WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ERIC VOLK, *Applicant*

vs.

LITTLE COMPANY OF MARY HOSPITAL, permissibly self-insured, administered by CORVEL CORPORATION, *Defendants*

Adjudication Numbers: ADJ10035604 ADJ10036839
Long Beach District Office

OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION DENYING PETITION FOR DISQUALIFICATION AND DENYING PETITION FOR REMOVAL

Applicant has filed a petition for reconsideration, entitled petition for disqualification/removal, of the November 12, 2024 order setting his case for a status conference issued by the workers' compensation administrative law judge (WCJ) in this matter.

Applicant contends that his case is being unreasonably delayed, and that the October 28, 2024 Opinion and Order Dismissing Petition for Reconsideration, Denying Petition for Disqualification and Granting Removal (Opinion) issued by the Appeals Board which returned this matter to the trial level for further proceedings mandates that the WCJ immediately set the case for a trial versus setting a status conference.

Applicant further requests disqualification of the assigned trial judge in this matter.

We did not receive an Answer from defendant.

We received a Report and Recommendation (Report) from the WCJ, which recommends that the Petition be denied.

In response to the WCJs report, applicant filed two supplemental petitions entitled petition for reconsideration. The supplemental pleadings reiterate his prior request for removal of the setting of a status conference and for disqualification of the aforementioned judge.

While we utilize our discretion to accept the supplemental pleadings pursuant to our authority under WCAB Rule 10964, we remind applicant that WCAB Rule 10964 requires that

supplemental pleadings or responses other than the Answer shall be considered only when specifically requested or approved by the Appeals Board. (Cal. Code Regs., tit. 8, § 10964(a).) Our Rules further require that a party seeking to file a supplemental pleading shall file a petition setting forth good cause for the Appeals Board to approve the filing of a supplemental pleading and shall attach the proposed pleading. (Cal. Code Regs., tit. 8, § 10964(b).) Applicant did not seek the permission of the WCAB to file supplemental pleadings, nor set forth good cause for doing so. Supplemental pleadings filed in the future that fail to adhere to such requirements may be disregarded nor deemed filed for any purpose. (Cal. Code Regs., tit. 8 § 10964(c).)

To the extent that applicant's December 18, 2024 and January 6, 2025 supplemental petitions raise the same issues as set forth in his initial petition objecting to the November 12, 2024 order of the WCJ as opposed to any new or supplemental order issued in this matter, we will treat the petitions filed on December 18, 2024 and January 6, 2025 as supplemental pleadings to applicant's initial petition requesting removal and disqualification.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report, as well as the contents of the supplemental petitions. (Cal. Code Regs., tit. 8, § 10964.)

Based on our review of the record and for the reasons set forth in the report of the WCJ, as well as the reasons discussed below, we will dismiss the Petition for Reconsideration, as the November 12, 2024 setting of a status conference was an interim order and not a final order subject to reconsideration. Also based on this review, we will deny the petition for removal.

Further to the extent the petition also seeks disqualification of the WCJ from this case, we will deny disqualification.

I.

Former Labor Code[1] 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.

[1]All further references are to the Labor Code, unless otherwise stated.

> (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 December 6, 2024 and 60 days from the date of transmission is February 4, 2025. This decision is issued by or on February 4, 2025, so that we have timely acted on the petition as required by Labor Code 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 December 6, 2024, and the case was transmitted to the Appeals Board on December 6, 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 December 6, 2024.

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 WCJ's decision solely relates to the setting of a status conference which is a intermediate procedural issue issued prior to a hearing on the merits. The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a "final" decision and the Petition will be dismissed to the extent it seeks reconsideration.

Further, removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (*Cortez*) (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (*Kleemann*) (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).)

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.) As stated by the Supreme Court of California in *Carstens v. Pillsbury* (1916) 172 Cal.572, "the commission...must find facts and declare and enforce rights and liabilities, - in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law." (*Id.* at p. 577.) 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 v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

The November 12, 2024 setting of a status conference by the WCJ was an interim order and not a final order subject to reconsideration. Further, petitioner has failed to demonstrate that substantial prejudice or irreparable harm will result if removal is not granted. Thus, we will deny the petition to the extent it seeks removal.

III.

Turning to the merits, we note the following facts as set forth in our Opinion of November 28, 2024:

> Applicant, while employed by defendant on April 14, 2015, sustained injury arising out of and in the course of employment (AOE/COE) to his chest wall and psyche, and claims to have sustained injury AOE/COE to his digestive system and chronic fatigue syndrome (ADJ10035604). Applicant also sustained injury AOE/COE to his psyche during the period May 19, 2014 to May 19, 2015, and claims to have sustained injury to his digestive system and chronic fatigue syndrome (ADJ10036839).
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> A joint findings and award issued by the WCJ on September 7, 2017 finding industrial injury to applicant's chest and psyche, but not to his digestive system and chronic fatigue syndrome. Both applicant and his counsel filed petitions for reconsideration, and an Opinion and Order Granting Reconsideration dated November 19, 2017 issued in which the matter was sent back for further record development.
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> Thereafter, applicant was evaluated by QMEs Meghan Marcum, Psy. D., and Cranford Scott, M.D., who both authored several medical reports.
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> On October 10, 2023, applicant filed a Declaration of Readiness to Proceed (DOR) to proceed to a Mandatory Settlement Conference (MSC) on all issues.
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> After several continuances of the MSC, on May 13, 2024, the case was continued to the WCJ's trial calendar of July 25, 2024 with the WCJ noting in the Comments on the Minutes of Hearing (MOH):
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> > "Parties understand that this is not a trial but a way for parties to speak w/WCJ w/o many time encumbrances."
> > (MOH, May 13, 2024.)

(Opinion, 10/28/24, pp. 3-4.)

At the hearing of July 25, 2024, after discussion with the parties, the WCJ issued findings on the minutes and ordered the case off calendar on his own motion.

On August 5, 2024, applicant filed a Petition for Reconsideration and Disqualification.

On October 28, 2024, we issued an Opinion and Order Dismissing Petition for

Reconsideration, Denying Petition for Disqualification and Granting Removal (Opinion). In that Opinion, we returned the matter back to the WCJ in order to make a record. We stated:

> While the WCJ discusses the reasoning for his decision to take the matter off calendar for further medical supplementation, and lists the date of several medical reports for such findings, no testimony or evidence was offered or admitted at the hearing. Decisions of the Appeals Board 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].) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "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 v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 (Appeals Bd. en banc) (*Hamilton*).)
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> 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 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*, at p. 476 citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)
>
> Here, it appears that the WCJ based his decision solely on a determination that the medical evidence was stale and needed updating and/or clarification, but did not make a record upon which to base these findings.
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> Thus, we are unable to determine if good cause exists at this juncture due to a lack of an adequate record. Therefore, we must rescind the Finding and Order taking the case off calendar, and return this matter to the trial ***level*** for further proceedings consistent with this opinion.

(Opinion, 10/28/24, pp. 6-7, emphasis added.)

Petitioner asserts that the return of this matter to the trial level as stated in our Opinion mandates that the WCJ set this matter for a trial proceeding, as opposed to a status conference.

In his Report, the WCJ addresses this issue as follows:

> Petition[er] contends that the Status Conference set on December 9, 2024, is inappropriate and the matter should be set for Trial. As stated in the Report and Recommendation dated August 13, 2024, the matter was set for trial on July 25, 2024, with the understanding that this was not a trial setting and a way to talk to the parties without the time encumbrances associated with a traditional

> conference calendar. It is important to note that no jointly executed Pre-Trial Conference Statement (PTCS) was prepared or filed with the court prior to or since this hearing. As such, setting the matter for trial upon remand from the WCAB would be incorrect as there is no document to state what the issues are. Therefore, a Status Conference is the correct setting as this would give the parties an opportunity to meet, confer, and prepare a PTCS so the matter can proceed to Trial.

(Report, p. 2.)

Here, we agree with the assigned trial judge as set forth in his Report that the setting of a status conference prior to proceeding to a trial is appropriate at this juncture. As we returned this matter to the trial *level* for further proceedings, we leave it to the WCJ to set the matter for whatever hearing is appropriate in order to provide a full adjudication of the disputed issues and to make an accurate record. Returning the matter to the trial *level* for further proceedings simply indicates that the matter be returned to the district office where trials are conducted in the first instance, rather than the case remaining at the Appeals Board. Additionally, returning the matter to the trial *level* does not mandate that a trial date be immediately set prior to the parties setting forth the proposed evidence and issues in order to create an accurate record, which can be accomplished at status or mandatory settlement conference for this purpose. Thus, we will deny removal.

WCAB Rule 10745 states:

> The Workers' Compensation Appeals Board, upon the receipt of a Declaration of Readiness to Proceed, may, in its discretion, set the case for a type of proceeding other than that requested. The Workers' Compensation Appeals Board may, on its own motion with or without notice, set any case for any type of hearing and may order that hearings be conducted electronically. (Cal. Code Regs., tit. 8 §10745.)

Further, WCAB Rule 10761 states:

> (a) A workers' compensation judge may receive evidence and submit an issue or issues for decision at a conference hearing if the parties agree.
> (b) If documentary evidence is required to determine the issue or issues being submitted, the parties shall comply with the provisions of rule 10759 regarding the listing and filing of exhibits.
> (c) After submission at a conference, the workers' compensation judge shall prepare minutes of the hearing and a summary of evidence as set forth in rule 10787.

(Cal. Code Regs., tit. 8 § 10761.)

Finally, WCAB Rule 10759, states, in pertinent part: "Each exhibit listed must be clearly identified by author/provider, date, and title or type (e.g., "the July 1, 2008 medical report of John

Doe, M.D. (3 pages)"). Each medical report, medical-legal report, medical record, or other paper or record having a different author/provider and/or a different date is a separate "document" and must be listed as a separate exhibit[.]" (Cal. Code Regs., tit. 8, § 10759(c).)

Thus, as previously stated, a record must be properly made with respect to the stipulations, issues, and exhibits prior to proceeding to trial.

IV.

To the extent applicant once again requests disqualification of the WCJ, we deny it. 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.)

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 Petition 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 request for disqualification is denied.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **DISMISSED.**

IT IS FURTHER ORDERED that applicant's Petition for Removal in response to the Order of November 12, 2024 issued by the WCJ setting the matter for a status conference is **DENIED**.

IT IS FURTHER ORDERED that applicant's request for disqualification of the WCJ is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 4, 2025

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

ERIC VOLK
BREDFELT, ODUKOYA & HAN

LAS/bp

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