WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

HARVEY MILLER, *Applicant*

vs.

PACIFIC BELL TELEPHONE COMPANY;
OLD REPUBLIC INS. CO., adjusted by SEDGWICK, *Defendants*

Adjudication Number: ADJ12745529

Redding District Office

OPINION AND ORDERS
GRANTING PETITION
FOR RECONSIDERATION
DISMISSING PETITION
FOR DISQUALIFICATION
AND DECISION
AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O)[1] issued on July 30, 2024, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that defendant paid applicant through an ERISA disability plan for a period of time where applicant had returned to work, and thus applicant had received an overpayment of ERISA benefits. The WCJ awarded defendant a credit of $8,075.28, which issued against the entirety of applicant's 2% permanent disability and applicant's future medical treatment.

Applicant argues that substantial evidence does not support the award of credit, that the calculation of credit contains mathematical error, and that the issue of credit under an ERISA plan is preempted by federal law.

Applicant further seeks to disqualify the WCJ; however, it is unclear upon what basis applicant seeks to disqualify the WCJ as the petition for disqualification is vague and without citation.

[1] The Findings and Order is miscaptioned as a Findings and Award, however, no award issued.

We have received an answer from defendant. We have also received an answer from lien claimant Steven Riley, which objects to the petition for disqualification.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration. The WCJ made no recommendation as to disqualification.

We have considered the allegations of the Petition for Reconsideration, Petition for Disqualification, the Answers, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, we will grant reconsideration, rescind the July 30, 2024 F&O, and return this matter to the trial level for further proceedings. We will dismiss applicant's petition for disqualification as it is skeletal.

FACTS

Applicant worked as a lineman when he sustained an industrial injury to his right knee, left hip, and lumbar spine on February 28, 2019. (Minutes of Hearing and Summary of Evidence (MOH), June 5, 2024, p. 2, lines 2-5.) The parties stipulated that applicant was paid temporary disability for broken periods, including the period of August 19, 2022 through September 15, 2022. (*Id*. at p. 2, lines 8-11.) The parties stipulated that applicant was adequately compensated for temporary disability benefits. (*Id*. at p. 2, lines 11-12.) The parties further stipulated that applicant's injury caused 2% permanent disability. (*Id*. at p. 2, lines 14-15.)

The parties did not stipulate the periods of temporary disability or the date when applicant returned to work. No testimony was received at trial.

Defendant issued a notice of temporary disability overpayment, which states that applicant returned to work on September 1, 2022. (Defendant's Exhibit B, p. 1.) In the notice, defendant sought overpayment of temporary disability benefits from September 2, 2022 through September 15, 2022, in the amount of $3,079.42. (*Ibid*.) In the petition for reconsideration, applicant alleges that he did not return to work until after September 15th. (Petition for Reconsideration, p. 3, lines 16-22.)

Defendant also claimed an overpayment of benefits from a short-term disability ERISA plan of $8,075.28. (Defendant's Exhibit E.)

The sole issue for trial was listed as follows:

> Defendant claims an ERISA credit of $8,075.28. Applicant asserts that allowance of the credit will obliterate the purpose and benefits conferred by a permanent disability award if allowed and should not be permitted per Maples and J.C. Penney. If a credit is allowed against permanent disability, then the remaining credit cannot be allowed against future medical or future injuries or any other matter or compensation owed that is not related to this case, including payroll, unused paid time off, or any money received, owed, or sought outside of this case.
>
> Applicant attorney fee of 15 percent is requested, and applicant's attorney disputes the validity of attorney fee lien due to violation of LC 4906, which is not at issue today.

(MOH, *supra* at p. 2, line 21, through p. 3, line 3.)

Applicant refers in the petition for reconsideration to his post-trial briefing, wherein applicant raised the issue of federal preemption over the issue of ERISA plan credits. The WCJ did not address this issue in the F&O. (Applicant's Post-trial Brief, June 18, 2024, p. 3.)

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(§ 5909.)

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on August 28, 2024, and 60 days from the date of transmission is Sunday, October 27, 2024, which by operation of law means that this decision is due by Monday, October 28, 2024. (Cal. Code Regs., tit. 8, § 10600.) This decision is issued by or on Monday, October 28, 2024, so that we have timely acted on the Petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on August 28, 2024, and the case was transmitted to the Appeals Board on August 28, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 28, 2024.

II.

The WCJ shall ". . . make and file findings upon all facts involved in the controversy[.]" (§ 5313; see also, *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).)

Labor Code section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, *supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton*, *supra*, at p. 475.)

The *voluntary* provision of workers' compensation benefits does not constitute an admission of liability to such benefits and the overpayment of benefits provided may be taken into account in fixing any compensation that comes due.[2] (§ 4909.) However, whether to award a credit is discretionary.

> [T]emporary disability indemnity and permanent disability indemnity were intended by the Legislature to serve entirely different functions. Temporary disability indemnity serves as wage replacement during the injured worker's healing period for the industrial injury. (Citation.) In contrast, permanent disability indemnity compensates for the residual handicap and/or impairment of function after maximum recovery from the effects of the industrial injury have been attained. (Citation.) Permanent disability serves to assist the injured worker in his adjustment in returning to the labor market. (Citation.) Thus, in many instances the allowance of credit for a temporary disability overpayment against permanent disability indemnity can be disruptive and, in some instances, totally destructive of the purpose of permanent disability indemnity.

(*Maples v. Workers' Comp. Appeals Bd*. (1980) 111 Cal.App.3d 827, 836-837 (citations omitted).)

[2] To the extent that the employer made payments under an ERISA plan, it is unclear whether such payments were voluntary. It is unclear whether defendant has appropriately characterized its request a "credit". Instead, the employer may actually be seeking reimbursement as a lien claimant under section 4903.1.

The issue listed for trial is credit from overpayment of ERISA benefits. This appears to implicate an employer-paid benefit.

Defendant offered evidence indicating that the overpayment was also, in part, an overpayment of temporary disability. This indicates an insurance-paid benefit.

No testimony was offered.

The WCJ awarded credit based upon the ERISA plan. However, the WCJ issued no award in this matter. It is not possible to award a credit unless benefits are awarded to which the credit attaches. An award of 2% disability should have issued as the parties stipulated to the level of disability.[3] Furthermore, no award of attorney's fees issued and it appears that the WCJ may have intended to apply the credit to applicant's attorney's fees, which is not proper. (See *Pena v. Aqua Systems*, 2022 Cal. Wrk. Comp. P.D. LEXIS 250.)

The WCJ awarded credit against future medical treatment; however again, no award of future medical treatment issued, which precludes application of a credit.

Lastly, if credit is based upon temporary disability, which is separate and distinct from any ERISA argument, an award of temporary disability listing the periods due and payable must issue. No medical records are in evidence at all. There is no record upon which we can discern the periods of temporary disability.

To the extent that credit is based upon a dispute between applicant and the employer over an alleged overpayment by an ERISA plan, applicant expressly raised the issue of ERISA preemption, which raises a fundamental question of Appeals Board jurisdiction to hear this dispute. The WCJ did not address this issue in either the Opinion on Decision or the Report.

In its answer defendant cites *Appleby v. Workers' Comp. Appeals Bd*. (1994) 27 Cal.App.4th 184, as a basis for awarding credit. However, the court in *Appleby* expressly declined to address the issue of ERISA preemption. (*Id*. at p. 196.) Thus, its holding is not controlling.

Congress enacted ERISA to "protect ... the interests of participants in employee benefit plans and their beneficiaries," by setting out regulatory requirements for employee benefit plans, and to "provide for appropriate remedies, sanctions, and ready access to the federal courts." *(Aetna Health Inc. v. Davila* (2004) 542 U.S. 200, 208.) To this end, ERISA has an expansive preemptive

[3] However, the WCJ must review the medical record to ensure the 2% stipulation is adequate prior to issuing any award.

reach intended to ensure that employee benefit plan regulation is "exclusively a federal concern." *(Id.,* citing *Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504, 523.)

The United States Supreme Court identifies "two strands to ERISA's powerful preemptive force." *(Cleghorn v. Blue Shield of Cal.* (9th Cir. 2005) 408 F.3d 1222, 1225, citing *Davila, supra,* 542 U.S. at 214 n.4.) The first form of preemption, commonly known as "conflict preemption," arises under ERISA section 514(a), 29 U.S.C. section l 144(a), and preempts any state laws that "relate to" an ERISA plan. (See *Id.)* The second form of preemption, commonly known as "complete preemption," arises from ERISA's civil enforcement provision, ERISA section 502(a), 29 U.S.C. section l 132(a). (See *Id.)* Under "complete preemption," state law causes of action falling within the scope of ERISA's remedial framework are preempted as conflicting with the intended exclusivity of ERISA' s remedies, even if those causes of action would not necessarily be preempted by ERISA section 514(a). (See *Id.)*

A. Conflict preemption / related to preemption

ERISA section 514(a) expressly preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." (29 U.S.C. § l 144(a).) State law claims "relating to" an employee benefit plan are subject to dismissal by both state and federal courts. State law claims of all kinds are "conflict" preempted by ERISA. Defendant seeks a credit under the terms of its ERISA plan of benefits paid to Applicant by that ERISA plan. The claim may thus be preempted as "relating to" the plan. (29 U.S.C. § 1144(a); *Pilot Life Ins. Co. v. Dedeaux* (1987) 481 U.S. 41, 47-48.)

The Supreme Court gives the phrase "relates to," found in ERISA section 514(a) a "broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan."' *(Pilot Life, supra,* 481 U.S. at 47, quoting *Metro. Life Ins. Co. v. Mass.* (1985) 471 U.S. 724, 739; see also *Gobeille v. Liberty Mut. Ins. Co.* (2016) 136 S. Ct. 936, 943; *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.* (1997) 519 U.S. 316, 324.) "In evaluating whether a common law claim has 'reference to' a plan governed by ERISA, the focus is whether the claim is premised on the existence of an ERISA plan, and whether the existence of the plan is essential to the claim's survival. If so, a sufficient reference exists to support preemption." *(McDowell, supra,* 385 F.3d at 1172.) "In determining whether a claim has a 'connection with' an employee benefit plan, courts in [the Ninth C]ircuit use a relationship test." *(Id.)* "The emphasis is on the genuine impact that

the action has on a relationship governed by ERISA, such as the relationship between the plan and participant." *(Id.)*

B. Complete preemption

"Complete preemption under § 502(a) is 'really a jurisdictional rather than a preemption doctrine, [as it] confers exclusive federal jurisdiction in certain instances where Congress intended the scope of a federal law to be so broad as to entirely replace any state-law claim."' *(Marin Gen. Hosp., supra,* 581 F.3d at 945, quoting *Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health & Welfare Trust Fund* (7th Cir. 2008) 538 F.3d 594, 596.) The Supreme Court created the doctrine of complete preemption under ERISA in 1987 when it held that section 502(a) reflects Congress's intent to "so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *(Metro. Life Ins. Co. v. Taylor* (1987) 481 U.S. 58, 63-64.) Under the complete preemption doctrine, "[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *(Davila, supra,* 542 U.S. at 209.) Accordingly, "**[a]ny cause of action based on state law that in reality seeks to recover benefits due under an ERISA-governed plan, seeks to enforce rights under an ERISA-governed plan, or seeks to clarify rights to future benefits under the terms of an ERISA-governed plan, falls under ERISA's civil-enforcement mechanism and is subject to complete preemption**." *(Bell v. Homestead Senior Care* (N.D. Tex. May 5, 2008) 2008 U.S. Dist. LEXIS 36780, at p. 9.)

Under the two-pronged test for "complete" preemption set forth by the Supreme Court in *Davila*, a claim is completely preempted if, first, "an individual, at some point in time, could have brought his claim under ERISA § 502(a), and, second, there is no other independent legal duty that is implicated by a defendant's actions." *(Noetzel v. Haw. Med. Serv. Ass'n.* (D. Haw. 2016) 2016 U.S. Dist. LEXIS 97981, at p. 5-6 [internal quotations omitted]; see also *Fossen v. Blue Cross & Blue Shield of Mont.* (9th Cir. 2011) 660 F.3d 1102, 1108 ["Both *Davila* and *Marin General Hospital* discussed complete preemption by reference to § 502(a)(l)(B) but not the other subparts of§ 502(a). The complete preemption doctrine applies to the other subparts of§ 502(a) as well."].)

This case appears to present a dispute over reimbursement of overpaid benefits under an ERISA plan. Complete preemption of ERISA was directly raised by applicant in his post-trial

brief, but not analyzed by the WCJ.[4] It appears that applicant may have a colorable argument as to ERISA preemption. As a doctrine implicating the subject matter jurisdiction the court is obligated to address it when raised. *(Totten, supra*, 154 Cal.App.4th at 46, quoting *Keiffer v. Bechtel Corp.* (1998) 65 Cal.App.4th 893, 896.) Accordingly, upon return, the WCJ must address whether defendant's claim for credit is preempted by ERISA.

III.

Next, applicant seeks disqualification of the WCJ.

Labor Code section 5311 provides that a party may seek to disqualify a WCJ upon any one or more of the grounds specified in Code of Civil Procedure section 641. (Lab. Code, § 5311; see also Code Civ. Proc., § 641.) Among the grounds for disqualification under section 641 are that the WCJ has "formed or expressed an unqualified opinion or belief as to the merits of the action" (Code Civ. Proc., § 641(f)) or that the WCJ has demonstrated "[t]he existence of a state of mind … evincing enmity against or bias toward either party." (Code Civ. Proc., § 641(g)).

Under WCAB Rule 10960, proceedings to disqualify a WCJ "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 … ." (Cal. Code Regs., tit. 8, § 10960, italics added.) It has long been recognized that "[t]he allegations in a statement charging bias and prejudice of a judge must set forth specifically the facts on which the charge is predicated," that "[a] statement containing nothing but conclusions and setting forth no facts constituting a ground for disqualification may be ignored," and that "[w]here no facts are set forth in the statement there is no issue of fact to be determined." (*Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 399, 316 P.2d 366.)

Furthermore, even if detailed and verified allegations of fact have been made, it is settled law that a WCJ is not subject to disqualification under section 641(f) if, prior to rendering a decision, the WCJ expresses an opinion regarding a legal or factual issue but the petitioner fails to show that this opinion is a fixed one that could not be changed upon the production of evidence and the presentation of arguments at or after further hearing. (*Taylor v. Industrial Acc. Com.* (*Thomas*) (1940) 38 Cal.App.2d 75, 79–80 [100 P.2d 511, 5 Cal.Comp.Cases 61].) Additionally,

[4] Applicant adopts this argument into his Petition for Reconsideration by reference, which is not proper. In the future, any arguments raised should be fully discussed within the body of the Petition for Reconsideration.

even if the WCJ expresses an unqualified opinion on the merits, the WCJ is not subject to disqualification under section 641(f) if that opinion is "based upon the evidence then before [the WCJ] and upon the [WCJ's] conception of the law as applied to such evidence." (*Id.*; cf. *Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312, 153 P.2d 734 [It is [a judge's] duty to consider and pass upon the evidence produced before him, and when the evidence is in conflict, to resolve that conflict in favor of the party whose evidence outweighs that of the opposing party."].)

Also, it is "well settled … that the expressions of opinion uttered by a judge, in what he conceives to be a discharge of his official duties, are not evidence of bias or prejudice" under section 641(g) (*Kreling*, *supra*, 25 Cal.2d at pp. 310–311; accord: *Mackie*, *supra*, 154 Cal.App.2d at p. 400) and that "[e]rroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias or prejudice, especially when they are subject to review." (*McEwen v. Occidental Life Ins. Co*. (1916) 172 Cal. 6, 11, 155 P. 86; accord: *Mackie*, *supra*, 154 Cal.App.2d at p. 400.) Similarly, "when the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies" the judge under section 641(g). (*Kreling*, *supra*, 25 Cal.2d at p. 312; see also *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219, 4 Cal. Rptr. 3d 519 [When making a ruling, a judge interprets the evidence, weighs credibility, and makes findings. In doing so, the judge necessarily makes and expresses determinations in favor of and against parties. How could it be otherwise? We will not hold that every statement a judge makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias."].)

Under no circumstances may a party's unilateral and subjective perception of bias afford a basis for disqualification. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1034, 119 Cal. Rptr. 2d 341, 45 P.3d 280; Robbins v. Sharp Healthcare (2006) 71 Cal.Comp.Cases 1291, 1310–1311 (Significant Panel Decision).)

Applicant's petition for disqualification is vague and without citation. Nowhere in the petition can we discern any factual basis for disqualification. We consider applicant's argument on this point skeletal and thus waived. (See *Flores v. Cal. Dept. of Corrections and Rehab.* (2014) 224 Cal.App.4th 199, 204 ("an appellant must do more than assert error and leave it to the appellate court to search the record … to test his claim"); *City of Santa Maria v. Adam* (2012) 211 Cal. App.4th 266, 287 ("[r]ather than scour the record unguided, we may decide that the appellant has

waived a point urged on appeal when it is not supported by accurate citations to the record"); *Salas v. Cal. Dept. of Transp.* (2011) 198 Cal.App.4th 1058, 1074 ("[w]e are not required to search the record to ascertain whether it contains support for [plaintiffs'] contentions"); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 ("[t]he appellate court is not required to search the record on its own seeking error" and "[i]f a party fails to support an argument with the necessary citations to the record, … the argument [will be] deemed to have been waived").)

Accordingly, we dismiss applicant's petition for disqualification as skeletal, grant reconsideration and as our Decision After Reconsideration, we will rescind the WCJ's July 30, 2024 Findings and Order and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Order issued on July 15, 2024 is **GRANTED**.

IT IS FURTHER ORDERED that as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings Order issued on July 30, 2024 is **RESCINDED**.

IT IS FURTHER ORDERED that applicant's Petition for Disqualification of the WCJ is **DISMISSED**.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

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

October 28, 2024

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

HARVEY MILLER
GORMAN LAW
YOUNG, COHEN & DURRETT, APC
RILEY LAW OFFICES

EDL/mc

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