appoint a neutral party and Ms. Berenson is said neutral
party as she has no stake in the outcome of this case, nor does this WCJ
have a stake in the outcome of the deposition other than ensuring the
deposition is completed without undue over-reaching or interference by
either defendant or applicant. Hence, while defendant is concerned over
its own due process, this WCJ has appointed the Special Master to help
assure the deposition process is completed for the benefit of all parties
and the witness. The appointment for the reasons stated is the only
"volitional" act by the WCJ which is quite contrary to the intentional act
of interference [of] which he is accused. The very fact that defendant

1 [takes]...offense to the trial Court's limitations of questioning to "those
2 issues presented by defendant as the basis for the discovery request,
3 namely: applicant's earnings since the injury in 1996, applicant's level of
4 activity and ability to function physically and mentally from March 1996"
leaves one to query how deep into the witness's life defendant desires to
delve and that a Special Master is essential.

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6 The only "limitations on defendant's ability to inquire" are as to
7 reasonable questioning regarding the subject issues of apportionment,
8 earnings, applicant's activities regarding working, and such relevant
9 questions determined by the Special Master which do not invade the
10 witness's right to privacy or are deemed harassing. If defendant does not
11 intend to embark on questioning the witness with embarrassing questions
12 with the intent to harass and intimidate and "has no intention of seeking
information in violation of any privilege," then it has nothing to complain
or quiver about. As this matter was returned on remittitur 6/16/15, exactly
12 months earlier to this day, and nothing has transpired to complete
discovery, it is time discovery be completed so the matter may be
submitted and concluded.

13 DISCUSSION

14 We agree that it is time for discovery to be completed so that the matter may be submitted and
15 concluded, and that a special master should be appointed to those ends. (See *Garcia v. Arun Enterprises*
16 *dba Subway* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 567 [special master appointed to attend
17 depositions, to conduct an in camera review of disputed information and/or documents, and to provide
18 recommendations to the parties and to the WCJ regarding the admissibility of disputed items]; *Borrayo v.*
19 *Tobar Industries* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 10 [WCJ may appoint a special master,
20 pursuant to the inherent powers authorized by Labor Code section 111].)

21 Under the circumstances of this case, however, we disagree that Ms. Berenson is the most
22 appropriate choice to serve as special master to oversee completion of discovery. In order to expedite
23 this matter while preserving the appearance of impartiality, we conclude that it is best to select a special
24 master from outside the Van Nuys District Office of the WCAB. To achieve this, and by analogy to the
25 procedure for selecting arbitrators under WCAB Rule 10995(d), we will refer this matter to Judge Ellen
26 Flynn, the Associate Chief Judge for the South. (Cal. Code Regs., tit. 8, § 10995(d).) It should be noted
27 that although Rule 10995(d) calls for referral to the Presiding Judge of the Van Nuys District Office, in

1 this case the referral will be to Judge Flynn in order to preserve impartiality. Consistent with Rule
2 10995(d) and with the discussion of Labor Code section 5270.5 set forth below, we will direct Judge
3 Flynn to provide the parties with a panel of five special masters chosen by Judge Flynn from Southern
4 California but from outside the geographic area of the Van Nuys District Office, whom she believes
5 would be able to serve as effective special masters under the unique circumstances of this case.

6 Labor Code section 5270.5, subdivision (a) provides that the PW CJ at each district office shall
7 prepare a list of all eligible attorneys who apply to be placed on the list of eligible arbitrators, and that
8 attorneys are eligible to become arbitrators if they are active members of the California State Bar
9 Association and also are either (1) a certified specialist in workers' compensation, or eligible to become
10 certified; (2) or a retired WCJ; (3) or a retired appeals board member; (4) or an attorney who has been
11 certified to serve as a judge pro tempore. Subdivision (b) states that "no attorney shall be included in a
12 panel of arbitrators, if he or she has served as a judge in any proceeding involving the same case, or has
13 represented, or whose firm has represented, any party in the same case."

14 In this case, when choosing the panel of five special masters, Judge Flynn shall be guided by the
15 qualifications for eligible arbitrators set forth in section 5270.5. However, her selection shall not be
16 limited to individuals on the list of eligible arbitrators maintained at the Van Nuys District Office or any
17 other District Office.

18 In selecting a special master, Judge Flynn should follow the procedure for selecting a panel of
19 five arbitrators while allowing each party to strike two panel members, as set forth in WCAB Rule
20 10995(d).¹ In addition, we believe it is appropriate for the parties to be allowed ten (10) days, rather than

21
22 ¹ WCAB Rule 10995(d) provides as follows: "If the arbitration submittal form requests a panel pursuant
23 to Labor Code section 5271(b), the presiding judge shall, within six (6) days of receipt of the arbitration
24 submittal form, serve on each of the parties an identical list of five arbitrators selected at random
25 pursuant to Labor Code 5271(b). For each party in excess of one party in the capacity of employer and
26 one party in the capacity of injured employee or lien claimant, the presiding judge shall randomly select
27 two additional arbitrators to add to the panel in accordance with the selection process set forth in Labor
Code section 5721(c). Each of the parties shall strike two arbitrators from the list and return it to the
presiding judge within six (6) days after service. Failure to timely return the list shall constitute a waiver
of a party's right to participate in the selection process. If one arbitrator remains, the presiding judge
shall, within six (6) days of return of the lists from the parties, order the issue or issues submitted for
arbitration before the selected arbitrator pursuant to Labor Code sections 5272, 5273, 5276 and 5277. If
more than one arbitrator remains on the panel, the presiding judge shall randomly select an arbitrator
from the remaining panelists."

1 the six days provided in the rule, to strike two special masters from the five-member panel presented to
2 them by Judge Flynn.

3 Accordingly, within ten (10) days of receipt of this decision, Judge Flynn is directed to serve on
4 each of the two parties herein an identical list of five special masters selected by Judge Flynn, in the
5 reasonable exercise of her discretion but also consistent with our discussion of Labor Code section
6 5270.5 above. Each of the parties shall strike two special masters from the list and return it to Judge
7 Flynn within ten (10) days after service. Failure to timely return the list shall constitute a waiver of a
8 party's right to participate in the selection process. If one special master remains, Judge Flynn shall,
9 within ten (10) days of return of the lists from the parties, order this matter referred to that special master
10 to preside over all further discovery and preparation of this matter for final resolution by the presently-
11 assigned WCJ. If more than one special master remains on the panel, Judge Flynn shall exercise her
12 discretion to select a special master from among the remaining panelists.

13 The special master selected by the foregoing procedure shall be responsible for formulating and
14 finalizing a discovery plan and for overseeing all aspects of that plan through completion and closure of
15 discovery, in accordance with the Court of Appeal's published decision in this matter. This discovery
16 plan should include oversight and completion of Dr. Gilberg's deposition and any deposition of Dana
17 Kasova or other witness. The special master will also have authority to explore settlement by the parties
18 pending completion and closure of discovery and referral of this matter back to the presently-assigned
19 WCJ. It is the intention of this decision that the presently-assigned WCJ need not have any further
20 involvement with this case until the special master is finished with this assignment and this case is ready
21 for final resolution. By analogy to WCAB Rule 10999, defendant shall be liable for the special master's
22 reasonable services and expenses. (See Cal. Code Regs., tit. 8, § 10999.)

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1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's petition for removal is **GRANTED**.


3 **IT IS FURTHER ORDERED**, as the Decision After Removal of the Workers' Compensation
4 Appeals Board, that the Order issued by the WCJ on May 10, 2016 is **RESCINDED**, and this matter is
5 **REFERRED** to Judge Ellen Flynn, the Associate Chief Judge for the South, for selection of and referral
6 to a special master for further proceedings as set forth in this decision.

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8 **WORKERS' COMPENSATION APPEALS BOARD**

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11 _____
12 DEIDRA E. LOWE

11 I CONCUR,

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14 _____
15 KATHERINE ZALEWSKI

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17 

18 _____
19 FRANK M. BRASS



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

22 **SEP 13 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 **KRISTIAN VON RITZHOF**
26 **FLOYD SKEREN & KELLY**
27 **GLAUBER BERENSON, ATTN: JAIME BERENSON**
ELLEN FLYNN, ASSOCIATE CHIEF JUDGE FOR THE SOUTH
PRESIDING WCJ LINDA MORGAN, VAN NUYS DISTRICT OFFICE
WCJ DAVID SEYMOUR, VAN NUYS DISTRICT OFFICE

bea

VON RITZHOF, Kristian

