WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CESAR CRUZ, *Applicant*

vs.

UNITED PARCEL SERVICE, INC.;
LIBERTY MUTUAL INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ13752411
San Francisco District Office

OPINION AND ORDERS DISMISSING PETITIONS FOR RECONSIDERATION AND DENYING PETITIONS FOR REMOVAL AND PETITION FOR DISQUALIFICATION

Applicant, in pro per, filed both a Motion for Reconsideration and a separate Motion for Reconsideration Petition to File Supplemental Pleading on April 9, 2025.[1] We have considered the allegations of applicant's pleadings and the contents of the WCJ's Report and Recommendation on Motion for Reconsideration.[2] Based on our review of the record, and for the reasons stated below, we will dismiss applicant's requests for reconsideration, treat the Petitions for Reconsideration as seeking removal and deny removal. To the extent applicant requests disqualification, we deny that request for the reasons stated by the WCJ in the Report, which we adopt and incorporate, and the reasons stated below.

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[1] We treat both petitions as timely filed Petitions for Removal and not as supplemental pleading. There are 30 days allowed within which to file a petition for removal from a "non-final" decision that has been served by mail upon an address outside California. (Cal. Code Regs., tit. 8, §§ 10605(a)(1), 10955(a).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) However, we do not accept the attached exhibits that were either already part of the record or that were never admitted into evidence, in violation of WCAB Rule 10945. (Cal. Code Regs., tit. 8, § 10945.)

[2] Deputy Commissioner Schmitz, who was on the panel that issued a prior decision in this matter is unavailable to participate further in this decision. Another panel member was assigned in her place.

I.

Preliminarily, we note that former Labor Code[3] 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.

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 April 21, 2025, and 60 days from the date of transmission is June 20, 2025. This decision is issued by or on June 20, 2025, 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. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on April 21, 2025, and the case was transmitted to the Appeals Board on April 21, 2025. Service of the Report and transmission of the

[3] All further statutory references are to the Labor Code, unless otherwise noted.

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 April 21, 2025.

II.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" *(Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id*. at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the March 11, 2025 Minute Order continuing this matter for trial on April 9, 2025 is solely an intermediate procedural order. It does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a "final" decision. Therefore, the request for reconsideration will be dismissed.

III.

We have treated applicant's petitions as requesting removal and deny removal. 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 not 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.

IV.

Next, we note that applicant has not filed a Petition for Disqualification. However, to the extent that applicant intended to request disqualification, we deny that request. 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, former § 10452, now § 10960 (eff. Jan. 1, 2020), 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.) 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).)

Moreover, 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, the request for disqualification does not set forth a declaration or affidavit providing 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). Moreover, the petition is untimely pursuant to WCAB Rule 10960. Accordingly, the request for disqualification is denied.

V.

Finally, we advise applicant that summary judgement is not a relief permitted in workers' compensation proceedings. (Cal. Code Regs., tit. 8, § 10515.)

For the foregoing reasons,

IT IS ORDERED that the Petitions for Reconsideration are **DISMISSED**.

IT IS FURTHER ORDERED that the Petitions for Removal and Disqualification are **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 19, 2025

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

CESAR CRUZ
MICHAEL SULLIVAN & ASSOCIATES LLP

PAG/bp

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

Report and Recommendation on Motion for Reconsideration and Notice of Transmission to WCAB

Elizabeth Dehn, Workers' Compensation Judge, hereby submits her report and recommendation on the Petition for Reconsideration filed herein.

Introduction

Applicant Cesar Cruz, appearing in propria persona, filed a petition for reconsideration of my March 11, 2025 order continuing the trial on this matter. The petition was received by this office on April 9, 2025.[1] A motion to file a supplemental petition for reconsideration was also filed on April 9, 2025.

Petitioner asserts that that the order, decision or award was made without or in excess of my powers, that the order, was procured by fraud, that the evidence does not justify the findings of fact, and that the findings of fact do not support the order, decision or award. As service of the March 11 2025 minutes of hearing included service on lien claimant at an out of state, it appears the petition was timely filed. It was accompanied by the verification required under Labor Code section 5902 and Regulation 10940(c). To date, I am not aware of an answer having been filed by defendants.

Facts

An application was filed on behalf of Cesar Cruz contending he sustained a specific injury to the head, back, neck and upper extremity on July 11, 2020 while employed by UPS, insured for workers' compensation purposes by Liberty Mutual. Venue was originally in San Francisco, however, based on a petition filed by his then attorney venue was changed to San Diego. The application was amended to include injury to the psyche.

Applicant has been unrepresented since 2022. Applicant has also filed petitions for serious and willful misconduct of the employer, petition for increased benefits pursuant to Labor Code section 132(a) and numerous penalty petitions.

This matter proceeded to trial on July 30, 2024 in front of Presiding Judge Clifford Levy on the issue of whether there was good cause to change the venue from San Diego to San Francisco. In his October 10, 2024 Finding, Order, and Opinion on Decision, WCJ Levy found good cause to change venue to San Francisco.

On November 15, 2024, defendant, through their attorney of record, filed for a declaration of readiness to proceed for mandatory settlement conference, listing the issues of temporary disability, permanent disability and future medical treatment. The matter was set for a mandatory settlement conference for January 2, 2025 based on that declaration of readiness to proceed. Also on November 15, 2024, applicant filed for an expedited hearing on the issues of medical treatment, temporary disability and entitlement to compensation due to a dispute between employers and/or carriers. Prior to the January 2, 2025 date, Judge Allyn continued the mandatory settlement conference to January 28, 2025.

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1 Title 8, Cal. Code of Regulations 10940 requires that petitions for reconsideration, removal or disqualification and answers are to be filed in the electronic management system or in the district office having venue. The proof of service indicates that the petition was filed with the WCAB, and was not received by this office until April 9, 2025.

At the January 28, 2025 mandatory settlement conference, WCJ Allyn issued minutes of hearing, attached to which were two pretrial conference statements. She ordered the matter set for trial on all issues over applicant's objection. She further ordered the parties to have an amended pretrial conference statement, signed by both parties, prior to or at the date of trial. The issue of whether the penalties would be tried with the case in chief were deferred to the trial judge.

This matter was set for trial in front of the undersigned on March 11, 2025. The parties had not prepared an amended and signed joint pretrial conference statement, and had not met and conferred on the issues. The morning of the trial was spent clarifying the stipulations and issues. The matter was continued to another trial on April 9, 2025. The parties were ordered to sign and file an updated pretrial conference statement prior to the next trial date, The pretrial conference statement was ordered to include the dates that EDD paid benefits as well as the rate those benefits were paid. As applicant denied receiving defendant's proposed exhibits, defendant was ordered to serve applicant with exhibits within 5 days. As there was a dispute on an average weekly wage, despite the fact that one of the proposed pretrial conference statements reflected a stipulation on earnings, exhibits regarding the average weekly wage were to be filed and served. However, no ruling on the admissibility of those exhibits was made.

It is from my March 11, 2025 order continuing this matter that applicant has filed a motion for reconsideration.

Discussion

Applicant filed a "Motion for Reconsideration" of my March 11 2025 order continuing the trial, using the March 11 2025 trial setting as a mandatory settlement conference to discuss the proposed stipulations and issues, in order to find it to serve applicant with another copy of the exhibits. As my March 11 2025 order was not a "final" order under Labor Code section 5900 as it did not make any findings on any threshold issues, or make a determination on any substantive rights or liabilities, the petition should have been a petition for removal.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. *Cortez vs. Workers' Comp Appeals Bd.* (2006) 136 Cal. App. 4th 596, 600, fn 5; *Kleemann vs. Workers' Comp Appeals Bd* (2005) 127 Cal. App. 4th 274, 281, fn 2. 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 Reg's Title 8 §10955(a). The applicant has not made any showing that he will suffer substantial prejudice or irreparable harm by my order continuing the trial.

In her January 29, 2025 Order setting this matter for trial, WCJ Allyn ordered the parties to prepare an amended pretrial conference statement. Specifically, she stated, "prior to or on the day of trial, the party shall have an amended pretrial conference statement prepared for the trial judge in the form of one document signed by both parties." (EAMS Doc ID 78812782) Attached to the minutes of hearing setting the matter for trial were two pretrial conference statements, which contained different information. It was also not clear if both parties were stipulating to all of the information listed on the stipulations page. At the time of the March 11 2025 trial, the parties confirmed that they had not had an amended pretrial conference statement prepared and signed by both parties as ordered by the mandatory settlement conference judge. I therefore spent the morning of the trial clarifying with the parties exactly what was stipulated to and what issues were to be tried.

In addition, despite the order that both parties serve each other with exhibits no later than 20 days before trial, the applicant advised on the day of trial that he had not received defendant's proposed exhibits. As applicant did not have a copy of defendants proposed exhibits, and the party

if they continue the matter in order to send it to serve applicant with their exhibits within 5 days so the applicant would not be prejudiced by not having copies of defendant's proposed exhibits.

Finally, in the course of clarifying issues with the parties, I learned that the applicant had received EDD benefits. The lien of EDD was not listed as an issue, however the periods and amounts EDD paid were not listed. As indemnity was one of the issues for trial, in order to avoid a potential period of duplicate payments, I determined that the information regarding the EDD lien was needed prior to being able to proceed.

As the trial judge, I am cognizant of my obligation to make findings on all issues at controversy. Part of that obligation is ensuring that all parties know the exact issues being submitted. Since the parties failed to prepare a joint pretrial conference statement prior to the March 11, 2025 trial date, I used the trial setting for that purpose.

The applicant also contends that I violated his ADA accommodation. The only accommodations that I was aware of was the presence of a Communication Access Realtime Translation ("CART"), an audio recording of the proceedings, and breaks as needed. A CART transcriptionist was present at the March 11 2025 trial. A WCAB employee was also present who made an audio recording of the proceeding for the applicant. I advised the applicant that the WCAB would be making the audio recording, and he did not have my permission to make his own recording. Breaks can be accommodated as well. No requests for breaks were made by the applicant during the morning session to my recollection.

Applicant also appears to be arguing that I should be disqualified based on professional relationship with "Katherine Buechler," an attorney at Michael Sullivan and Associates, the law firm representing the defendant. There are no specific allegations of bias made in the petition. I did formerly work with Kristen Beuhler, an attorney who is now with Michael Sullivan and Associates. However, I have not stated or displayed any bias or partiality to any of the parties in this case. I believe that I have been, and can continue to remain, an impartial arbitrator in this matter.

Recommendation

For the foregoing reasons, I recommend that applicant's Motion for Reconsideration, filed herein on April 9, 2025, be denied. This matter is being transmitted to the Appeals Board on the service date indicated below my signature.

WCJ Elizabeth C. Dehn
Workers' Compensation Judge
Workers' Compensation Appeals Board

The Report and Recommendation on Petition for Reconsideration was filed and served on all parties listed in the Official Address Record and the case was transmitted to the Appeals Board on this date.

Date: April 21, 2025
By: A. Paraiso