WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE H. HERNANDEZ, ***Applicant*,** **vs.** **AMS STAFF LEASING,**[1] ***Defendant(s).***	**Case Nos. ADJ2182149 (LAO 0837423)** **ADJ3329537 (ANA 0360928)** **OPINION AND ORDER DISMISSING PETITION FOR REMOVAL**

Defendant sought removal, requesting that the Appeals Board rescind the Orders filed and served on July 27, 2010, wherein the workers' compensation administrative law judge (WCJ) ordered defendant to produce its claims adjuster for deposition on September 28, 2010, and "to produce at said deposition the original and/or copies in his/her control of each of the documents identified in Appendix A, Item #3 of applicant's Notice of Taking Deposition and Demand for Production of Documents, and all utilization review referrals and responses."

Defendant contended that it would be irreparably harmed by the WCJ's Orders, arguing that the broad scope of discovery ordered would require deposition testimony and document production that exceeds any reasonable or established needs of applicant. Defendant further contended that it was prejudiced in pursuing removal because the WCJ did not explain the reasons for his decision, the exhibits offered by the parties were not admitted into evidence, no summary of evidence was prepared, the issues and stipulations were not formulated on the record, and the

[1] The caption of the Orders, which are the subject of defendant's petition herein, names only the employer as defendant, and fails to name any insurance carrier. Our review of the paper and electronic records in this case reveals a variety of entities identified as defendants: American Casualty, Broadspire Ins. Cos., RSKCo, Broadspire Brea, RSKCo Claims Services, National Fire Ins. Co. of Harford, and CNA Claimplus. The actual Orders are directed to CNA Risk Insurance Company. A WCJ should make sure to identify all proper defendants, using their correct legal names, not their uniform assigned names (see Cal. Code Regs., tit. 8, § 10217), and indicating whether a named defendant is an insurance company or a third party administrator. (See Cal. Code Regs., tit. 8, § 10550.)

exhibits relied on by the WCJ were not scanned into the Electronic Adjudication Management System (EAMS) "due to a back log [sic] in scanning." (Petition to Remove, 4:20.)

We have considered defendant's petition and applicant's answer, and we have reviewed the record in this matter. The WCJ prepared a Report and Recommendation on Petition for Removal (Report) recommending that the petition be denied.

In preparing this opinion for filing and service, we discovered that this matter was settled by a Compromise and Release (C&R), which was approved by a different WCJ on January 18, 2011. But for that discovery, we would have granted removal, rescinded the WCJ's Orders, and returned the matter to the trial level for preparation of a proper record, because the record in this case, as discussed below, is inadequate and incomplete. Those actions are no longer necessary because approval of the C&R has rendered defendant's petition moot. Nevertheless, defendant's petition for removal is still pending and must be acted upon. Given that the issues raised in the petition are now moot, we will dismiss it.

BACKGROUND

According to defendant's petition and applicant's answer, applicant served a Notice of Taking Deposition and Demand for Production of Documents on February 26, 2010. This document was listed as an exhibit by applicant on the pre-trial conference statement, but we were unable to find it in EAMS or in paper format in the legacy file. On March 18, 2010, defendant served a Motion to Quash Notice of Taking Deposition and Demand for Production of Documents and Motion for Protective Order, which has not been scanned into EAMS. Applicant stated that he filed an Opposition to Motion to Quash and for Protective Order and Motion to Compel the Deposition on March 24, 2010, and this document was also listed as an exhibit on the pre-trial conference statement; but we saw no paper or electronic record of this document.

The parties stipulated at the June 9, 2010 mandatory settlement conference that applicant sustained industrial injury to his back on October 21, 2001, and that he claimed injury to multiple additional body parts. In the pre-trial conference statement, which is in EAMS, the parties identified the issues in dispute, including "defendant's objections to request for production" and

"motion to compel claims adjustor's deposition." Applicant listed numerous documents as exhibits. According to the pre-trial conference statement, as it appears in EAMS, defendant did not list any exhibits. We located in the paper, or legacy, file a stack of documents labeled "Petition for Removal additional defendant's exhibits." According to defendant, these exhibits were attached to the petition for removal.

The Minutes of Hearing for the July 26, 2010 trial, also available in EAMS, indicate that the matter was taken off calendar and include the following comment: "After consideration of Defendant's objections — Order Compelling Deposition and limited production of documents — Signed." In their petition and answer, the parties gave widely differing accounts of what happened at trial. Defendant claimed exhibits were offered by both parties; applicant claimed the matter was submitted on the pleadings. There is no record of stipulations and issues submitted for decision or of documents offered and received into evidence.

On July 27, 2010, the Orders, which were the subject of this petition, were filed and served. They appear in EAMS under the misnomer "Order Allowing Deposition Attorney Fees." The Orders state, in their entirety:

> "GOOD CAUSE APPEARING;
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> IT IS ORDERED THAT CNA RISK INSURANCE COMPANY PRODUCE TERRI CALDWELL OR THE CURRENT CLAIMS ADJUSTER/ANALYST FOR DEPOSITION ON SEPTEMBER 28, 2010 AT 9:00 A.M., *DAY TO DAY UNTIL COMPLETED, AT 3600 WILSHIRE BLVD, SUITE 2100, LOS ANGELES CALIFORNIA 90010.*
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> THE DEPONENT IS ORDERED TO PRODUCE AT SAID DEPOSITION THE ORIGINAL AND/OR COPIES IN HIS/HER CONTROL OF EACH OF THE DOCUMENTS IDENTIFIED IN APPENDIX A, ITEM #3 OF APPLICANT'S NOTICE OF TAKING DEPOSITION AND DEMAND FOR PRODUCTIONOF [sic] DOCUMENTS, AND ALL UTILIZATION REVIEW REFERRALS AND RESPONSES."

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We were unable to find any electronic or paper record of "Appendix A," referenced in the WCJ's

Orders. According to the record in EAMS, no documents were admitted into evidence.

Defendant filed a petition for removal. Applicant filed an answer. The WCJ prepared a Report on August 17, 2010, in which he said, at pages 1-2, "After reviewing the pleadings and discussing the issues with the parties, I determined that the deposition of the claims examiner and the production of documents identified in appendix A, item number 3 and all utilization review referrals and responses was appropriate."

A recent review of EAMS revealed that the deposition of Terri Caldwell took place, as ordered, on September 28, 2010, and the deposition transcript was received at the district office on October 23, 2010. The transcript was not entered into EAMS until February 23, 2011.

The electronic record also shows that a C&R was presented to a different WCJ on a walk-through basis, and an Order approving the C&R issued, on January 18, 2011. These documents were not entered into EAMS until March 8, 2011.

The Appeals Board was not notified of the January 18, 2011 settlement and received no request to withdraw defendant's petition for removal.

DISCUSSION

Any decision by the Appeals Board or a WCJ must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) "The WCJ's decision must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) (*Hamilton*).

In *Hamilton,* we held: "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." (66 Cal.Comp.Cases at p. 477.)

Furthermore, Labor Code section 5313 requires the WCJ to serve on the parties "a

summary of the evidence received and relied upon and 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, supra,* 66 Cal.Comp.Cases at p. 476, citing *Evans v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) As provided in 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." (66 Cal.Comp.Cases at p. 475.) In addition, the WCJ should make sure the record is "properly organized" and that admitted evidence is "clearly labeled." (*Id.* at pp. 474, 476.)

WCAB Rule 10566 specifies what the WCJ must include in the Minutes of Hearing and Summary of Evidence:

> "Minutes of hearing and summary of evidence shall be prepared at the conclusion of each hearing and filed in the record of proceedings. They shall include:
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> "(a) The names of the commissioners, deputy commissioner or workers' compensation judge, reporter, the parties present, attorneys or other agents appearing therefor and witnesses sworn;
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> "(b) The place and date of said hearing;
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> "(c) All interlocutory orders, admissions and stipulations, the issues and matters in controversy, a descriptive listing of all exhibits received for identification or in evidence (with the identity of the party offering the same) and the disposition, which shall include the time and action, if any, required for submission;
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> "(d) A summary of the evidence required by Labor Code Section 5313 that shall include a fair and unbiased summary of the testimony given by each witness;
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> "(e) If motion pictures are shown, a brief summary of their contents;
> "(f) A fair statement of any offers of proof.

> "If the disposition is an order taking off calendar or a continuance, the reason therefor shall be given."

Section 1.45 of the Division of Workers' Compensation (DWC) – Workers' Compensation Appeals Board Policy and Procedural Manual (2003 Revision)[2] provides further guidance as to the requirements for trial minutes and organization of the file. It states, in part, "The WCJ shall conduct the proceedings so as to ensure that the minutes are complete and contain a proper record in accordance with WCAB Rule 10566. The stipulations and issues should be recited into the record, noting any changes in either the stipulations or issues as set forth in the MSC statement. The parties' agreement as to the accuracy of the stipulations and issues should be obtained on the record."

WCAB Rule 10301(b) defines "adjudication file" or "ADJ file" as "a case file in which the jurisdiction of the Workers' Compensation Appeals Board has been invoked and which is maintained by the Division of Workers' Compensation in *paper format, or electronic format, or both*, including a temporary paper case file." (Cal. Code of Regs., tit. 8, § 10301(b).) (Emphasis added.)

Court Administrator Rule 10216(d) (Cal. Code Regs., tit. 8, § 10216(d)) requires the DWC to maintain a paper adjudication file until it is converted to an electronic adjudication file. It further provides that, if "a paper adjudication file is maintained on or after the effective date of these regulations [November 17, 2008], an electronic adjudication file shall also be created and any documents filed thereafter shall be maintained electronically in EAMS…."

WCAB Rule 10751(a) provides,

> "(a) The Workers' Compensation Appeal Board's adjudication file shall consist of:
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> "(1) all findings, orders, decisions, awards and correspondence issued by the Workers' Compensation Appeals Board, but not including documents that, under the rules of the Court

[2] The DWC – WCAB Policy and Procedural Manual (2003 Revision) can be found at www.dir.ca.gov/wcab/wcab_policy_proceduremanual/wcabpolicy_proceduremanual.html.

> Administrator, shall not be made available for inspection by any person (see current Rule 10271); and
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> "(2) all documents filed by any party, lien claimant, attorney or other agent of record, but not including documents that, under the rules of the Court Administrator, shall not be filed (see current Rule 10222(b)), unless the Workers' Compensation Appeals Board has ordered that the document be filed.
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> "(b) The adjudication file includes the record of proceedings."

The record of proceedings is described in WCAB Rule 10750(a), which provides,

> "(a) The Workers' Compensation Appeals Board's record of proceedings consists of: the pleadings, declarations of readiness to proceed, minutes of hearing and summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a proceeding, exhibits marked but not received in evidence, notices, petitions, briefs, findings, orders, decisions and awards, and the arbitrator's file, if any. Each of these documents are part of the record of proceedings, whether maintained in paper or electronic form. Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings."

Although *Hamilton* involved a record that was created and maintained in paper format, *Hamilton's* explanation of the responsibilities of the parties and the WCJ, and the needs of the parties and the Appeals Board, applies equally to a record created and maintained in an electronic format. As indicated above, *Hamilton* requires the record to contain the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence.

Moreover, the incorporation of a Minutes of Hearing form in Court Administrator Rule 10245 (Cal. Code Regs., tit. 8, § 10245) does not relieve a WCJ of the responsibilities set forth in *Hamilton*, Labor Code section 5313, and WCAB Rule 10566.

In the present case, the WCJ stated, "Petitioner argues that I should have conducted a full blown evidentiary hearing. I disagree. Workers' Compensation Judges have the authority to hear discovery disputes and make orders respecting same. It is within their sound discretion to

determine if a discovery dispute is appropriate for a hearing. ***Allison v WCAB* (1999) 64 CCC 624, 632**" (Report, p. 2.) (Bold in original.)

We agree with the WCJ that not every discovery dispute requires a "full blown evidentiary hearing" and preparation of a full Minutes of Hearing and Summary of Evidence and an Opinion on Decision. In this case, however, the matter was scheduled for *trial*, not conference, on July 26, 2010. The requirements set forth in *Hamilton* and Labor Code section 5313 applied. Even at a conference, the record must be properly maintained, especially if documents were accepted and a decision issued.

In this case, as we considered defendant's petition, we did not have a paper or electronic record of all the pleadings and motions that precipitated the WCJ's Orders. His Minutes of Hearing contained only an abbreviated notation of the WCJ's disposition — that he signed an "Order Compelling Deposition and limited production of documents." There was no record of the issues submitted for decision, the admissions and stipulations of the parties, or the admitted evidence. The WCJ did not incorporate the stipulations and issues set forth in the pre-trial conference statement — a disfavored procedure, in any event.

In addition, the WCJ said in his Report that he relied on "appendix A, item number 3"; but that document was not part of the record of proceedings or the adjudication file. Appendix A was apparently part of applicant's Notice of Taking Deposition and Demand for Production of Documents. Court Administrator Rule 10222(b) provides that notices of taking deposition "shall not be filed with the district office or the appeals board, except as a non duplicative supporting exhibit or upon the order" of a WCJ or the Appeals Board. (Cal. Code Regs., tit. 8, § 10222(b).) In this case, the notice of taking deposition was a "non duplicative supporting exhibit" and was, in fact, relied on by the WCJ. There was no basis for its exclusion from the record.

The WCJ did not prepare an opinion on decision. He indicated in his Report, however, that he made his decision after consideration of the pleadings, discussion with the parties, and review of "appendix A, item number 3." The WCJ's only explanation of the reasons for his decision was the following: "When, as here, an Applicant filed an appropriate motion and showed good cause, it

was within my purview to issue orders regarding discovery that I determined to be necessary to insure full and fair adjudication, expedite litigation and safeguard against unfair surprise." (Report, p. 2.) As no record, or even a summary, of applicant's pleadings or the discussions relied on by the WCJ was available for our review, it was impossible for us to review the WCJ's decision.

Defendant said, "At the time of the preparation of this Petition we have been advised, through telephone contact of the Appeals Board in Los Angeles that the Defense exhibits given to, reviewed by and partially relied upon [sic] Judge Bailey in making his decisions have not [sic] scanned into the EAMS system due to a back log [sic] in scanning." (Petition to Remove, 4:17-20.) It thus appears that defendant offered exhibits into evidence; yet there is no record of any admitted evidence.

We are aware that many district offices have problems scanning documents into EAMS in a consistently accurate and timely manner. Undoubtedly, the hiring freeze and mandatory furloughs of state employees have contributed to the backlogs. However, the challenges posed by the transition to EAMS do not alter the fundamental tasks and responsibilities of the Appeals Board as a reviewing court. If a full and up-to-date record is not available for our examination, we cannot render a proper decision as to the correctness of a WCJ's decision.

While there are very real problems causing system-wide backlogs, these problems do not excuse the WCJ or the litigants from ensuring that a complete and properly organized record is available to the Appeals Board. Ideally, documents presented to a WCJ at trial would be scanned into EAMS immediately. In any event, they should be scanned no later than the date the WCJ issues a decision on a disputed issue. If a petition for reconsideration, removal, or disqualification is filed, and the scanning could not be completed by the date the WCJ issues his or her Report, the paper documents should be placed in the legacy file, if there is one, filed in proper order, bradded, and separated as necessary, and forwarded to us. Upon return of the file to the district office after our decision, the documents could then be scanned. If the file exists in EAMS only, it is the responsibility of the WCJ to ensure that all documents in the record are scanned into EAMS by the

time he or she issues the decision on the disputed issue, even if this requires prioritizing these documents over other documents that may be waiting for scanning. The 60-day deadline for the Appeals Board to act on a petition for reconsideration further requires that procedures at the district office be completed expeditiously. (See Lab. Code, § 5909.) If all relevant documents are not scanned into EAMS by the time the file is sent to us for action on a petition for reconsideration, removal, or disqualification, we may be unable to rule on the petition, or we may act under the incorrect assumptions that documents, which are waiting for scanning, do not exist. Moreover, when there is a pending petition before the Appeals Board and there are delays at the district office in scanning documents, the Appeals Board may waste its time and resources attempting to resolve matters that are no longer in dispute. That is precisely what happened in this case.

EAMS shows this case's status as "At recon," and the Appeals Board has the file. The filing of a petition for removal does not terminate the WCJ's authority to proceed in a case; however, the WCJ is required, after a petition for removal has been filed, to consult with the presiding WCJ prior to proceeding. (Cal. Code Regs., tit. 8, § 10843(e).) It does not appear that the presiding WCJ was consulted in this case, and the C&R should not have been approved.

In addition, there is nothing in EAMS nor has anything been received by us requesting that the petition for removal be withdrawn. Failure to withdraw a pending petition in these circumstances, thereby wasting our time and resources, is sanctionable conduct. However, given the state of the record in this case, it is entirely possible that a request to withdraw the petition was filed, but has not yet been scanned into EAMS.

Despite the inadequate record and irregular procedures in this case, we have no desire to disturb the parties' settlement. However, because defendant's petition for removal is still pending before us, we will now dismiss it as moot.

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For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Removal, with regard to the Orders filed and served on July 27, 2010, is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Ronnie G. Caplane

I CONCUR.

/s/ Alfonso J. Moresi

/s/ Deidra E. Lowe

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

4/11/2011

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

GRAIWER & KAPLAN
JOSE H. HERNANDEZ
MALMQUIST, FIELDS & CAMASTRA

CB/bea