

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

RONALD PAYNE, *Applicant*

vs.

**CDCR, administered by STATE COMPENSATION INSURANCE FUND/STATE
CONTRACT SERVICES, *Adjusting Agency, Defendants***

**Adjudication Number: ADJ9887085
Long Beach District Office**

OPINION AND ORDER DISMISSING PETITION FOR REMOVAL

Applicant Ronald Payne, in pro per, seeks removal of the Opinion and Order Denying Petition for Removal issued by the Workers' Compensation Appeals Board (Appeals Board or we) on July 20, 2022 (July 2022 Opinion). In the July 2022 Opinion, the Appeals Board denied applicant's August 16, 2021 Petition for Removal of the Appeals Board's August 9, 2021 Opinion and Order Denying Petition for Disqualification of workers' compensation administrative law judge (WCJ) Diana Marsteiner (August 2021 Opinion),¹ and denied applicant's January 5, 2022 Petition for Disqualification of WCJ Marsteiner because it was untimely. The Appeals Board also noted that even if the January 5, 2022 Petition for Disqualification had been timely filed, applicant failed to state grounds sufficient to disqualify WCJ Marsteiner and that the record "confirmed the summary of the facts and circumstances set forth in the WCJ's Report – and, in turn, did *not* confirm the allegations made by applicant in the petition." (July 2022 Opinion, p. 4.)

Applicant reiterates contentions previously alleged related to the WCJ's alleged failure to set applicant's various petitions for hearing; related to questions of fact in the case in chief that have yet to be heard and/or adjudicated; and, related to applicant's erroneous interpretation of the legal effect of defendant's failure to file written objections to its petition to reopen and declarations of readiness to proceed. In addition, applicant contends that the Appeals Board denied the removal on "minor procedural" errors such as his failure to file a declaration under the penalty of perjury

¹ In the August 2021 Opinion, the Appeals Board denied applicant's April 30, 2021 Petition for Disqualification of WCJ Marsteiner.

stating detailed facts to establish grounds to disqualify WCJ Marsteiner (Cal. Code Regs., tit. 8, § 10960). Finally, applicant contends that the Appeals Board failed to correctly interpret its own Rule 10744, which constituted a “ridiculous argument” that was “insulting to anyone’s intelligence.”

Defendant filed an Answer to Applicant’s Petition for Removal (Answer).

We have reviewed the record in this matter, and have considered the allegations in the Petition for Removal and defendant’s Answer. Based on the record, and for the reasons set forth herein, we dismiss the Petition for Removal.

I.

Applicant filed a pleading titled, “Applicant’s Answer to Defendant’s Answer to Petition for Removal,” on September 2, 2022. This pleading is not an answer to a petition for reconsideration, removal, or disqualification and is therefore a “supplemental pleading” pursuant to WCAB Rule 10964. (Cal. Code Regs., tit. 8, § 10964 [“When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses *other than the answer* shall be considered only when specifically requested or approved by the Appeals Board.”], emphasis added.) We find no petition to file a supplemental pleading in the record of this matter, even though applicant was cautioned in the July 2022 Opinion and the August 2021 Opinion to comply with WCAB Rule 10964. (Cal. Code Regs., tit. 8, § 10964 [“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.”], emphasis added.)

Consequently, we do not accept the pleading for filing as a supplemental pleading, and do not consider the allegations in the pleading.

II.

Applicant attached exhibits to the Petition for Removal in violation of WCAB Rule 10945, subdivision (c) (Cal. Code Regs., tit. 8, § 10945(c)), which states as follows:

(c) (1) Copies of documents that have already been received in evidence or that have already been made part of the adjudication file shall not be attached or filed as exhibits to petitions for reconsideration, removal, or disqualification or answers. Documents attached in violation of this rule may be detached from the petition or answer and discarded.

(2) A document that is not part of the adjudication file shall not be attached to or filed with a petition for reconsideration or answer unless a ground for the petition for reconsideration is newly discovered evidence.

(3) A document shall not be attached to or filed with a petition for removal or disqualification or answer unless the document is not part of the adjudication file and is relevant to a petition for removal or disqualification.

Exhibit A is a Declaration of Readiness to Proceed (DOR) with a “received” stamp from the Long Beach District Office dated August 4, 2022.² The DOR is dated February 28, 2021. We do not find this document in the Electronic Adjudication Management System (EAMS). There is no way to determine whether this document was actually filed in EAMS. There have been no hearings in this matter after the March 11, 2021 trial at which applicant failed to appear. (Minutes of Hearing, March 11, 2021.) Even if we assume *arguendo* that this document constitutes “new evidence,” we find it irrelevant to our determination of the pending Petition for Removal, the August 12, 2021 petition for removal, or the January 5, 2022 Petition for Disqualification. When the record in this case is reviewed *in toto*, it becomes quite clear that hearings were held after each DOR filed in this case; that all continuances of this matter were reasonable under the circumstances; and that the WCJ was very interested in proceeding to trial in this case. (See section IV, *infra*.) Therefore, although Exhibit A is not a part of the adjudication record, it is not relevant to the pending Petition for Removal, the August 12, 2021 petition for removal, or the January 5, 2022 Petition for Disqualification. Exhibit A was therefore attached in violation of WCAB Rule 10945, subdivision (c)(3). Exhibit A will be detached from the petition and discarded. (Cal. Code Regs., tit. 8, §10945(c)(3).)

Exhibit B is an unsigned and undated Petition to Reopen with a “received” stamp from the Long Beach District Office dated July 22, 2020. We do not find this document in EAMS. However, we do find in EAMS an identical Petition to Reopen, which has a “received” stamp from the Long Beach District Office dated October 26, 2020. (See Petition to Reopen, filed October 26, 2020, EAMS Doc ID 73471918.) Therefore, Exhibit B is already part of the adjudication file and was attached in violation of WCAB Rule 10945, subdivision (c)(1). Exhibit B will be detached from the petition and discarded. (Cal. Code Regs., tit. 8, §10945(c)(1).)

² Applicant erroneously describes the document as a copy of a DOR filed on April 30, 2021 with his April 30, 2021 Petition to Reopen.

Exhibit C contains two nearly identical October 31, 2016 notices to applicant from SCIF related to permanent disability benefits disability status. The only difference in these documents is that one of them was put on SCIF letterhead, and the other was not. They are identical in content. These October 31, 2016 notices are already a part of the adjudication record. (See PD Notice to IW 10-31-2016.pdf, October 31, 2016, EAMS Doc ID 24492653.) Therefore, Exhibit C was attached in violation of WCAB Rule 10945, subdivision (c)(1) and will be detached from the petition and discarded. (Cal. Code Regs., tit. 8, §10945(c)(1).)

III.

Applicant's Petition for Removal is impermissibly successive. (See *Crowe Glass Co. v. Industrial Acc. Com. (Graham)* (1927) 84 Cal.App. 287, 293 (*Crowe Glass*), and *Navarro v. A&A Farming* (2002) 67 Cal.Comp.Cases 296, 299 (Appeal Bd. en banc) (*Navarro*).) In other words, no party may file a successive petition alleging the same facts and the same law as was already determined by the Appeals Board. (*Ibid.*) The Court in *Crowe Glass* explained that,

Under such a practice there would be no end to the litigation, as no time, however great, would operate to bar successive applications provided only that they were applied for in seasonable time. Such a construction would lead to legal chaos. ... the construction contended for would defeat the very purposes of the act itself which contemplates a speedy determination of controversies involved thereunder, and not a vacillating attitude on the part of the Commission. (*Crowe Glass, supra*, 84 Cal.App. 287 at p., 293.)

The only exception to this rule is when the Appeals Board's decision is based on new and additional evidence (*Pacific Employers Ins. Co. v. Industrial Acci. Com. (Mazzanti)* (1956) 139 Cal.App.2d 22, 25 [21 Cal.Comp.Cases 46]; or, on a new rationale not previously raised (*Navarro, supra*, 67 Cal.Comp.Cases at p. 300-301, citing *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584, 592] and *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805, 809-810]).

Here, applicant seeks removal of the July 2022 Opinion based on the same contentions and grounds raised in his August 16, 2021 petition for removal, and in his April 30, 2021 Petition for Disqualification. Applicant presents counter-arguments to the legal and factual conclusions *already determined* by the Appeals Board in the 2022 Opinion and the August 2021 Opinion. There is no new or additional evidence, nor any new rationale not previously raised.

We therefore dismiss the Petition for Removal as impermissibly successive.

IV.

We note that when the record in this case related to WCJ Marsteiner is reviewed *in toto*,³ it becomes very clear that hearings were held after each DOR filed in this case; that all continuances of this matter were reasonable under the circumstances; and that the WCJ was very interested in proceeding to trial in this case.

- DOR, February 7, 2020 and Minutes of Hearing, February 18, 2020 [“matter was set for trial on many issues today, but the threshold issue that needs to be decided first is whether there is good cause to set aside the 12/5/17 Award;” parties still resolving discovery issues];
- DOR, August 10, 2020 and Minutes of Hearing, September 10, 2020 [matter continued because the WCJ was ill];
- DOR, October 26, 2020 and Minutes of Hearing, November 12, 2020 [matter continued so that WCJ could receive and review a federal court complaint filed by applicant naming the WCJ as a defendant];
- Minutes of Hearing, January 5, 2021 [WCJ denied *applicant’s* request for continuance pending resolution of his federal case, but ordered continuance “one last time” because of *applicant’s* failure to file his trial exhibits; applicant “ORDERED” to file exhibits no later than 10 days before trial];
- Minutes of Hearing, March 11, 2021 [trial continued because *applicant* failed to appear and could not be reached by phone or email; matter to be taken off calendar if applicant fails to appear at next trial date [see Cal. Code Regs., tit. 8, § 10756];⁴ applicant also told to comply with January 5, 2021 order to file exhibits].)

It appears that trial in this matter was thereafter reset for May 11, 2021, but defendant’s counsel was unavailable for that date and requested trial in the week of May 17 or May 24, 2021. (Letter to Judge Diana Marsteiner, April 13, 2021.) The May 11, 2021 trial was thereafter cancelled pursuant to defendant’s request. (EAMS, Events.)

However, it was after the March 11, 2021 trial when applicant failed to appear, that applicant began filing petitions objecting to WCJ Marstein; requesting that the Appeals Board disqualify WCJ Marstein; and thereafter, filing several petitions for removal of the Appeals

³ WCJ Marsteiner appears to have been assigned this matter in February 2020. Before February 2020, this matter appears to have been assigned to WCJ Gene Lee (2019-January 2020); WCJ Frisch (October 10, 2017); WCJ Cyprien (2017-2018); WCJ Spitzer (November 15, 2018); and WCJ Nelson (January 11, 2016.)

⁴ “Where a required party, after notice, fails to appear at a trial in the case in chief: ¶ (a) If good cause is shown for failure to appear, the workers' compensation judge may take the case off calendar or may continue the case to a date certain.” (Cal. Code Regs., tit. 8, § 10756 (a).)

Board's decisions. Although the WCJ retains jurisdiction to conduct proceedings while a petition for removal and/or disqualification is pending, applicant must recognize that a petition for disqualification of the WCJ should be determined *before* any further proceedings are held before that WCJ. (See *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805] (*Rucker*) [all parties are entitled to due process, i.e., notice and a fair hearing].)

We also note that applicant appears to misconstrue the purpose of the DOR.⁵ Contrary to applicant's contentions, the filing of a DOR form is a workers' compensation procedure to request a hearing at the District Office. (See Cal. Code Regs., tit. 8, § 10742.) As a result of this misunderstanding, applicant appears to be concerned that the issues identified in his various DORs and petitions to re-open will somehow not be adjudicated, i.e., included in the issues set for trial. However, there is no need for concern. It is the pre-trial conference statement (PTCS) – which is actually the important document that identifies all issues for trial (i.e., *not* the DOR). (See Cal. Code Regs., tit. 8, § 10759(b) [“the parties shall complete a joint Pre-Trial Conference Statement setting forth the issues and stipulations for trial, witnesses, and a list of exhibits by the close of the mandatory settlement conference”].)

The parties in this case prepared a PTCS on January 9, 2020 wherein they identified various issues for trial including applicant's temporary and permanent disability; applicant's petitions to reopen and set aside the prior order approving stipulations; and, SCIF's alleged fraudulent conduct. These are the very issues raised in applicant's various DORs and petitions to re-open. Thus, all the issues raised by applicant are *already* identified for trial in the parties' January 9, 2020 PTCS.

In addition, the parties and the WCJ will again have the opportunity to refine the issues for trial on the first day of trial, which will then be included in the minutes of hearing and summary of evidence prepared by the WCJ at the end of the trial. (Cal. Code Regs., tit. 8, §10787(c)(3) [minutes of hearing and summary of evidence “shall be prepared” and “shall include...the issues

⁵ See eg., applicant's “Petition to Schedule Court Hearing Pursuant to Labor Code 5502(e)(1),” May 19, 2021 [“...of course Employee's case has been set for trial (although it has been set for trial for 15 months) but that has nothing to do with the Declaration of Readiness to Proceed that Employee recently filed containing new allegations that Employee has learned of after he filed the November 10, 2018 Declaration of Readiness to Proceed. ¶ Employee has previously alleged that Judge Marsteiner is heavily biased against him, and Employee contends that this is another good example of that bias, Employee contends that the allegations listed in his Declaration of Readiness to Proceed are serious in nature, and there is irrefutable evidence in writing to support Employee's allegations, so for whatever reason Employee contends it appears that Judge Marsteiner is biased against Employee and/or is protecting State Fund, and as a result Judge Marsteiner is not scheduling a court hearing pursuant to California Labor Code 5502 (e)(1).”].)

and matters in controversy...”]; (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Bd. en banc).)

Finally, we reiterate that all 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, including defendant. (*Rucker*, 82 Cal.App.4th at pp. 157-158.) Therefore, just because defendant did not object to applicant’s various petitions to reopen and DORs, does not mean that defendant somehow waived or lost its right to due process – defendant is still entitled to notice and a fair hearing on the merits. As stated in the 2022 Opinion, it is up to the parties to file a DOR to reset this matter for trial (Cal. Code Regs., tit. 8, § 10742(a)). If they do so, WCJ Marstein will hear the matter as she has previously – and consistently – done in this case.

III.

Applicant was reminded in the July 2022 Opinion that using language that is “patently insulting, offensive, insolent, intemperate, foul, vulgar, obscene, abusive or disrespectful,” or “impugns the integrity of the Workers' Compensation Appeals Board or its commissioners, judges or staff...” may be grounds for sanctions. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421(b)(9).)

Even so, applicant has *once again* used language in reference to the Appeals Board that is “. . . patently insulting, offensive, insolent, intemperate . . . or disrespectful . . .” and “impugns the integrity” of the Appeals Board (Cal. Code Regs., tit. 8, § 10421(b)(9).) While it is certainly acceptable to offer alternative argument for consideration, applicant’s statements that the Appeals Board’s interpretation of its own Rule is “ridiculous” and “insulting to anyone’s intelligence” are “patently insulting, offensive, insolent, intemperate” and “disrespectful.” (Cal. Code Regs., tit. 8, § 10421(b)(9).) It also “impugns the integrity” of the Appeals Board. (*Ibid.*) By including such language, applicant has once again engaged in, “. . . bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.” (Lab. Code, § 5813(a).)

In addition, applicant has once again violated the WCAB’s Rules with respect to supplemental pleadings (Cal. Code Regs., tit. 8, § 10964), despite being cautioned in the July 2022 Opinion and the August 2021 Opinion to comply with WCAB Rule 10964, or potentially face the imposition of sanctions for failure to follow the WCAB’s Rules. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421.) Applicant has also violated the WCAB’s Rules with respect to attaching documents. (Cal. Code Regs., tit. 8, § 10945.)

We therefore now admonish applicant to pursue his claim in good faith, to follow the WCAB's Rules, and to conduct himself with the courtesy and respect required by Labor Code section 5813 and WCAB Rule 10421. We remind applicant that violations of these rules may subject him to an award of attorney's fees and costs and monetary sanctions in an amount of up to \$2,500.00. (Lab. Code, § 5813(a).)

Accordingly, applicant's Petition for Removal is dismissed as successive.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal of the Opinion and Order Denying Petition for Removal issued by the Workers' Compensation Appeals Board on July 20, 2022 is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 25, 2022

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

**RONALD PAYNE, IN PRO PER
STATE COMPENSATION INSURANCE FUND**

AJF/abs

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