

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

ANTHONY GILLILAND, *Applicant*

vs.

**WALMART INC., ACE AMERICAN INSURANCE COMPANY,
administered by SEDGWICK, *Defendants***

**Adjudication Numbers: ADJ15709298; ADJ12880191
Pomona District Office**

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

Lien claimant Medland Medical Group seeks removal in response to the Order setting the matter for an in person lien trial and ordering an in person representative to appear at trial issued by the workers' compensation administrative law judge (WCJ) on February 4, 2025.

Lien claimant contends that the WCJ abused her discretion by requiring the long term assigned hearing representative to appear in person where she appeared virtually at previous hearings in this case.

Lien claimant also seeks disqualification of the WCJ due to bias or the appearance of bias.¹

We have not received an Answer from defendant. The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that the Petition for Removal be denied.

We have considered the allegations in the Petitions and the contents of the Report with respect thereto. Based on our review of the record, and as discussed below, we will grant the Petition for Removal and rescind the Order. We will also grant the Petition for Disqualification,

¹ Lien claimant filed a document titled "Proposed Answer to the WCJ Opinion and Recommendation on Lien Claimant's Petition for Removal; Petition for Disqualification under 10960," which we treat as a petition for disqualification.

order that the WCJ is disqualified and order that the case be returned to the presiding WCJ (PWCJ) for assignment to another WCJ.

BACKGROUND

We will briefly review the relevant facts.

On November 18, 2024, we issued an “Opinion and Order Granting Reconsideration and Decision After Reconsideration” (Opinion) following lien claimant’s petition for reconsideration. Lien claimant contended that its due process rights were violated when the WCJ would not allow lien claimant’s representative to appear electronically at the lien trial. With respect to electronic proceedings, we stated that:

Under WCAB Rules 10815 and 10816 (Cal. Code Regs., tit. 8, §§ 10815, 10816), hearings may take place electronically and parties may appear electronically. If a WCJ determines that there is good cause, such as illness, a WCJ may allow a party to appear electronically even if the request is made on the day of trial and especially when, as here, the requesting party has diligently appeared at the proceedings. To the extent that the WCJ relied on a “14 day rule,” her decision is without merit because the so called “14 day rule” is an underground regulation and not enforceable. (*Rea v. Workers’ Comp. Appeals Bd. (Milbauer)* (2005) [127 CalApp.4th 625 [70 Cal.Comp.Cases 312].) As set forth in *Milbauer*, enforcement of rules that are not properly adopted by way of the rule- making process in sections 5307 and 5307.4 violates due process.

(Opinion, p. 6.)

We concluded that “lien claimant’s due process rights were violated in multiple ways: by the WCJ’s reliance on an “unofficial” rule, by the WCJ’s failure to issue an NIT, and by the WCJ’s intentional choice to proceed without lien claimant.” (Opinion, p. 8.) We rescinded the decision and returned the matter to the WCJ so that the matter could be re-set for trial.

On February 4, 2025, a mandatory lien settlement conference took place before WCJ Bernal. Defendant’s representative Mr. McNeeley and lien claimant’s representative Ms. Davis appeared electronically. The minutes state:

Case Set for in person lien trial, each party is required to have an in person rep for the hearing; Def. request for telephonic hearing taken under submission. Cont. Granted. Set For: Lien Trial Set On 3/06/2025 at 8:30 Location pom Before Judge Bernal. . . .

On February 10, 2025, lien claimant filed a Petition for Removal seeking relief from WCJ Bernal's requirement that Medland Medical's Group, lien claimant's representative, Carolyn Davis appear in person for the lien trial. In its Petition for Removal, lien claimant states,

Carolyn Davis is the most qualified person to represent lien claimant. Ms. Davis has been assigned to this case for over 2 years, and has full knowledge of the case history, prior hearings, and negotiations. She has been **exclusively assigned to this case**

On February 27, 2025, lien claimant filed the Petition for Disqualification. It contended that the WCJ exhibited bias when she refused to allow lien claimant's selected representative to appear virtually and when she raised the issue of sanctions.

DISCUSSION

I.

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, based upon the WCJ's analysis of the merits of petitioner's arguments, we are persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

Here, Ms. Davis appeared electronically at all of the proceedings in this matter. The issue of an in person appearance did not arise until the June 11, 2024 proceeding, where the WCJ found that Ms. Davis, who called into the hearing, had not "appeared" because she failed to appear in person. We continue to be unable to discern any basis for the WCJ's refusal to grant Ms. Davis' request to appear electronically.

Labor Code section 4907(b)² provides that non-attorney representatives are "held to the same professional standards of conduct as attorneys." Section 5700 states in pertinent part that:

² All further references are to the Labor Code unless otherwise noted.

“Either party may be present at any hearing, in person, by attorney, or by any other agent. . .”
“‘Appearance’ means a party or their representative’s presence, pursuant to Labor Code section 5700, at any hearing.” (Cal. Code Regs., tit. 8, § 10305(c).) WCAB Rules 10815, 10816, and 10817 (Cal. Code Regs., tit. 8, §§ 10815, 10816, 10817) allow electronic proceedings, appearances, and testimony, and there is nothing in the Labor Code or in our Rules that requires that hearings be in person.

The WCJ’s proposed remedy of having two representatives, one in person and one electronically, is not only impractical, but it also violates lien claimant’s due process right to select the representative of its choice as set forth in the Labor Code. Thus, we will grant the Petition for Removal and rescind the Order in its entirety.

II.

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 demonstrated “[t]he existence of a state of mind . . . 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. (citations)” (*Robbins v. Sharp Healthcare, et al.* (2006) 71 Cal. Comp. Cases 1291, 1302 [2006 Cal. Wrk. Comp. LEXIS 314] (*Robbins*)). The appearance of bias may be sufficient to require disqualification. As to the appearance of bias, the objective test to be applied is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with impartiality (*Id.*, at p. 1307). Bias against a party’s attorney may be a ground for disqualification. (*Id.*, at p. 1306).

A petition to disqualify must be verified upon oath in the manner required for verified pleadings in courts of record. (Cal. Code Regs., tit., 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.)

Here, the WCJ took issue with Ms. Davis' request to appear electronically by not allowing Ms. Davis to appear electronically at the lien trial on June 11, 2024 despite allowing her to appear electronically at all previous proceedings in this matter. Not only did the WCJ treat Ms. Davis' electronic appearance as a non-appearance, but she proceeded to submit the matter without considering any evidence submitted by lien claimant. Following our Opinion rescinding the decision, WCJ Bernal again denied Ms. Davis' request to appear electronically at the trial now scheduled for March 6, 2025.

Ms. Davis has continued as the hearing representative throughout the lien proceedings, and according to lien claimant's Petition for Disqualification is the most knowledgeable person in the company regarding the matters. In our review of the record, we do not see any basis to deny Ms. Davis' reasonable request, especially since defendant has voiced no objection. In her Report, the WCJ is unable to articulate a legal basis for her denial; instead, she reiterates her order that the trial be in person. In addition, in her Report, she recommends that the Appeals Board sanction lien claimant and its representative for misrepresentations on the basis that she did not expressly deny a request with respect to Ms. Davis but merely set the matter for an in person hearing.

In sum, Ms. Davis has been appearing electronically, yet is now mandated to appear in person despite previous guidance from the Appeals Board, and in response to her Petition for Removal, the WCJ recommends sanctions. Pursuant to the rationale in *Robbins, supra*, "[d]ue process is violated where there is even an appearance of bias or unfairness in administrative hearings." (*Id.*, at p. 1302.) We conclude that the actions of WCJ Bernal toward Ms. Davis could reasonably raise concerns as to the *appearance* of unfairness or bias to a "reasonable person with knowledge of the facts of this case." Thus, we grant the Petition for Disqualification, and order that the WCJ is disqualified, and return the matter to the PWJC for assignment to a different WCJ.

For the foregoing reasons,

IT IS ORDERED that lien claimant's Petition for Removal in response to the Orders of February 4, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the Orders of February 4, 2025 are **RESCINDED**.

IT IS FURTHER ORDERED that lien claimant's Petition for Disqualification of workers' compensation administrative law judge Bernal is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Disqualification of the Workers' Compensation Appeals Board that WCJ Bernal is **DISQUALIFIED** and the matter is **RETURNED** to the presiding workers' compensation administrative law judge of the Pomona District Office in order to reassign this matter to a different workers' compensation administrative law judge.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ LISA SUSSMAN, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 7, 2025

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

**TESTAN LAW
MEDLAND MEDICAL**

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*