WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL BAKER, ***Applicant***

vs.

CLASSIC PARTY RENTAL (INSPERITY); ACE AMERICAN INSURANCE COMPANY, ADMINISTERED BY SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., ***Defendants***

Adjudication Numbers: ADJ10954617; ADJ16206534; ADJ16210220
Long Beach District Office

OPINION AND ORDER DENYING PETITION FOR DISQUALIFICATION; OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order to study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant in pro per seeks reconsideration of the Findings & Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on December 28, 2021 in Case Number ADJ10954617. By the F&O, the WCJ found in relevant part that: applicant sustained injury arising out and in the course of employment (AOE/COE) to his left little finger and wrist; that there was good cause to compel applicant to attend a panel qualified medical evaluation (QME); and that applicant must attend an evaluation by QME Dr. Ghodadra and that if applicant did not attend, "proceedings may be suspended pursuant to Labor Code section 4053 and benefits barred pursuant to section 4054 effective on the date of the scheduled examination."

We did not receive an Answer from defendant. The WCJ issued a Report and Recommendation recommending we deny reconsideration.

While this matter was pending on reconsideration, applicant filed a Petition to Disqualify the WCJ in Case Numbers ADJ16206534 and ADJ16210220. We did not receive an Answer from defendant. The WCJ issued a Report and Recommendation recommending we deny the Petition for Disqualification.

We have considered the allegations of applicant's Petition for Reconsideration and the Petition for Disqualification and the contents of the WCJ's Reports with respect thereto. Based on our review of the record, and for the reasons discussed below, as our decision after reconsideration, we will rescind the WCJ's decision and return this matter for further proceedings consistent with this decision. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

We will also deny applicant's Petition for Disqualification.

BACKGROUND

Applicant, while employed as a driver on July 26, 2016, sustained a specific injury (amputation of the little left finger and a left wrist injury) arising out of and in the course of employment to his little left finger and wrist.

As stated in the WCJ's Report on the Petition for Reconsideration:

> Applicant sustained an admitted specific injury to the left upper extremity, specifically an amputation of the left little finger and a left wrist injury, nearly five and a half years ago. Applicant is subject to a Permanent and Stationary report from Dr. Opoku, his treating physician; however, the applicant generally disputes the reporting of Dr. Opoku. The Applicant was originally represented by counsel, but has proceeded in pro per since October 13, 2017. The Applicant proceeded to PQME Dr. Silver on June 21, 2018, but little additional discovery has taken place since then, with the Applicant generally disputing a further examination with a PQME. During the course of discovery and due to COVID-19, Dr. Silver was not conducting medical examinations and the parties obtained a new panel listing, with Dr. Ghodadra being selected as the new PQME.
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> The undersigned has presided over the following hearings, with detailed notations on the Minutes of Hearing, regarding Defendant's attempt to obtain a PQME examination:
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> - Status Conference - May 5, 2021: Applicant expressed his desire to the undersigned for "his day in court" and the matter was continued to a Mandatory Settlement Conference at the Applicant's request, over Defendant's objection.
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> - Mandatory Settlement Conference - July 1, 2021: Parties exchanged Pre-Trial Conference Statement; however, Applicant indicated late receipt of document and wanted time to designate stipulations and issues, as well as exhibits. Applicant was informed of his ability to speak to Information and Assistance, as well as the fact that the eventual trial was limited to discovery issues of the PQME, reports to the PQME, compelling the exam, etc.

- Mandatory Settlement Conference - August 12, 2021: Applicant motioned for a trial date on the limited discovery issues. The undersigned granted a continuance to trial, noting the MOH being set on limited discovery issues of the petition to compel, attendance at the exam, ex parte communications, and medical reports to the PQME. No Petition for Removal was filed to this motion by either party.

- Trial - October 5, 2021: Defendant's Attorney requested a continuance due to illness, but the Applicant requested additional time to finalize exhibits and pleadings. At the hearing, the undersigned verbally reiterated to the Applicant that the trial was limited to discovery issues.

- Trial - November 30, 2021: The parties appeared for trial and Applicant again indicated his exhibits were not ready, but also indicated that he was not ready to proceed to trial on the discovery issues at all, despite his prior motions for trial. The undersigned then framed the stipulations and issues, which were limited to Defendant's request for order compelling applicant's attendance at PQME Dr. Ghodadra, ex-parte communications with the PQME, and medical reports to be sent to the PQME. During the undersigned's reading of exhibits, Applicant left the proceedings.

After the matter was submitted, the undersigned reviewed Defendant's limited exhibits, as well as filings made by the Applicant. The undersigned then found good cause to compel a PQME examination with Dr. Ghodadra, that there was no ex parte communication with the PQME, and that the medical reports proposed by Defendant were permissible to send to the PQME. It is from this determination that Applicant files his Petition for Reconsideration.

DISCUSSION
I.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal. Comp. Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment (AOE/COE), jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal. App. 5th 658, 662 [210 Cal. Rptr. 3d 101, 81 Cal. Comp. Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or Court of Appeal. (Lab. Code, § 5904.)

Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions. Here, applicant does not dispute the finding of injury, but raises questions as to the order regarding the QME evaluation.

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, we are persuaded that applicant has shown that substantial prejudice or irreparable harm will result based on our concerns regarding the lack of a record and the resulting violation of due process.

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board En Banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision and the WCJ shall ". . . make and file findings upon all facts involved in the controversy[.]" (Lab. Code, § 5313; *Hamilton*, *supra,* at p. 476; *Blackledge v. Bank of America*, *ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-622.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Hamilton*, *supra,* at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).) The purpose of the requirement is "to assist the reviewing court to

ascertain the principles relied upon by the lower tribunal, to help that tribunal avoid careless or arbitrary action, and to make the right of appeal or of seeking review more meaningful." (*Evans, supra*, at p. 755.)

"It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton*, *supra,* at p. 475.) 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 pp. 475-476; see Lab. Code, § 5313 and *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-22.)

Moreover, all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is". . . one of 'the rudiments of fair play' assured to every litigant. . ." (*Id*., at p. 158.) The "essence of due process is simply notice and the opportunity to be heard." (*San Bernardino Community Hospital v. Workers. Comp. Appeals Bd. (McKernan)* 74 Cal.App.4th 928, 936 (64 Cal. Comp. Cases 986) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties' rights to due process. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584], citing *Rucker*, *supra,* at pp. 157-158.) A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish*, *supra,* at p .1295; *Rucker*, *supra,* at pp. 157-158, citing *Kaiser Co. v. Industrial Acci. Com*. (*Baskin*) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

WCAB Rule 10515 (Cal. Code Regs., tit. 8, § 50515) states that: "Demurrers, petitions for judgment on the pleadings and petitions for summary judgment are not permitted."

On December 28, 2021, the WCJ issued a Findings & Order (F&O) and Opinion on Decision from the November 30, 2021, trial finding that there is good cause to compel applicant to attend a PQME appointment, that there have been no ex parte communications with the PQME, and the medical reports listed by defendant in the medical index attached in defendant's exhibits

B & C are to be sent to the PQME. The Minutes of Hearing (MOH) state that the WCJ took Judicial Notice of Defendants' Petition to Compel the PQME exam dated June 9, 2021, as reflected in the Minutes of Hearing dated the same day. Further, the WCJ took Judicial Notice of Filings and Pleadings in [*sic*] the Board made by applicant to the extent that it is relevant and pertinent to the issues at hand in order to afford and ensure due process for applicant in pro per. (Minutes of Hearing, 11/30/21 trial, 11:10 a. m. – 11:14 a.m. at 3:4 – 3:7.)

Here, the WCJ in the F&O refers to defendant's June 28, 2021, Petition to Compel Applicant to Attend the PQME[1] and exhibits. However, the Petition to Compel is a motion on the pleadings, akin to a summary judgment motion, which is prohibited by WCAB Rule 10515. After a review of the adjudication file, neither the petition nor its exhibits have been admitted into evidence, the documents are only uploaded into EAMS, but are not marked as admitted into evidence. Thus, there is no record nor evidence in the record as required by *Hamilton*, *supra*. Thus, the WCJ must hold a hearing on defendant's request for applicant to be evaluated by a PQME and at that time parties may make their arguments regarding compelling applicant to attend the PQME.

Labor Code section 4054 provides that if the injured worker "fails or refuses to submit to examination" after an order by a WCJ or the Appeals Board, or if the injured worker "obstructs the examination," his right to benefits during the period shall be barred. We caution applicant that at some point he must attend an evaluation with either Dr. Ghodadra or another physician as is required by Labor Code section 4062.1. If he does not attend the evaluation, he risks that the WCJ may suspend his right to benefits.

In addition, we advise applicant that repetitive, meritless, and ineffectual filings may lead to proceedings for the purpose of declaring applicant as a vexatious litigant pursuant to WCAB rule 10430 (Cal. Code Regs., tit. 8, § 10430). Here, applicant has filed numerous pleadings since he released his attorneys and substituted himself in pro per. Several of the pleadings applicant has filed are duplicative and address the same issues as other pleadings and do not further the proceedings, and burden the court and its resources. The pattern and practice of filing multiple filings on the same issues may be considered a violation under WCAB Rule 10430. Applicant is cautioned that based on his conduct to date, he risks designation as a vexatious litigant.

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[1] The Proof of Service for the Petition to Compel Attendance at PQME in the Electronic Adjudication Management System (EAMS) adjudication file indicates that the Petition was served on applicant on June 26, 2021.

II.

Finally, we turn to applicant's Petition to Disqualify the WCJ. We have considered the allegations of the Petition for Disqualification 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 for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny the Petition for Disqualification.

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, italics added.)

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 [5 Cal.Comp.Cases 61].)[2] Additionally, 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

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[2] Overruled on other grounds in *Lumbermen's Mut. Cas. Co. v. Industrial Acc. Com.* (*Cacozza*) (1946) 29 Cal.2d 492, 499 [11 Cal.Comp.Cases 289].

the [WCJ's] conception of the law as applied to such evidence." (*Id*.; cf. *Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312 ["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; 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 ["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; *Robbins v. Sharp Healthcare* (2006) 71 Cal.Comp.Cases 1291, 1310-1311 (Significant Panel Decision).)

Finally, WCAB Rule 10960 provides that when the WCJ and "the grounds for disqualification" are known, a petition for disqualification "shall be filed not more than 10 days after service of notice of hearing or after grounds for disqualification are known."

Here, as discussed in the WCJ's report, the petition for disqualification does not set forth facts, declared under penalty of perjury, that are sufficient to establish disqualification pursuant to Labor Code section 5311, WCAB Rule 10960, and Code of Civil Procedure section 641(f) and/or (g). Accordingly, the petition will be denied.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of December 28, 2021 issued by the WCJ in Case Number ADJ10954617 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

IT IS FURTHER ORDERED that the Petition to Disqualify the WCJ filed by applicant in Case Numbers ADJ16206534 and ADJ16210220 on August 8, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/JOSEPH V.CUPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 12, 2024

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

MICHAEL BAKER
SHAW JACOBSMEYER CRAIN CLAFFEY

DLM/oo

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