

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

EARL MOSS, *Applicant*

vs.

KAISER FOUNDATION HEALTH PLAN, *Defendant*

**Adjudication Number: ADJ4668467
Oakland District Office**

**OPINION AND ORDER
GRANTING PETITION FOR DISQUALIFICATION
AND DECISION AFTER DISQUALIFICATION**

Defendant Kaiser Health Plan (defendant) seeks the disqualification of workers' compensation administrative law judge James Griffin (WCJ), in the above captioned matter pursuant to Labor Code¹ section 5311 and WCAB Rule 10960 (Cal. Code Regs., tit. 8, § 10960). Defendant contends that the WCJ's contact with the Information and Assistance Officer (I&A Officer)² and review of the proposed pre-trial conference statement (PTCS) prepared by applicant before service of the PTCS on defendant presents the appearance of impropriety and bias.

We have received a Response from applicant. The WCJ filed a Report and Recommendation (Report) recommending that the Petition for Disqualification be denied.

We have considered the allegations of the Petition for Disqualification and the contents of the report of the WCJ with respect thereto. Based on our review of the record, the allegations in the Petition for Disqualification, the Response, and the contents of the Report, and for the reasons discussed below, we will grant the Petition for Disqualification.

¹ All further references are to the Labor Code unless otherwise noted.

² As described on the DWC website, "The DWC Information and Assistance Unit provides information and assistance to employees, employers, labor unions, insurance carriers, physicians, attorneys and other interested parties concerning rights, benefits and obligations under California's workers' compensation laws. The unit plays a major role in reducing litigation before the Workers' Compensation Appeals Board (WCAB) and is often the first DWC contact for injured workers." (<https://www.dir.ca.gov/dwc/IandA.html>)

BACKGROUND

On September 20, 2023, applicant filed a Declaration of Readiness to Proceed to Expedited Hearing, averring a dispute with respect to medical treatment. The matter was set for hearing on October 16, 2023 before WCJ Griffin, who has presided over more than ten hearings in this case since 2016.

On October 13, 2023, WCJ Miller issued a minute order in advance of the hearing date, indicating that the issues identified as the subject of the upcoming Expedited Hearing on October 16, 2023 had been resolved. (Minutes of Hearing, dated October 13, 2023.) However, the WCJ also noted that:

Applicant has at least 3 penalty petitions and at least 1 claim for reimbursement that have not been able to be activated, due to numerous IMR appeals. Case is continued to status conference to prepare non-IMR and non-UR issues for trial.

On November 14, 2023, the parties proceeded to a mandatory settlement conference (MSC) before WCJ Miller. The Minutes indicate that:

Continued to MSC over defendant's objection and request for OTOC based on failure to meet and confer prior to MSC. Applicant to meet with I&A to hone the PTCS. Updated PTCS to be sent to defendant for completion ahead of 11/28/23 MSC.

On November 28, 2023, the parties completed a joint PTCS, and the matter was again set for trial before WCJ Griffin.

Defendant's Petition concerns the review of applicant's proposed PTCS between the November 14 and November 28, 2023 MSCs. Defendant avers that "[o]n November 21, 2023, the Information and Assistance Office emailed the defendant's representative a revised Pretrial Conference Statement and informed defendant's representative that she had met with Judge Griffin, who would be the trial judge. . . ." (Petition, at p. 3:9.) Defendant submits that "at no time prior to November 21, 2023 had defendant's representative or defendant's counsel ever been provided with a copy of the proposed Pretrial Conference Statement that was reviewed by Judge Griffin." (*Id.* at p. 3:15; 4:14.)

Defendant admits that it did not submit its proposed version of the PTCS to applicant until the morning of November 28, 2023.

Defendant's Petition submits that pursuant to WCAB Rule 10841 (Cal. Code Regs., tit. 8, § 10841), receipt by a WCJ of an ex parte letter or document prepared by a party shall be served on all other parties with a cover letter explaining that the letter or document was received ex parte in violation of the rule. Defendant further submits that the review of applicant's proposed PTCS creates an appearance of bias sufficient to justify disqualification of the WCJ. (*Id.* at p. 6:21.)

Applicant's Response indicates that there was no direct contact between applicant and WCJ Griffin, and that the defendant was dilatory in providing its version of the PTCS to the applicant. (Response, at p. 2.)

DISCUSSION

Pursuant to section 5311, "Any party to the proceeding may object to the reference of the proceeding to a particular workers' compensation judge upon any one or more of the grounds specified in Section 641 of the Code of Civil Procedure and the objection shall be heard and disposed of by the appeals board." (§ 5311.) A petition to disqualify must be verified upon oath in the manner required for verified pleadings in courts of record. (Cal. Code Regs., tit. 8, § 10940(c).)

WCAB Rule 10960 provides:

Proceedings to disqualify a workers' compensation judge under Labor Code section 5311 shall be initiated by the filing of a petition for disqualification supported by an affidavit or declaration under penalty of perjury stating in detail facts establishing one or more of the grounds for disqualification specified in section 641 of the Code of Civil Procedure. The petition to disqualify a workers' compensation judge and any answer shall be verified upon oath in the manner required for verified pleadings in courts of record.

If the workers' compensation judge assigned to hear the matter and the grounds for disqualification are known, the petition for disqualification shall be filed not more than 10 days after service of notice of hearing or after grounds for disqualification are known.

A petition for disqualification shall be referred to and determined by a panel of three commissioners of the Appeals Board in the same manner as a petition for reconsideration.

(Cal. Code Regs., tit. 8, § 10960.)

Code of Civil Procedure section 641 states, in pertinent part, that "[a] party may object to the appointment of any person as referee, on one or more of the following grounds . . . (g) The existence of a state of mind in the potential referee evincing enmity against or bias toward either

party.” (Code Civ. Proc., § 641(g).) “Due process is violated where there is even an appearance of bias or unfairness in administrative hearings.” (*Robbins v. Sharp Healthcare, et al.* (2006) 71 Cal.Comp.Cases 1291, 1302 (*Robbins*)).) The test “is an objective one, i.e., would a reasonable person with knowledge of the facts entertain doubts concerning the WCJ’s impartiality.” (*Id.*, at p. 1303.)

Based on our review of the record, we find no evidence that the WCJ had *ex parte* contact with the applicant. However, pursuant to *Robbins, supra*, our analysis must extend to whether a reasonable person with knowledge of the facts would entertain doubts concerning the impartiality of the WCJ. And in this regard, we are persuaded that the potential *appearance* of bias or unfairness necessitates disqualification.

According to the allegations in defendant’s Petition, the WCJ was presented with applicant’s revised draft of PTCS by the I&A Officer. Defendant further alleges that the WCJ then discussed the particulars of applicant’s proposed PTCS with the I&A officer, outside the presence of the parties, and prior to defendant’s receipt of the PTCS. (Petition, at p. 3:9; 3:20.)

We acknowledge that personnel from the DWC I&A Unit may need to consult with a WCJ from time to time regarding limited procedural issues relevant to a pending case involving an unrepresented applicant, e.g., the organization of trial exhibits or scheduling issues. Indeed, “[a] judge may consult with court personnel whose function is to aid the judge in carrying out the judge’s adjudicative responsibilities” (Code of Judicial Ethics, Canon 3B(7)(b); see also *Fremont Ind. Co. v. Workers’ Comp. Appeals Bd. (Zepeda)* (1984) 153 Cal. App. 3d 965, 973 [49 Cal.Comp.Cases at p. 294].) Thus, we do not believe that the I&A Officer and the WCJ engaged in *ex parte* conduct *per se*.

However, the I&A Officer provided the WCJ with applicant’s revised PTCS, a document not previously served on defendant.

Thus, we are persuaded that the WCJ’s actions could reasonably raise concerns as to the *appearance* of unfairness or bias. Pursuant to the rationale in *Robbins, supra*, we conclude that “[d]ue process is violated where there is even an appearance of bias or unfairness in administrative hearings.” (*Robbins v. Sharp Healthcare, et al.* (2006) 71 Cal.Comp.Cases 1291, 1302 (*Robbins*)).) Because the actions of the WCJ with regard to the review and discussion of applicant’s PTCS might cause a “reasonable person with knowledge of the facts [to] entertain doubts concerning the

WCJ's impartiality," we will grant defendant's Petition and return this matter to the Presiding Workers' Compensation Judge for reassignment. (*Id.*, at p. 1303.)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Disqualification is hereby **GRANTED**.

IT IS FURTHER ORDERED as the Decision after Disqualification of the Workers' Compensation Appeals Board that workers' compensation administrative law judge James Griffin is **DISQUALIFIED** and that this matter is **RETURNED** to the presiding workers' compensation administrative law judge of the Oakland District Office in order to reassign the matter to a workers' compensation administrative law judge other than James Griffin.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 11, 2024

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

**EARL MOSS
ACUMEN LAW**

SAR/abs

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