

Trial Practice In The Time of COVID-19: WCAB Addresses Objections to Virtual Witness Testimony

January 14, 2021

As we approach the one year anniversary of the COVID-19 pandemic and corresponding shut-downs, we continue to see some of the provisions set forth in the Governor's Executive Orders gaining support and permanency via statute and case law decisions. The latest development came through the January 12, 2021 Significant Panel Decision of *Limin Gao v. Chevron Corp.* (ADJ10024232), which addressed Executive Order N-63-20 and objections to electronic testimony at trial. The Board agreed that the Workers' Compensation Judge violated the applicant's due process rights when the Judge continued a trial indefinitely for in-person testimony over applicant's objection. We have provided a brief summary of the Board's decision and reasoning below, along with our analysis of the potential legal implications for workers' compensation practice and some tips for moving forward.

Summary of *Gao*

The parties originally proceeded to trial on the applicant's alleged psyche injury on March 10, 2020. The applicant completed in-person testimony at the Bakersfield WCAB. The WCJ continued the trial to June 9, 2020 to complete in-person testimony for all witnesses. Six days later, the Board stopped conducting in-person proceedings due to the COVID-19 pandemic. The Board began conducting telephonic trial proceedings in May 2020, and video conference trials in July 2020.

The matter was continued again to September 1, 2020. The WCJ contacted the parties via letter on August 20, 2020, asking whether either party objected to video conference trial. Defendant submitted an objection, and the WCJ issued an Order continuing the trial indefinitely on August 25, 2020. The applicant filed a Petition for Removal of the Workers' Compensation Judge's Order Continuing, alleging that her due process rights were violated by not allowing her to be heard at trial and by concluding that the trial could not proceed remotely. The WCJ issued a response noting that due process required that defendant be afforded the opportunity to question their witnesses in person, as applicant was afforded this opportunity.

At the outset of their discussion, the WCAB noted that video conferencing trials are now a realistic possibility at the Board, so the WCJ had a choice as to whether to proceed via video conference or continue the matter for in-person testimony (a choice that was not available during the first few months of the shut-down). Ultimately, the Board agreed with the applicant that her due process rights were violated when the Board continued the September 1, 2020 trial indefinitely before receiving a response from the applicant to the WCJ's August 20, 2020 letter. The Board remanded

the matter back to the trial Judge with instructions to set a remote hearing to address the parties' respective arguments regarding a remote trial.

The Board stopped short of ordering the matter to proceed via remote trial, but provided an extensive discussion about the difference between due process under normal circumstances versus due process during the pandemic. In this case, the WCJ and defendant emphasized fairness concerns where applicant was afforded the opportunity to testify in person, while the defense witnesses would be required to testify remotely. The Board agreed that this would violate defendant's due process rights if this distinction was ordered arbitrarily, but in this case, the sole reason applicant's testimony took place in person was the fact that this portion of the trial occurred before the COVID-19 shut down.

While they did not believe a continuance to allow for in-person testimony would always be unreasonable depending on the facts and circumstances of the individual case, the party seeking continuance needed to provide clear and concise reasons as to why the superiority of in-person testimony outweighs the potential detrimental delay in the case. The Board concluded the discussion noting that:

“in consideration of Executive Order N-63-20, the purposes of the workers' compensation system, and current conditions, the default position should be that trials proceed remotely, in the absence of some clear reason why the facts of a specific case require a continuance. Moreover, as the party seeking the continuance, the burden should be on defendant in this case to demonstrate why a continuance is requested.”

Conclusion

The Significant Panel Decision may still be appealed at this stage, but it provides helpful insight as to how the Board is likely to handle these disputes moving forward. We anticipate that the Board will remain closed to in-person hearings for the foreseeable future. Further, as the Board closures continue, we anticipate that applicants will continue to raise due process arguments regarding trial delays, which may outweigh due process trial procedure arguments in light of the availability of remote trials. We will continue to monitor the situation closely and provide updates regarding any legislative or regulatory changes, as well as any Appellate Court decisions.

In the interim, we believe the following are important considerations when facing the decision to object to electronic trial proceedings:

- 1) Make a clear objection to electronic trial proceedings on the record. Include as much detail as possible in support of your argument that virtual proceedings will not be sufficient to ensure the parties due process rights (ex: technology issues, witness credibility issues, etc.). We anticipate that the success or failure of objections in the future will hinge on the specific nuances of each case. Therefore, argument preservation is important as the law develops.
- 2) Understand the distinctions between pre-pandemic due process and due process during the pandemic. Had the defendant and applicant been offered

different trial procedures post-pandemic, the result might have been different in *Gao*.

- 3) Consider mutual agreements to proceed with electronic trials where the issue is not as crucial to the overall case in chief, or where the case does not hinge on witness testimony.
- 4) Consider how evidence obtained in the pre-trial discovery (witness depositions, medical reports, documents, or video footage) can substitute for or enhance trial testimony.

As always, do not hesitate to reach out to our firm with any questions or concerns.

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