WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

IN RE: DANIEL ESCAMILLA, ***Respondent.***	**Misc. No. 254** **OPINION AND ORDERS SUSPENDING DANIEL ESCAMILLA'S PRIVILEGE TO APPEAR BEFORE THE WORKERS' COMPENSATION APPEALS BOARD** **(EN BANC)**

I.

INTRODUCTION

On September 21, 2011, we issued a Notice of Hearing (NOH) (*In Re Escamilla* (2011) 76 Cal.Comp.Cases 944 [Appeals Board en banc]) initiating proceedings pursuant to Labor Code section 4907[1] to suspend or remove Daniel Escamilla's privilege to appear before the Workers' Compensation Appeals Board (WCAB) as a nonattorney hearing representative. Section 4907 confers the Appeals Board with the authority to remove, deny or suspend the "privilege of any person, except attorneys admitted to practice in the Supreme Court of the state, to appear in any proceeding as a representative of any party before the appeals board, or any of its workers' compensation administrative law judges" on the showing of good cause after a hearing.[2]

The NOH cites 11 cases in which sanctions were imposed on Mr. Escamilla for bad faith and/or

[1] All statutory references are to the Labor Code unless otherwise specified.

[2] When this proceeding was initiated, section 4907 read "The privilege of any person, including attorneys admitted to practice in the Supreme Court of the state to appear in any proceeding as a representative of any party before the appeals board, or any of its referees, may, after a hearing, be removed, denied or suspended by the appeals board for a violation of this chapter or for other good cause." During the pendency of this proceeding, section 4907 was amended and now excludes from its scope attorneys admitted to the State Bar, substitutes the current "workers' compensation administrative law judges" title for the antiquated "referees," and specifies that the privilege to appear before the WCAB may be removed for violation of the Rules of the Workers' Compensation Appeals Board, or the Rules of the Administrative Director, and for failure to pay any final order of sanctions, attorney's fees, or costs imposed pursuant to section 5813. Although these amendments merely clarified already existing law, we have conducted these proceedings under the former wording of section 4907. Since both the current and former section 4907 state that the privilege to appear before the WCAB may be removed, denied, or suspended for "good cause," our decision would be the same under either version.

frivolous conduct as set forth in sections 5813[3] and WCAB Rule 10561 (Cal. Code Regs., tit. 8, § 10561).

Having considered the legal arguments, evidence and testimony presented, we find that there is good cause to suspend Mr. Escamilla for the following reasons:

1. Mr. Escamilla has repeatedly disregarded the rules and regulations governing workers' compensation proceedings;

2. Mr. Escamilla has engaged in a continuing course of sanctionable conduct with no apparent attempt to reform despite having been warned and sanctioned;

3. Mr. Escamilla has either intentionally or with reckless indifference verified or filed pleadings containing misrepresentations of material facts;

4. Mr. Escamilla's conduct has burdened the WCAB with unnecessary proceedings, wasted valuable court time and squandered the limited resources of the WCAB;

5. Sanctions have proved to be ineffective in correcting Mr. Escamilla's conduct.

Therefore, pursuant to section 4907, we will suspend Mr. Escamilla's privilege to appear as a hearing representative in any WCAB proceeding for a period of 90 days. The suspension will start 45 days from the filing of this decision.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Escamilla describes himself as "an ABA law school graduate who, during the past 21 years, has made a career representing lien claimants as a nonattorney hearing representative before the Workers' Compensation Appeals Board (WCAB). [Mr. Escamilla] generally appears on multiple cases before workers' compensation judges every week and has been doing this for over 20 years." (November 7, 2011 Petition for Reconsideration, p. 2.)

[3] Labor Code section 5813(a) states that "The workers' compensation referee or appeals board may order a party, the party's attorney, or both, to pay any reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. In addition, a workers' compensation referee or the appeals board, in its sole discretion, may order additional sanctions not to exceed two thousand five hundred dollars ($2,500) to be transmitted to the General Fund."

On September 21, 2011, the Appeals Board initiated this action with a NOH, citing 11 cases in which Mr. Escamilla was sanctioned for misconduct, which demonstrated a pattern of behavior with no attempt to reform. The underlying cases are summarized in the NOH as follows:

> "1) In Case No. MON 206997 (*Harris*), Mr. Escamilla was sanctioned $750.00 plus costs and fees on August 19, 2003 pursuant to Labor Code section 5813 for willfully executing, verifying and filing a successive untimely petition for reconsideration that was frivolous and without merit because the successive petition asserted the same issues and arguments that were raised in the earlier petition for reconsideration that was dismissed by the Appeals Board as untimely;
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> 2) In Case No. AHM 92791 (*Rios*), Mr. Escamilla was sanctioned $500.00 on May 19, 2006 pursuant to Labor Code section 5813 for willfully executing, verifying and filing a frivolous petition for reconsideration that was totally without merit because his client, lien claimant Ali Mostafavi, D.C., was not aggrieved by the challenged compromise and release agreement approved by the WCJ;
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> 3) In Case No. VNO 0330565 (*Fagan*), Mr. Escamilla was ordered on May 7, 2007 to pay defendant's reasonable costs and fees pursuant to Labor Code section 5813 for willfully executing and filing a frivolous petition for removal that mischaracterized earlier decisions of the Appeals Board and the Court of Appeal;
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> 4) In Case No. LAO 0800614 (*Cling*), Mr. Escamilla was sanctioned $500.00 on June 14, 2007 pursuant to Labor Code section 5813 for willfully executing, verifying and filing a frivolous petition for reconsideration that was totally without merit because his client, lien claimant David Silver, M.D., was not aggrieved by the challenged compromise and release agreement approved by the WCJ;
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> 5) In Case No. MON 0280037 (*Crumpton*), Mr. Escamilla was sanctioned $2,500.00 on August 1, 2007 pursuant to Labor Code section 5813 for willfully executing, verifying and filing a frivolous petition for reconsideration that was without merit and for continuing to litigate a lien claim of David Silver M.D., that was earlier settled (*Escamilla v. Workers' Comp. Appeals Bd.* (*Crumpton*) (2008) 73 Cal.Comp.Cases 280 (writ den.));
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> 6) In Case No. LAO 0829698 (*Rozenblat*), Mr. Escamilla was sanctioned $500.00 and ordered to pay defendant $800.50 costs and fees on May 1, 2009 pursuant to Labor Code section 5813 for willfully executing, verifying and filing an untimely petition for reconsideration that he knew or should have known was frivolous because the Appeals Board did not

have jurisdiction to consider the petition and it would not have time to grant reconsideration on its own motion;

7) In Case No. RIV 057393 (*Roberts*), Mr. Escamilla was sanctioned $900.00 on August 5, 2009 by the WCJ for several failures to appear without good cause and for willfully executing, verifying and filing a petition for removal that mischaracterized the facts;

8) In Case No. ADJ1194116/LAO 0797672 (*Ortiz*), Mr. Escamilla was sanctioned $750.00 by the Appeals Board on July 14, 2010, for filing a verified petition for reconsideration on July 27, 2009 that contains materially false statements of fact;

9) In Case No. ADJ1130558 (*Lee*), Mr. Escamilla was sanctioned $3,150.00 by the WCJ on June 23, 2010 and ordered to pay $2,464.50 in costs and fees as affirmed by the Appeals Board on January 6, 2011, for tardiness and engaging in frivolous and bad faith actions (*Escamilla v. Workers' Comp. Appeals Bd.* (*Lee*) (2011) 76 Cal.Comp.Cases 567 (writ den.));

10) In Case No. ADJ3897299 (*Santangelo*), Mr. Escamilla was sanctioned $1,000.00 and ordered to pay $44,169.81 in costs and fees by the WCJ, as amended and affirmed by the Appeals Board on April 14, 2011, for engaging in bad faith and frivolous actions and tactics;

11) In Case Nos. ADJ4517161/ADJ3871851 (*Chavez*), Mr. Escamilla was sanctioned $2,500.00 by the Appeals Board on June 13, 2011 for filing a petition for reconsideration that contains material misrepresentations of fact and frivolous legal arguments." (*In Re Escamilla* (2011) 76 Cal.Comp.Cases 944, 945-947 [Appeals Board en banc])

On November 7, 2011, Mr. Escamilla filed a Petition for Reconsideration challenging our NOH. On January 4, 2012, we dismissed the Petition for Reconsideration because it was not taken from a final order (Lab. Code, § 5900, subd. (a)). However, we accepted it as a response to our NOH, and stated the contentions would be considered when we issued a final order. (*In Re Escamilla* (2012) 77 Cal.Comp.Cases 71, 74 [Appeals Board en banc].)

Pursuant to section 5309(b), workers' compensation administrative law judge (WCJ) David Hettick was appointed to act on behalf of the Appeals Board as the hearing officer to conduct prehearing conferences and take testimony. There were five prehearing conferences and on June 5, 2012, WCJ Hettick conducted an evidentiary hearing at which Mr. Escamilla testified, documentary evidence was

introduced and witness declarations were submitted. At Mr. Escamilla's request, a second hearing took place on September 24, 2012, before the Commissioners of the Workers' Compensation Appeals Board sitting en banc.

Despite the fact that Mr. Escamilla did not comply with orders regarding the timing of his submission of evidentiary exhibits and witness declarations, because of the seriousness of these proceedings, we have considered all of the exhibits and declarations offered by Mr. Escamilla. These documents include pleadings filed by Mr. Escamilla in the underlying cases in which sanctions were ordered, as well as the declarations of Michael Smalley, David M. Bautista, Lori Milas, Nathan Deschnes, David E. Bresler, Thomas Hewko, and Edward Wood. These declarations from Mr. Escamilla's litigation adversaries, clients, and acquaintances contain statements regarding Mr. Escamilla's general character[4] and the declarants' personal opinions regarding the propriety of disciplinary actions taken against Mr. Escamilla, but nothing in the way of facts relevant to the issues before us. Nevertheless, together with the Board's exhibits, we will admit these declarations into the evidentiary record.

The Appeals Board has reviewed and considered all evidence offered by Mr. Escamilla in rendering our decision as well as his Petition for Reconsideration, Trial Brief, and Petition for an Order Dismissing the Action Contemplated by the WCAB.

III.

DISCIPLINING NONATTORNEY REPRESENTATIVES

As a general rule, only a licensed attorney may represent parties in legal proceedings. However, "[s]ince 1917, persons unlicensed to practice law have been permitted to represent [parties] before the WCAB." (*Longval v. Workers' Comp. Appeals Bd.* (1996) 51 Cal.App.4th 792, 798 [61 Cal.Comp.Cases 1396].) The authority for a nonattorney representative to appear in workers' compensation proceedings is conferred by section 5700, which states that a party may be represented "by attorney … or by any other

[4] In an April 20, 2012 Opinion and Orders addressing motions brought by Mr. Escamilla, we clarified to Mr. Escamilla that his moral character was not at issue in these proceedings. (*In Re Escamilla* (2012) 77 Cal.Comp. Cases 430, 433 [Appeals Board en banc].)

agent…," and by section 5501, which states that an application may be filed by an applicant's "attorney … or other representative authorized in writing." As explained by the Supreme Court, the rationale for allowing lay representation of litigants in WCAB proceedings was "that numerous claimants for compensation are indigent and their claims are of such character and the compensation allowed by the Commission is so small as not to justify the engagement or service of a member of the bar, and that without the right to have a lay representative the claimant would ofttimes be unrepresented." (*Eagle Indem. Co. v. Industrial Acc. Com. (Hernandez)* (1933) 217 Cal. 244, 249.) However, the Court also recognized that the use of lay representatives could result "in inexperienced and inexpert advice and assistance to a deserving claimant to the latter's detriment." (*Ibid*)

Courts also have acknowledged the burden an unlicensed representative imposes on the court and other litigants. "[T]he conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents but as well for his adversaries and the court. The lay litigant frequently brings pleadings that are awkwardly drafted, motions that are inarticulately presented, proceedings that are needlessly multiplicative. In addition to lacking the professional skills of a lawyer, the lay litigant lacks many of the attorney's ethical responsibilities, e.g., to avoid litigating unfounded or vexatious claims." (*Jones v. Niagara Frontier Transp. Authority* (2nd Cir. 1983) 722 F.2d 20, 22.)

An attorney must be adjudged to be of "good moral character" (Bus. and Prof. Code, § 6060, subd. (b)), complete rigorous educational or apprenticeship requirements (Bus. and Prof. Code, § subds. (c) & (e)), and pass examinations in both general law and professional responsibility (Bus. and Prof. Code, § 6060, subds. (f) & (g)) before being admitted to The State Bar of California. An unlicensed hearing representative has no such character, educational, or examination requirements.

However, the Appeals Board is vested with the power under section 4907 to remove, deny, or suspend the privilege of a nonattorney hearing representative appearing before the WCAB after a hearing for "good cause." Given hearing representatives' lack of legal education and training, and given that they are not held to the same standard of care as licensed attorneys for purposes of malpractice or breach of

fiduciary duty[5] (*Bland v. Reed* (1968) 261 Cal.App.2d 445, 449), section 4907 is an important bulwark for protection of the public and the WCAB adjudicatory system. [6]

Indeed, the policy that initially was intended to provide indigent workers with representation has evolved into a burgeoning business. Although section 4903(a) prohibits an award of attorney's fees from an injured worker's recovery payable to nonattorney hearing representatives, there is no restriction against nonattorney hearing representatives being paid directly by third parties. Hence, nonattorneys like Mr. Escamilla have made careers representing lien claimants rather than injured workers.

IV.

GOOD CAUSE TO SUSPEND

"Good cause" is a term that frequently appears in statutes and contracts and dozens of California cases have expounded upon its meaning. "Good cause" essentially connotes "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." (*R.J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 145.) Good cause means "real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate excuses that will bear the test of reason, just grounds for action, and always the element of good faith." (*Cal. Portland Cement Co. v. Cal. Unemp. Ins Appeals Board* (1960) 178 Cal.App.2d 263, 272-273, quoting *Bliley Electric Co. v. Unemployment Comp. Board of Review* (1946) 158 Pa.Super. 548 [45 A.2d 898, 903].)

Mr. Escamilla has repeatedly violated our regulations, misrepresented facts either intentionally or with reckless disregard for the truth, filed frivolous petitions and engaged in other sanctionable conduct in violation of section 5813 and WCAB Rule 10561. He has been warned about and sanctioned for his behavior repeatedly. In two of the cases cited in the NOH, Mr. Escamilla was sanctioned the maximum amount of $2,500 and in one case he was ordered to pay fees and costs to opposing counsel in excess of

[5] Mr. Escamilla testified at the February 9, 2009 Commissioners Conference in the underlying *Rozenblat* case that he did not carry an errors and omissions policy. (Transcript of February 9, 2009 Commissioners Conference in *Rozenblat*, p. 34.)

[6] In fact, the Legislature has further demonstrated its concern about nonattorney appearances by amending section 4907, effective January 1, 2013, to clarify that nonattorney representatives are to be held "to the same professional standards of conduct as attorneys." (Stats 2012 ch 363 § 73 (SB 863).)

$44,000.

Mr. Escamilla's conduct has wasted valuable court time, delayed proceedings, burdened the Appeals Board with frivolous petitions, inconvenienced other parties and exposed his clients to monetary sanctions. Even though Mr. Escamilla has been sanctioned repeatedly, he persists in engaging in a pattern of conduct which evidences no intent to reform. Thus it is apparent that sanctions are ineffective and consequently we exercise our authority under section 4907.

Nothing in Mr. Escamilla's testimony or argument convinces us that suspension of his privilege is inappropriate. His primary defense is, in essence, that despite over 20 years of appearing before the WCAB, he is unaware of basic workers' compensation law and procedure. He defends being sanctioned for filing multiple successive petitions for reconsideration of the same issue by claiming that he "had never heard or read the term 'successive petition for reconsideration.'" (Transcript of June 5, 2012 Proceedings, p. 33.) He defends a frivolous filing in the *Chavez* matter by stating that he was "uninformed of the current state of the law with regard to what constitutes a compensable psychological injury," (Transcript of June 5, 2012 Proceedings, p. 64) despite the fact that the law in question has been in effect since July 16, 1993, almost since Mr. Escamilla started appearing before the WCAB. Mr. Escamilla said that the sanction in *Chavez* made him learn that he "needs to Shepardize cases if he is handling matters outside his standard area of expertise."[7] Mr. Escamilla testified with regard to the *Ortiz* case, that he was "misled" by the fact that he did not review the entire file. (Transcript of June 5, 2012 Proceedings, p. 50.)

Willful ignorance is tantamount to bad faith. (*Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 533 ["[W]illful ignorance of contempt procedures by an experienced judge constitutes bad faith."]; *Levy v. Irvine* (1901) 134 Cal. 664, 672 ["[W]illing ignorance is to be regarded as equivalent to actual knowledge."]; *Cole v. Patricia A. Mayer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1118 [Willful ignorance is not a defense to filing frivolous or vexatious litigation]; *In re Douglas* (2011) 200 Cal.App.4th 236, 244 ["California law does not condone willful ignorance."].) Blaming these

[7] Unfortunately, Mr. Escamilla did not heed this lesson in the current proceedings, in which he cites *United States v. Halper* (1989) 490 U.S. 435 and *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, which have been overturned.

filings on ignorance is not a colorable defense.

Mr. Escamilla testified that after being sanctioned in the *Cling* and in *Rios* cases for the exact same conduct, he did not repeat that conduct again although, as detailed in the NOH, he committed numerous other sanctionable acts afterwards. In the 2009 Commissioners Conference in the underlying *Rozenblat* case, Mr. Escamilla stated that he graduated from Chapman Law School and passed the California Bar Examination, but that he chose not to be licensed because "becoming licensed puts some restrictions on your practice that might not be in the best interest of the client." (Transcript of February 9, 2009 Commissioners Conference in *Rozenblat*, pp. 2-5.) Later at the *Rozenblat* hearing, Mr. Escamilla stated that one of the reasons that he chose not to become a member of the bar was so that he would not be held to the Rules of Professional Conduct applicable to licensed attorneys. (Transcript of February 9, 2009 Commissioners Conference in *Rozenblat*, p. 24.) At the *Rozenblat* conference, we advised Mr. Escamilla that we would exercise our power to suspend him from appearing before the WCAB if he continued to disregard our rules, and Mr. Escamilla assured us that he understood that. (Transcript of February 9, 2009 Commissioners Conference in *Rozenblat*, p. 38.)

For the reasons stated in the NOH and herein, we find ample good cause to suspend Mr. Escamilla from appearing before the WCAB as a hearing representative on behalf of any party or lien claimant for a period of 90 days.

V.

RESPONSE TO MR. ESCAMILLA'S LEGAL ARGUMENTS

We now respond to the legal contentions that Mr. Escamilla has made in the course of these proceedings.

Mr. Escamilla contends that the "good cause" standard is unconstitutionally vague. He cites no authority for this proposition. Although it is beyond our power to declare a statute unenforceable on the grounds that it is unconstitutional (Cal. Const., art. III, § 3.5; *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1038 [58 Cal.Comp.Cases 793]), we will nevertheless respond to this contention.

The term "good cause" "is not considered vague or uncertain since [the term 'good cause'] call[s] for a factual exposition of a reasonable ground for the order." (*O'Hagen v. Board of Zoning Adjustment*

(1971) 19 Cal.App.3d 151, 160.) In *E.S. Bills, Inc. v. Tzucanow* (1985) 38 Cal.3d 824, 837, the Supreme Court flatly stated that "[t]he statutory standard of good cause is not impermissibly vague," and quoted the Fifth Circuit Court of Appeals decision in *C.A. May Marine Sup. Co. v. Brunswick Corp.* (5th Cir. 1977) 557 F.2d 1163, 1167, that a vagueness challenge of the "good cause" standard is "patently frivolous." Similarly, in *People v. McGirr* (1988) 198 Cal.App.3d 629, 636, the Court of Appeal rejected a vagueness challenge to the phrase "good cause," holding that "'good cause' has in fact acquired reasonable certainty by established usage, interpretation and a settled common sense meaning." We agree.

Mr. Escamilla argues that the present proceeding is akin to a license revocation and that the Appeals Board must "prove by clear and convincing evidence to a reasonable certainty that there is good cause to remove or suspend …." This argument also lacks merit. Even if this were to be treated as a license revocation, Mr. Escamilla would not be entitled to a clear and convincing standard of proof. As explained in *Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916:

> "'Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.' (Evid. Code, § 115.) In determining the proper standard of proof to apply in administrative license revocation proceedings, courts have drawn a distinction between professional licenses such as those held by doctors (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856 [185 Cal.Rptr. 601]), lawyers (*Furman v. State Bar* (1938) 12 Cal.2d 212, 229 [83 P.2d 12]), and real estate brokers (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457 [94 Cal.Rptr 136]) on the one hand, and nonprofessional or occupational licenses such as those held by food processors (*San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1894 [58 Cal.Rptr.2d 571]) and vehicle salespersons (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 318–319 [90 Cal.Rptr.2d 277]), on the other hand. In proceedings to revoke professional licenses, the decision makers apply the clear and convincing evidence standard of proof, while in proceedings to revoke nonprofessional or occupational licenses, the decision makers apply the preponderance of the evidence standard of proof.
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> The 'sharp distinction between professional licenses, on the one hand, and … nonprofessional licenses, on the other, supports the distinction in the standards of proof applicable in proceedings to revoke these two different types of licenses. Because a professional license represents the

> licensee's fulfillment of extensive educational, training and testing requirements, the licensee has an extremely strong interest in retaining the license that he or she has expended so much effort in obtaining. It makes sense to require that a higher standard of proof be met in a proceeding to revoke or suspend such a license. The same cannot be said for a licensee's interest in retaining a [nonprofessional] license.' (*San Benito Foods v. Veneman*, supra, 50 Cal.App.4th at p. 1894.)" (See also *Lone Star Security & Video, Inc. v. Bureau of Security and Investigative Services* (2012) 209 Cal.App.4th 445.)

As stated above, in stark contrast to the professional practitioner, there are no "educational, training and testing requirements" to appear as a hearing representative before the WCAB. As such, the present section 4907 proceeding is, at best, analogous to a nonprofessional license revocation where the proper standard of proof is preponderance of the evidence. However, here Mr. Escamilla has been sanctioned 11 times in final decisions. These facts are not in dispute, and the sole issue is whether Mr. Escamilla's documented course of conduct in WCAB proceedings constitutes "good cause" to suspend him. "Good cause" is a legal conclusion, not a factual issue (*Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal.3d 1, 6), and we conclude on this record that there is good cause to suspend him.

Mr. Escamilla also argues that section 4907 has been ruled unconstitutional by the Supreme Court in *Hustedt v. Workers' Compensation Appeals Bd.* (1981) 30 Cal.3d 329 [46 Cal.Comp.Cases 1284][8]. This completely misstates the issue and holding. The sole issue in *Hustedt* was whether the WCAB had "the power to discipline *an attorney* by temporarily or permanently prohibiting him or her from practicing before the [WCAB]." (Emphasis added.) The Appeals Board's power to remove or suspend a nonattorney hearing representative was not in question.

As originally enacted in 1923, section 4907 authorized the Appeals Board to suspend or remove from practice any person except attorneys licensed to practice law. (Stats. 1923, ch. 381, § 1, pp. 772, 773-774.) In 1929, the Legislature amended section 4907 to extend the Appeals Board's power to take disciplinary action against attorneys licensed, or admitted to practice. (Stats. 1929, ch. 173, § 1, pp. 323,

[8] Mr. Escamilla has asked us to take judicial notice of an amicus curiae brief filed by the State Bar of California in the Court of Appeal proceedings in *Hustedt*. Although we have considered this document, it does not cover any ground not covered by the Supreme Court's decision in *Hustedt*.

324.) (*Hustedt,* 30 Cal.3d at p. 335, fn. 3.)

In *Hustedt,* the only issue raised by the attorney petitioner and considered by the court was the constitutionality of the 1929 amendment to section 4907.[9] The Court held that "[i]n purporting to bestow the power to discipline *attorneys* upon the Board, the Legislature overreached its traditionally recognized authority, under the police power, to regulate the practice of law" (*id.* at p. 341 (emphasis added)). Only the Supreme Court has the power to admit an attorney to membership in the bar and to disbar a licensed attorney. The court did not consider the authority of the Appeals Board pursuant to section 4907 to discipline nonattorneys.

Mr. Escamilla's contention that the judicial branch has the exclusive power to regulate the appearance of unlicensed hearing representatives in WCAB proceedings has no merit. The privilege of a nonattorney to appear was created by the Legislature in sections 5501 and 5700. Having created this privilege, the Legislature also invested the Appeals Board with the power to deny, suspend or revoke it. There is no other tribunal to regulate the conduct of nonattorney hearing representatives appearing in WCAB proceedings.

Next, Mr. Escamilla argues that section 4907 "violates the Equal Protection Claus [sic] of the U.S. Constitution." Mr. Escamilla states that "[s]ince Section 4907 permits only the suspension or removal of some of the persons appearing before the Board (i.e. Nonattorney Hearing Representatives) and not others (Attorneys) for the same conduct, the statute denies Petitioner equal protection." However, "[t]he equality guaranteed by the equal protection clauses of the federal and state Constitutions is equality under the same conditions, and among persons similarly situated. The Legislature may make reasonable classifications of persons and other activities, provided the classifications are based upon some legitimate object to be accomplished." (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 659.) Nonlicensed hearing representatives are not "similarly situated to persons licensed to practice law in California." (*Longval v. Workers' Comp. Appeals Bd.* (1996) 51 Cal.App.4th 792, 803 [61 Cal.Comp.Cases 1396].) Thus, Mr. Escamilla's equal protection rights have not been violated.

[9] Section 4907 has since been amended to conform with the *Hustedt* decision. The present version of section 4907 expressly exempts "attorneys admitted to practice in the Supreme Court of the state" from its scope.

Mr. Escamilla also contends that his due process rights have been violated because the Appeals Board is acting in the dual role of "charging party" and "decision maker." However, the Supreme Court has explained that "[b]y itself, the combination of investigative, prosecutorial, and adjudicatory functions within a single administrative agency does not create an unacceptable risk of bias and thus does not violate the due process rights of individuals who are subjected to agency prosecutions." (*Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 737.) Mr. Escamilla also complains that "[t]he Board's own advising attorney, John Shields, has been assigned the position of prosecutor and such a structure does not adequately separate the prosecutory aspects from the adjudicatory function," allegedly in violation of Mr. Escamilla's due process rights. Although Mr. Shields regularly acts in an advisory role in other matters, his role in this matter is strictly prosecutorial. He has not acted in an advisory role in this matter. In *Morongo, supra*, the Supreme Court held that it is not a violation of due process to have an administrative agency utilize a prosecuting attorney who regularly acts as an advisor to the agency in other unrelated matters. Due process concerns are only raised when an attorney acts in an advisory and prosecutorial role in the same matter.

As in the instant proceedings, in *Morongo* the relevant tribunal issued a notice of proposed action and appointed one of its regular staff attorneys to be the prosecuting attorney, although she had acted as an advisory attorney in other matters. The Supreme Court held that, absent evidence that the same attorney was acting as an advisor and a prosecutor on the same matter, there was no due process violation. Here, Mr. Shields has not advised the Appeals Board in any manner regarding our adjudicatory function and has not engaged in any ex parte communications regarding this matter. The Court of Appeal has flatly held that "[q]uite clearly the WCAB may assign one or more members of its staff to act as investigators and prosecutors in a particular contempt proceeding and still have other members of its staff act as advisory counsel in the WCAB's internal adjudicatory process in that same matter." (*Rowen v. Workers' Comp. Appeals Bd.* (1981) 119 Cal.App.3d 633, 641 [46 Cal.Comp.Cases 634].) Mr. Escamilla's due process rights were not violated by the Appeals Board's dual role as investigator and decision-maker or by Mr. Shields' appointment as prosecuting attorney.

Mr. Escamilla complains that the Appeals Board is "improperly constituted by its lack of a lay

commissioner." (Transcript of September 24, 2012 Proceedings, p. 9.) Mr. Escamilla contends that his "due process rights as a lay representative are being denied as a result of the lack of lay representative on the Board." (Transcript of September 24, 2012 Proceedings, p. 9.) Section 112 states that "[f]ive of the members of the appeals board shall be experienced attorneys at law admitted to practice in the State of California. The other two members need not be attorneys at law." There is no requirement in section 112 or anywhere else that any Appeals Board member be a nonattorney. Mr. Escamilla's argument that he is being denied due process by the lack of any nonattorney member of the Appeals Board is patently frivolous.

Mr. Escamilla contends that these proceedings are improper because they were not "initiated by the filing of an Application of Adjudication, a case opening Compromise and Release Agreement, a case opening Stipulations with Request for Award, or a Request for Findings of Fact under [WCAB Rule] 10405" as provided by WCAB Rule 10400(a). (Cal. Code Regs., tit. 8, § 10400, subd. (a).) However, WCAB Rule 10400 applies only to proceedings regarding workers' compensation benefits, and not to a section 4907 hearing. This section 4907 proceeding was properly initiated by the NOH, which was served on Mr. Escamilla, and which apprised him of our proposed action and the factual and legal basis of that action.

Mr. Escamilla also complains that there are no published statutes or regulations setting forth the procedures to be followed in a section 4907 hearing. Mr. Escamilla is correct that section 4907 states that the privilege of a hearing representative may be suspended or removed "after a hearing," but there are no specific procedures regulating such a hearing. However, "where machinery has been supplied for the employment of its jurisdiction by legislative enactment, such machinery must be adopted or accepted by the court. But when a certain jurisdiction has been conferred on this or any court, it is the duty of the court to exercise it; a duty of which it is not relieved by the failure of the legislature to provide a mode for its exercise." (*People v. Jordan* (1884) 65 Cal. 644, 646.) "Absent an applicable rule of court covering such proceedings, the superior court, in exercise of its inherent power [may] adopt any suitable method of practice…." (*Buchwald v. Katz* (1972) 8 Cal.3d 493, 502; see also *Barnes v. District Court of Appeal* (1918) 178 Cal. 500, 504.) Because the WCAB is a "constitutional court" (*Dakins v. Board of*

Pension Commissioners (1982) 134 Cal.App.3d 374, 381 [47 Cal.Comp.Cases 1450]) and constitutionally exercises judicial power (*Laisne v. California State Board of Optometry* (1942) 19 Cal.2d 831, 837-838), it too may adopt suitable methods of practice. In addition to our inherent judicial power, the Legislature has specifically empowered us to "make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit [of the Labor Code]." (Lab. Code, § 5708.) The argument that this proceeding is improper because there are no statutes or regulations governing a section 4907 hearing is thus without merit.

"The due process clauses of the state and federal Constitutions (Cal. Const., art. I, § 7; U.S. Const., Amend. 14, § 1) generally require that the government provide notice and an opportunity to be heard before it deprives a person of property…." (*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 400.) Mr. Escamilla has requested the "utmost" due process in these proceedings, and it has been provided. He was given detailed notice of the reasons behind our proposed action. There have been five prehearing conferences. Mr. Escamilla testified two separate times. He has brought multiple motions, and was presented an opportunity to call witnesses, although he did not submit a witness list in a timely manner as previously ordered, and ultimately did not offer any live testimony other than his own. Documentary evidence offered by him was admitted despite the fact that he did not comply with clearly delineated timelines regarding its disclosure and filing. Mr. Escamilla complains that we denied his request to produce the file contents of the cases in which he was sanctioned, despite the fact that he was advised in our April 20, 2012 decision that, pursuant to Court Administrator Rule 10270 (Cal. Code Regs., tit. 8, § 10270) all of these documents were open for his inspection at his convenience during the regular business hours of the WCAB district offices. (*In Re Escamilla* (2012) 77 Cal.Comp.Cases 430, 432 [Appeals Board en banc].) Furthermore, all of the documentary evidence supporting the NOH was attached to the NOH itself and was thus provided to Mr. Escamilla at the outset of these proceedings. Mr. Escamilla has been afforded the "utmost" due process in these proceedings.

Mr. Escamilla claims that we denied his request for a change of the location of his hearing. However, Mr. Escamilla never set forth why the San Francisco hearing location would be a burden to any

witnesses or to his defense. In our January 20, 2012 decision in response to Mr. Escamilla's request to change the location of his evidentiary hearing to Southern California, we stated, "[i]f, after the pre-hearing conference and determination of the witnesses who will be appearing at the hearing, we determine that a location other than San Francisco is more appropriate, we may schedule the hearing in a different location." (*In Re Escamilla* (2012) 77 Cal.Comp.Cases 75, 77 [Appeals Board en banc].) However, at the March 16, 2012 prehearing conference, Mr. Escamilla only identified two potential witnesses, one living in the nation of Laos, and one living in Santa Ana, California. According to Mr. Escamilla's offer of proof at the March 16, 2012 conference, the proposed witness who lives in Santa Ana served as a workers' compensation administrative law judge during an unspecified period in the 1990s and "does not recall any cases where I appeared before her and either presented frivolous legal pleadings or arguments or pleadings which contained misrepresentations of material fact." (Transcript of March 16, 2012 Proceedings, p. 25.) Identification of a single Southern California witness, who was ultimately not called to testify at trial, did not justify moving this proceeding to Southern California. Mr. Escamilla could have requested depositions of any Southern California witnesses, and he was allowed to present evidence by declaration. Since Mr. Escamilla never called any live witnesses other than himself and has not claimed that his ability to present live witness testimony was in any way impeded by the evidentiary hearings taking place in San Francisco, Mr. Escamilla's argument is without merit.

Mr. Escamilla also complains that he was improperly denied a request to depose Deputy Commissioner Rick Dietrich whose only public function in these proceedings has been to authenticate documents from the underlying sanctions orders attached to the NOH. Other than a vague reference to wanting to question Deputy Commissioner Dietrich "on the matters raised in the initial accusation," Mr. Escamilla presents no legal basis to depose Deputy Commissioner Dietrich. Furthermore, WCAB rule 10593 provides that a Deputy Commissioner may not be compelled to testify regarding "(1) the reasons for or basis of any decision or ruling he or she has made or (2) his or her opinion regarding any statements, conduct, or events occurring in proceedings before him or her…." (Cal. Code Regs., tit. 8, § 10593, subd. a.) Similarly, Evidence Code section 703.5 states that:

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> "No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure."

While the basis of Mr. Escamilla's request to depose Mr. Dietrich is not entirely clear, he appears to seek information which is not discoverable from a member of a public judicial board, or from an attorney counseling a judicial board. Mr. Escamilla's request to depose Mr. Dietrich did not comply with the substantive or procedural mandates of WCAB Rule 10593, Evidence Code section 703.5 or the case law regarding depositions of counsel (see generally *Spectra-Physics v. Superior Court (Teledyne, Inc.)* (1988) 198 Cal.App.3d 1487) ["The circumstances under which opposing counsel may be deposed are limited to those where (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and not privileged; (3) the information is crucial to the preparation of the case."] "[A]n attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." (Code. Civ. Proc., § 2018.030, subd. (a); *Fireman's Fund Ins. Co. v. Superior Court (Front Gate Plaza, LLC)* (2011) 196 Cal.App.4th 1263, 1272-1281.) Mr. Escamilla's request to take Mr. Dietrich's deposition was properly denied.

Mr. Escamilla complains that subjecting him to "discipline" for the sanctions orders in *Harris v. Southwest Community College* (MON 0206997) and *Rios v. Trugreen Landcare* (AHM 092791), which were issued more than five years prior to the NOH, violates the statute of limitations. Mr. Escamilla bases this contention on section 5804, which states that, "No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition by a party in interest filed within such five years." However, section 5804 is inapposite, since we are not rescinding, altering, or amending any award of compensation.

There is no statute of limitations applicable to section 4907 proceedings. In any event, Mr. Escamilla's conduct in the *Harris* and *Rios* cases is part of a pattern of virtually unabated conduct. Under

the continuing violation doctrine, even conduct outside a limitations period is actionable if it is sufficiently linked to violations occurring within the limitations period. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812; *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 343-344.) "The key is whether the conduct complained of constitutes a continuing pattern and course of conduct as opposed to unrelated discrete acts. If there is a pattern, then the suit is timely…." (*Joseph v. J.J. MacIntyre Cos., L.L.C.* (N.D. Cal. 2003) 281 F.Supp. 1156, 1161.) Even if there were a limitations period applicable to a section 4907 proceeding, all of the conduct in the NOH would be encompassed by the continuing violation doctrine.

Next, Mr. Escamilla argues that the current proceedings "are in excess of the Board's jurisdiction based on the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution because both the prior sanctions and any suspension or removal would constitute punishment under the Fifth Amendment." (November 7, 2011 Petition for Reconsideration, p. 20.)

The Double Jeopardy Clause of the Fifth Amendment states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb…." (U.S. Const., 5th Amend.) "The Clause protects only against the imposition of multiple *criminal* punishments for the same offense." (*Hudson v. United States* (1997) 522 U.S. 93, 99.)

Mr. Escamilla's reliance on *United States v. Halper* (1989) 490 U.S. 435, 446 for the proposition that a civil sanction may be considered a criminal punishment for purposes of the Double Jeopardy Clause is misplaced. *Halper* was expressly overruled by the United States Supreme Court in *Hudson, supra,* which held that "*Halper's* deviation from longstanding double jeopardy principles was ill considered." (*Hudson*, 522 U.S. at p. 101.)

Under *Hudson*, it is clear that the sanctions assessed against Mr. Escamilla were civil, not criminal sanctions. "Administrative determinations of liability … have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations." (*Id.* at p. 103 quoting *United States v. Spector* (1952) 343 U.S. 169, 178 (Jackson, J., dissenting).) Additionally, "the payment of fixed or variable sums of money is a sanction which has been recognized as enforceable by civil proceedings since the original revenue law of 1789." (*Hudson,* at p.

104, quoting *Helvering v. Mitchell* (1938) 303 U.S. 391, 400.) It is clear that the underlying sanctions were civil sanctions, which did not subject Mr. Escamilla to any jeopardy. Additionally, license revocation proceedings and state bar disciplinary proceedings are not criminal actions subjecting one to jeopardy. (*Emslie v. State Bar* (1974) 11 Cal.3d 210, 224; *Hawkins v. State Bar* (1979) 23 Cal.3d 591, 628.)

Finally, Mr. Escamilla argues that we are abridging the Freedom of Speech Clause under the First Amendment of the United States Constitution because our proposed action is based on his "speech" rather than on his "conduct." However the First Amendment does not protect the right to initiate groundless proceedings, or the right to take frivolous legal positions or make false or misleading statements in litigation proceedings. (*Bill Johnson's Restaurants, Inc. v. National Labor Relations Board* (1983) 461 U.S. 731, 743; *Larsen v. Commissioner of Internal Revenue* (9th Cir. 1985) 765 F.2d 939, 941.)

VI.

DISPOSITION

Good cause having been established, we order that Mr. Escamilla be suspended from appearing before the Workers' Compensation Appeals Board as a hearing representative on behalf of any party or lien claimant for a period of 90 days. During this time Mr. Escamilla is prohibited from performing any acts in furtherance of representation of clients before the WCAB including, but not limited to, drafting and/or filing pleadings or other documents before the WCAB, negotiating and settling claims relating to workers' compensation proceedings, appearing at depositions, appearing at WCAB hearings, and engaging in discovery or responding to discovery requests. This suspension will commence 45 days after the date of the filing of this order.

For the foregoing reasons,

IT IS ORDERED that Respondent Mr. Escamilla's Exhibits 6 through 12 are admitted into evidence.

IT IS FURTHER ORDERED that Mr. Escamilla's Request for Judicial Notice of the Amicus Curie [sic] Brief Filed by the California State Bar in the Court of Appeal Proceedings in *Hustedt v.*

Workers Comp. Appeals Bd. (marked as Respondent's 13) is **GRANTED**.

IT IS FURTHER ORDERED that Mr. Escamilla's Request for Judicial Notice of the Orders Imposing Sanctions in *Speight v. Vulcan Materials Co.* (marked as Respondent's 14) is **GRANTED**.

IT IS FURTHER ORDERED that Mr. Escamilla be suspended from appearing before the Workers' Compensation Appeals Board as a hearing representative on behalf of any party or lien claimant for a period of 90 days, commencing 45 days from the filing of this Order.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Chairwoman

/s/ Frank Brass
FRANK BRASS, Commissioner

/s/ Deidra Lowe
DEIDRA LOWE, Commissioner

/s/ Alfonso Moreso
ALFONSO MORESI, Commissioner

/s/ Marguerite Sweeney
MARGUERITE SWEENEY, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
2/14/2013

SERVICE BY MAIL EFFECTED ON ABOVE DATE ON THE FOLLOWING PARTIES:

DANIEL ESCAMILLA
JOHN SHIELDS, Staff Attorney
HONORABLE DAVID HETTICK

DW/bgr