WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DAVID LIN, *Applicant*

vs.

AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA SEDGWICK, *Defendants*

Adjudication Number: ADJ8233486
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Orders (F&O) issued by a workers' compensation administration law judge (WCJ) on November 29, 2023, wherein the WCJ found that applicant did not sustain injury arising out of and in the course of his employment (AOE/COE) to his neck, back, digestive tract, psyche, internal (in the form of asthma), sleep, sexual dysfunction, shoulders, chest and headaches, and that all other issues were deemed moot. The WCJ ordered that applicant take nothing from his claims. The WCJ also entered into evidence applicant's Exhibits 5 through 9 and 41, defendant's Exhibit BB, and the Court's Exhibits's ZZ, ZZ-2 and ZZ-2. The WCJ struck applicant's Exhibit 42 (Transcript Testimony of David T. Lin, Volumes I and II dated February 3, 2012 and April 16, 2012).

Applicant contends that the WCJ did not comply with the instructions of the Appeals Board's April 18, 2023 Opinion and Decision after Reconsideration (2023 Decision) in this case[1] wherein the WCJ's prior take nothing order was rescinded and the matter returned to the WCJ to create a full and complete record; the WCJ determined that because applicant is listed as the CEO of a corporation on a Secretary of State (SOS) form, the treating doctor and the panel qualified medical evaluator (QME) did not have an accurate history of applicant's activities in supplemental re-evaluation during trial related to applicant's ability to sit for further testimony and/or cross-

[1] Commissioner Dodd, who was on the panel that issued a prior decision in this matter, is unavailable and another panelist has been assigned in her place.

examination at trial; that applicant's counsel offered alternative ways to address the SOS form and any inferences arising from the fact that applicant was named as the CEO of a corporation (i.e., probative documents to be reviewed by the WCJ in camera to establish that the corporation never operated or made income; Elizabeth Lin's willingness to testify at trial with the WCJ present; returning applicant to the QME and/or treating doctor regarding the SOS information); that although deposition transcripts are admissible in workers' compensation in lieu of live testimony, the WCJ refused to admit applicant's deposition testimony during which defendant was able to cross-examine applicant; and, that the WCJ has repeatedly indicated a bias toward applicant based on the fact that he sustained a psychological injury rather than a physical injury.

Defendant filed an Answer to Petition for Reconsideration (Answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration (Report). The WCJ recommended that the Petition for Reconsideration be denied.

We have reviewed the record in this case, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. Based on our review of the record in this case, we grant reconsideration and as our decision after reconsideration, we rescind the F&O and return this case to the trial level for further proceedings. Given the acrimony apparent on the surface of the pleadings in this matter, which we believe gives rise to the inability of the WCJ to prepare a proper record for review on reconsideration despite the attempt to guide the process in the 2023 Decision, we conclude that the parties would be better served by a re-assignment to a new WCJ. (Lab. Code, §§ 5300, 5301, 5708.) We therefore return the matter to the presiding WCJ for re-assignment as to another WCJ. (Cal. Code Regs., tit. 8, § 10346(a).)

I.

We note that the underlying issue that gave rise to this F&O, as well as the September 15, 2020 F&O that we rescinded by way of the 2023 Decision, started in December 2016. (See Opinion and Orders Denying Petition for Removal, April 6, 2017 and July 24, 2017.) On the seventh day of trial, applicant, who was diagnosed by the QME with major depressive disorder and a generalized anxiety disorder, objected to defendant's notice to appear and testify based on a medical restriction – which, we note, if supported by medical opinion, is a legitimate objection to a notice to appear:

At the December 12, 2016 trial date in this case, applicant objected to defendant's December 13, 2016 Notice to Appear, alleging that he was medically restricted from testifying pursuant to the November 17, 2016 "Return to Work and Disability Form" prepared by PTP Dr. Curtis. (Minutes of Hearing (Further), December 12, 2016 ("December MOH"), p. 4:6-24; Objection to Defendant's Notice to Appear 11/29/16 and Various Attachments, December 12, 2016 ("Objection"), p. 3.) Defendant responded by stating that applicant was playing games and made an oral motion to dismiss applicant's claim based on defendant's inability to cross-examine applicant, due process and its right to a speedy trial. (December MOH, pp. 4:20-24, 7:9-15.)
...

On January 4, 2017, defendant filed a Motion for an Evidentiary Hearing on Applicant's Unavailability to Testify at Trial, and a Petition for Order Compelling Second Deposition of the Applicant and Production of Documents. (Motion for an Evidentiary Hearing on Applicant's Unavailability to Testify at Trial, January 4, 2017 ("Motion"); Petition for Order Compelling Second Deposition of the Applicant and Production of Documents, January 4, 2017 ("Petition").)
...

On April 10, 2017, the parties again proceeded to trial, at which time the WCJ issued and personally served the orders at issue in defendant's Petition for Removal. (See Minutes of Hearing (Further), April 10, 2017 ("April MOH").) The WCJ granted defendant's Motion and Petition, re-opened discovery and ordered further development of the record on the limited issue of applicant's unavailability to testify based on a medical restriction. (Ibid.)
...

The WCJ continued the trial to June 19, 2017 in order to allow defendant to conduct discovery and thereafter proceed to an evidentiary hearing on the issue of applicant's unavailability to testify based on a medical restriction. (April MOH, pp. 1:23-24, 2:22-25.)

On May 1, 2017, defendant filed this Petition for Removal, contending that there was no good cause to continue the trial and that the WCJ's April 10, 2017 orders violated its rights to due process, equal protection under Labor Code section 3202.5, and its right to an expeditious hearing under the California Constitution (Cal. Const., Art. XIV, §4). In addition, defendant also contends that there is no good cause to re-open discovery or order further development of the record on the limited issue of applicant's unavailability to testify based on a medical restriction.
...

Here, defendant consistently complains that by filing his Objection and refusing to testify, applicant is engaged in "gamesmanship," and is intentionally acting

> to disrupt and delay proceedings and deny defendant its right to due process. (December MOH, pp. 4:20-24, 7:9-15; Petition for Removal, p. 15:18-16:11, 16:23-28.) Now that the WCJ has acted to protect defendant's rights to due process, defendant reverses course, contending that somehow, allowing the discovery and evidentiary hearing it requested violates its right to due process, equal protection under Labor Code section 3202.5, and the constitutional mandate for expeditious proceedings.

(Opinion and Order Denying Petition for Removal, July 24, 2017, p. 2-4.)

After further evaluation, QME Marcia G. Lamm, Ph.D., gave the following opinion:

> Having had the opportunity to re-evaluate Mr. Lin, I find hi[s] psychological condition to be consistent - albeit, deteriorated, as compared to his presentation at the time of his initial evaluation, in August of 2013. He remains quite timid, anxious, easily startled and panicked, and he continues to demonstrate nervous apprehensions and disturbances in concentration and thought processing which render him feeling emotionally paralyzed. His anxiety is reflected in his difficulty with word finding, completing testing which took an extended amount of time as he agonized over each question on the paperwork - and doubting his ability to give a complete and thorough account of his condition and history. He continues to present with pronounced anxiety associated with his injuries and in describing his emotions. There were times when his anxiety caused him to stutter or stammer, speaking almost inaudibly, and becoming internally distracted and tearful. Revisiting the work history was clearly overwhelming and painful to him. His panic was quite evident during the interview and testing. In reflecting on my initial impressions, I find Mr. Lin to present with progressed symptoms of depression, anxiety, panic, and emotional fragility. He presents at this time with almost paralyzing anxiety.
>
> Based on his clinical presentation, and current psychological testing, it is my opinion that Mr. Lin is psychologically incapable of testifying in any litigation proceedings and/or depositions relating to industrial injuries, as it is anticipated if forced to do so, it would result in further psychological injury and harm, and would aggravate his psychological condition.

(Court Exh. ZZ, May 10, 2017 report of Dr. Lamm, p. 8.)[2]

[2] In her March 27, 2013 report, Dr. Lamm concludes that "[b]ased on his clinical presentation, and test results, it appears that Mr. Lin has made no conscious attempt to mislead, distort, nor exaggerate his symptoms. His current testing results appear to be a fairly accurate estimate of his current symptoms. I do not find this patient is malingering." (Court Exh. Z, p. 37.) In May 2017, Dr. Lamm also found after clinical testing that "[m]alingering is not indicated, based on the results of this test, and scores are consistent with Mr. Lin's clinical presentation." (Court Exh. ZZ, p. 7.)

Treating doctor Thomas A. Curtis, M.D., gave the following opinion:

> There was also a request to evaluate Mr. Lin's ability to testify in deposition or in court. Judge Greenberg has requested evaluation from the treating psychiatrist, myself, and from the PQME psychologist, Dr. Lamm.
>
> As indicated in my earlier handwritten note of 11/17/16, Mr. Lin would develop panic anxiety from focusing on the disturbing events which would bring it all back, impair his recovery and make him temporarily worse and probably permanently worse. It would just cause an unnecessary mental decompensation.
>
> In my experience, this is not a complicated situation, one that is not rare in litigation psychiatry. A comprehensive psychiatric evaluation is not needed for this issue.
>
> Mr. Lin should not be forced to testify at court or in deposition. Under such force, he would just get worse, like he did after each of his depositions.

(App. Exh. 41, May 18, 2017 report of Dr. Curtis, p. 2.)

The parties also engaged in further written discovery, namely defendant's request for applicant to produce documents (RFPD). Two of defendant's requests were particularly disputed:

> DOCUMENT REQUEST NO. 2:
> All documents of any subsequent employment (including self-employment) after Applicant's termination from the Automobile Club of Southern California.
> ...
>
> DOCUMENT REQUEST NO. 6:
> All records of earnings from any subsequent employment (including self employment) after Applicant's termination from the Automobile Club of Southern California.

(Verified Amended Responses & Objections to Defendant's Request to Production of Documents per Defense Letter of 5/11/17 (Amended RFPD Responses), filed May 19, 2027, pp. 3, 5.)

In response to both requests, applicant initially responded that without waiving objections, he was "not in possession of any documents as this request is not applicable." (Applicant's verified Responses & Objections to Defendant's Request for Production of Documents (RFPD Responses), filed May 8, 2017, pp. 4-5.) Applicant's amended response to both requests was that both requests were an attempt by defendant to re-open discovery. (Amended RFPD Responses, pp. 3, 5.)

During the continued trial on August 15, 2017, applicant's counsel stated that without waiving objections, there were no responsive documents to the RFPD. (Minutes of Hearing and

Summary of Evidence, August 15, 2017, at Def. Exhs. CC and DD, pp. 5-6.) Defendant then alleged that applicant withheld documents from production in response to Document Request Nos. 2 and 6, namely two documents filed with the SOS naming applicant CEO on February 3, 2014 of a corporate entity titled Advanced Communications Technology Research Group Corporation (Advanced Communications), until at least February 19, 2016. (*Ibid.*) Defendant accused applicant of misrepresentation about his ability to work, and that the SOS documents were evidence that as CEO of a corporation, he has had employment and earnings after his employment with defendant. (*Id.*, at p. 4; see defendant's Second Notice and Petition for Costs and Sanctions, Including Issue, Evidentiary and Terminating Sanctions Re: Failure to Comply with Order to Compel Production of Documents (RFPD Petition), September 29, 2017.)[3]

Applicant submitted a verified response to defendant's RPFD Petition that the SOS documents were not responsive in any way to either RFPD number 2 or 6 because applicant was never employed or self-employed since his termination from defendant's employment. (Applicant's Response to Defendant's Petition for Sanctions, Defendant's Request for Dismissal and Applicant's Response Requested by the WCJ regarding S-Corp filing documents (SOS Response), October 2, 2017, p. 2.)

> The documents produced to the WCJ are S-Corp filings. S-corp owners are not considered self-employed. Straight from the IRS website, "if an officer does not perform any services or only performs minor services and is not entitled to compensation, the officer would not be considered an employee." Here the Applicant performs no services nor duties for the S-corp. The S-corp has no clients/customers. The S-corp has no income, nor distributions and the Applicant has not received any wages. Even the documents submitted by defendants show that the filings were done by someone other than the Applicant.

(SOS Response, p. 3.)

Applicant's counsel offered to submit to an in camera interview with the WCJ with applicant present "with regard to privileged communication and/or information on this narrow and limited topic to verify the representations made to the court and in this response so that the WCJ is able to verify the veracity of the statements made and confirm the credibility of the Applicant and to clear up any doubts the WCJ may in this matter." (SOS Response, p. 7.) The WCJ subsequently refused this offer in any form.

[3] At this stage, there were multiple dueling petitions for costs and sanctions filed by both parties. (See eg., MOH, August 15, 2017, p. 4.) To the best of our knowledge, there are still no orders on most of the dueling petitions.

On September 11, 2017, defendant took the deposition of QME Dr. Lamm. (Court Exh. ZZ, Deposition of Marcia Lamm, Ph.D., September 11, 2017.) Dr. Lamm testified that in order to assess whether applicant's position as CEO of a corporation would have any effect on her opinion on his ability to concentrate and testify at trial, she "would have to see what he was doing." (*Id.*, at pp. 38-39.) There is no indication in the record that applicant was ordered to return to Dr. Lamm for re-evaluation so that she could ask him about Advanced Communications, nor that the verified SOS response was ever sent to Dr. Lamm.

On December 19, 2017, the WCJ issued an Order Allowing the Subpoena Deposition of Elizabeth Lin (Elizabeth Lin Order), to further defendant's discovery related to applicant's ability to testify. (Elizabeth Lin Order, December 19, 2017, Order no. 1.)[4] The WCJ ordered that applicant's wife, Elizabeth Lin, be deposed regarding "the request of defendant showing employment; (Applicant is CEO)..." (*Ibid*.) Applicant sought removal of the Elizabeth Lin Order; the Appeals Board's Opinion and Order Denying Petition for Removal was issued on January 18, 2018 and stated in pertinent part:

> Based on our April 6, 2017 Opinion and Order Denying Petition for Removal, the WCJ ordered discovery reopened for the limited purpose of conducting discovery regarding applicant's alleged unavailability to testify at trial, including medical evaluations by primary treating physician Thomas A. Curtis, M.D., and qualified medical [e]valuator Marcia Lamm, Ph.D., further depositions of Drs. Curtis and Lamm, and potentially, a second deposition of applicant. (See Opinion and Order Denying Petition for Removal, July 24, 2017.) Defendant sought removal of these new orders, contending that applicant's case should simply be dismissed based on his refusal to testify at trial. (*Id*.) We denied defendant's removal, and reiterated that applicant's objection to testifying at trial had not yet been heard by the WCJ because further discovery on the issue had yet to proceed. (*Id*.)
>
> > The gravamen of the issue created by applicant's Objection is the parties' respective right to due process. This is a complex issue deserving of careful consideration by the WCJ. Defendant diligently requested additional discovery and an evidentiary hearing on the question of applicant's unavailability to testify at trial; to deny defendant that opportunity would severely restrict its ability to conduct a fair hearing on the issue. (Opinion and Order Denying Petition for Removal, July 24, 2017, p. 4:17-21.)

[4] This order also contained an order that applicant's objections to defendant's RFPD were overruled and that applicant was to serve supplemental responses; amended responses were served followed by further petition by defendant for costs and sanctions and terminating sanctions for insufficient amendments and violations of this order.

> The discovery orders at issue herein relate to the same issue raised in both applicant's and defendant's prior petitions for removal, i.e., applicant's ability to testify at trial as raised in applicant's Objection to Defendant's Notice to Appear. Applicant's current Petition for Removal attempts to resolve the issue of marital privilege as it relates to these discovery orders before the discovery has taken place. We concur with the WCJ that any applicable objections may be made at the deposition of Elizabeth and/or in applicant's supplemental responses to defendant's document request. (See Report, p. 3.)
>
> We also disagree with applicant's assertion of the marital privilege in Evidence Code sections 970 and 971 as a sort of "blanket" privilege preventing any testimony by Elizabeth Lin, and caution both parties to distinguish carefully between questions that may fall within that privilege, and questions that may be outside the scope of the privilege. (See *People v. Bradford* (1969) 70 Cal.2d 333, 342-343.)

(Opinion and Order Denying Petition for Removal, January 18, 2018, pp. 2-3.)

The deposition of Elizabeth Lin never went forward, and on March 27, 2018, the WCJ issued an Amended Notice of Intention to Sanction and to Draw Adverse Inference for Failure to Comply with the December 19, 2017 Discovery Order. (See Opinion and Decision after Reconsideration, May 6, 2020 (2020 Decision), § II, pp. 4-13, for a full description of the record related to the deposition.) On April 16, 2018, the WCJ issued orders[5] wherein it was found that applicant failed to comply with the December 19, 2017 discovery order despite the denial of removal of that order and that applicant's failure to comply with the discovery order thwarted defendant's ability to depose Elizabeth Lin, resulting in a denial of due process and causing an unreasonable delay in the proceedings. (Sanctions Order) The WCJ therefore ordered sanctions pursuant to Labor Code section 5813 and WCAB Rule 10561 (Cal. Code Regs., tit. 8, § 10561), in the amount of $500.00 jointly and severally against applicant, his attorney Gregory M. Field, Esq., and Mr. Field's firm, Goldfarb, Zeidner & Field. (*Id.*) The WCJ also ordered an adverse inference be drawn against applicant "that applicant misrepresented to physicians regarding his ability to work and to testify," and ordered applicant to appear at trial to testify as an adverse witness pursuant to Evidence Code section 776. (*Id.*)

[5] The full name of the WCJ's order is, "Order Drawing Adverse Inference against Applicant that Applicant Misrepresented to Physicians Regarding Ability to Work and Testify and Order Imposing Sanctions of $500 for Failure to Comply with December 19, 2017 Discovery Order per Labor Code §5813 and Title 8, Cal Code Regs §10561 against Applicant David Lin, Attorney Gregory M. Field, Esq. and Goldfarb, Zeidner & Field and Notice of Intent to Draw Further Adverse Inference against Applicant on the Merits of the Dispute and Defendants Good Faith Personnel Defense Should Applicant Refuse to Testify at Next Hearing." We refer to this order as the Sanctions Order.

Applicant sought reconsideration of the Sanctions Order, and the Appeals Board affirmed the WCJ's imposition of sanctions, and the WCJ's decision to draw an adverse evidentiary inference against applicant and overrule applicant's objection to defendant's notice that he appear and testify at trial. (See 2020 Decision.)

> Next, the WCJ ordered an adverse inference against applicant "regarding his ability to work and to testify...," and ordered applicant to testify at the next trial date as an adverse witness pursuant to Evidence Code section 776. In other words, the WCJ has overruled applicant's objection to defendant's notice that he appear and testify at trial (based on the contention that he is medically restricted from testifying). (See Minutes of Hearing and Summary of Evidence, December 12, 2016, pp. 4-5.) The WCJ based his order on applicant's repeated and intentional failure to comply with the discovery order, which has resulted in a violation of defendant's due process rights. (Orders, p. 6.)

(2020 Decision, pp. 16-17.)

However, the Appeals Board specifically noted that despite the adverse inference, "the WCJ may ultimately require medical evidence to determine whether applicant is able to work, and to what extent he may be able to work, with or without restrictions. *We decline to interpret the WCJ's order of "adverse inference" to extend to those issues in relation to applicant's case in chief*." (2020 Decision, p. 16, fn. 9, italics added.) Once again, this matter was returned to the WCJ for further proceedings.

On September 15, 2020, the WCJ issued Findings of Fact and Orders (2020 F&O) wherein it was found that applicant did not sustain injury AOE/COE, and reserved jurisdiction related to all outstanding Labor Code section 5813 matters. (Opinion and Decision after Reconsideration, April 18, 2023 (2023 Decision), p. 1.) The WCJ denied the introduction of applicant's deposition transcript, Volumes I and II, into evidence, and ordered applicant take nothing by his claim. (*Ibid.*) Applicant sought reconsideration contending that despite the Appeals Board's warning, the WCJ conflated the adverse evidentiary interest drawn related to applicant's ability to testify with the determination of AOE/COE, and that because defendant was able to cross-examine applicant at deposition on issues related to the merits of his claim and their defenses, defendant's right to due process had been protected. (*Id*., at p. 2.)

Unfortunately, the record was insufficient to permit reasonable reconsideration of the WCJ's decision pursuant to Labor Code section 5313 and WCAB Rule 10787 (Cal. Code Regs., tit. 8, § 10787), *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473,

476 (Appeals Bd. en banc), and *Blackledge v. Bank of America, ACE American Insurance Company (Blackledge)* (2010) 75 Cal.Comp.Cases 613. (*Id.*, pp. 5-8.) We reminded the WCJ that any adverse evidentiary inference taken against applicant pursuant to WCAB Rule 10670 (Cal. Code Regs., tit. 8, § 10670(d)), creates a *rebuttal presumption* and not a conclusive presumption. (2023 Decision, p. 6.) Given that we already declined to extend the evidentiary inference to preclude applicant's case in chief in the 2020 Decision, any evidentiary inference taken against applicant will not be dispositive of applicant's case in chief. (*Ibid.*) Therefore, "the WCJ must 'show his work' as to how – specifically – the presumption against applicant's credibility impacts the medical reporting and other evidence in this case." (*Ibid.*)

In addition, the WCJ did not admit applicant's deposition into evidence even though deposition transcripts are admissible evidence in workers' compensation proceedings. (2023 Decision, p. 8 citing Lab. Code, § 5708, *Mote v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 902, 913 [62 Cal.Comp.Cases 891].)

> The record is also deficient because there is no identification of issues, evidence, or legal argument related to defendant's contention that their right to due process was violated because applicant refused to submit to cross-examination. There is also no record of defendant's objections to the introduction of two volumes of applicant's depositions, or the grounds on which the WCJ sustained those objections.

(2023 Decision, p. 8.)

Because the record was insufficient to permit reasonable reconsideration, the 2020 F&O was rescinded and the matter was returned with instructions to the WCJ to create a clear and detailed record to support any future decision. (2023 Decision, p. 10.)

II.

As stated in the 2020 Decision, an adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; Cal. Code Regs., tit. 8, § 10787; H*amilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc).) First, the MOH should have included "[t]he admissions and stipulations, the issues and matters in controversy, a descriptive listing of all exhibits received for identification or in evidence (with the identity of the party offering the same)..." (Cal. Code Regs., tit. 8, § 10787(c)(3).

Section 5313 requires that together with findings of fact, orders, and/or awards, a WCJ "shall" serve "a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313; see *Blackledge v. Bank of America, ACE American Insurance Company (Blackledge)* (2010) 75 Cal.Comp.Cases 613, 621-22.) 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*, 66 Cal.Comp.Cases at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) "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, supra*, at p. 475.)

Here, the WCJ issued the F&O that is the subject of the pending Petition for Reconsideration on November 29, 2023, finding that applicant did not sustain injury AOE/COE, and ordering that he take nothing from his claim. In addition, the WCJ made various evidentiary orders without explanation, including once again striking applicant's two volumes of deposition (App Exh. 42).

First, just as with the 2020 F&O, the WCJ has refused to admit applicant's deposition transcripts into evidence even though deposition transcripts are admissible evidence in workers' compensation proceedings, and in this case, "especially given that defendant's claim could have been mitigated through admission of applicant's depositions." (2023 Decision, p. 8.)

In addition, it appears that the WCJ has conflated the discovery issues involving the Elizabeth Lin deposition – which was discovery related to applicant's ability to testify – with applicant's case in chief. We once more emphasize that while applicant's counsel's behavior in relation to Ms. Lin's deposition resulted in sanctions and a presumption "that the evidence [related to the SOS document] would be adverse" (Cal. Code Regs., tit. 8, § 10670(d)), to applicant's objection to defendant's notice to testify – that adverse inference *is rebuttable.* (2023 Decision, p. 6.)[6]

[6] For instance, applicant's counsel has already expressed Ms. Lin's willingness to appear at trial to testify. (See 2020 Decision, p. 7, referencing Correspondence, dated February 21, 2018, filed April 5, 2018, p. 3.) Given that in workers' compensation, trial testimony of witnesses is often favored, and given that it appears Ms. Lin was always willing to testify at trial in the presence of the WCJ, it may be that a notice to appear at trial served on Ms. Lin could assist the

We have also stated since the 2020 Decision that "the determination of applicant's case in chief would depend on medical evidence, and that *we declined to extend an evidentiary inference to preclude applicant's case in chief*. (May Decision, p. 16, fn. 9.)" (2023 Decision, p. 6, italics added.)

> If it is then still the WCJ's conclusion that the medical evidence cannot be relied on as substantial evidence because it is based on incomplete or inaccurate history, we note that the WCJ may need to assess whether or not to exercise his discretionary authority to develop the record to provide due process and/or to fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).)

(*Id.*, at pp. 6-7, fn. 5.)

However, the WCJ appears not to have acknowledged that the adverse evidentiary inference related to applicant's ability to testify is rebuttable *or* that the same adverse evidentiary inference does not preclude applicant's case in chief. After reiterating the procedural history related to the parties' discovery dispute related to applicant's objection to defendant's notice to appear and testify, the WCJ concludes in pertinent part:

> *Applicant is not credible.*
>
> Applicant would not produce documents defendant requested and would not allow the deposition of Elizabeth Lin to proceed despite the undersigned ordering said document production and said deposition to go forward on 12/19/2017.
>
> Applicant's attempt to overturn the 12/19/2017 order failed. Removal was denied 1/18/2018.
>
> *Applicant's alleged disability does not figure into the failure to comply with said discovery order.*
>
> Simply put, applicant's attempt to circumvent the defendant's due process right to investigate *this claim* has failed.

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parties and the court confirm whether or not the verified responses to defendant's RFPD and the verified SOS Response were true and accurate or not. That testimony may or may not need to be forwarded to the QME and treating doctor, depending on what the testimony is.

> *Had said deposition took place the Court would have found out about applicant's performance of the job duties as CEO which is relevant to applicant's capacity to testify and overall credibility.*
>
> Said discovery order also overruled applicant's objections to defendant's production of documents. The undersigned found defendant is entitled to said document discovery.
>
> *Because applicant is not credible, his evidence is not substantial evidence. The examining and treating doctors reporting in this case were not provided an accurate history of applicant's activities. The medical records are not substantial evidence.*
>
> This case has been up on appeal numerous times over the years. *Applicant's attempts to hide behind his failed excuse to answer questions under oath at trial has been exposed.*
>
> *This claim has no merit.*

(F&O, Opinion on Decision, pp. 10-11, italics added; Report, pp. 1-2.)

Once again, the WCJ did not comply with the basic requirements of Labor Code 5313 and WCAB Rule 10787 (Cal. Code Regs., tit. 8, § 10787). Instead, the WCJ summarily concluded that because of the adverse evidentiary inference related to applicant's ability to testify, applicant is not credible and because applicant is not credible, *all* of "his evidence is not substantial evidence." (F&O, Opinion on Decision, p. 11.) Among other deficiencies, there is once again no acknowledgment that the adverse evidentiary inference is rebuttable, nor any discussion of why the WCJ failed to admit applicant's depositions into evidence. Unfortunately, it appears that the WCJ has pre-judged applicant's credibility and jumped over a full review of the evidence and legal analysis of the merits of applicant's claim and defendant's rebuttal.[7]

Again, the WCJ was informed in the 2023 Decision that coming to summary conclusions was not enough for meaningful reconsideration under section 5313, *Blackledge v. Bank of America, ACE American Insurance Company (Blackledge)* (2010) 75 Cal.Comp.Cases 613 and *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473 (Appeals Bd. en banc).)

[7] We note some effort to attempt a dismissal of applicant's claim based on applicant's violation of a court order to appear and testify; however, the WCJ failed to follow the proper procedure following the violation to issue a notice of intention, provide opportunity to object and/or a hearing on the matter. (Cal. Code Regs., tit. 8, § 10832.) At this point, we believe that due process and the parties are better served by reassignment to another WCJ.

Accordingly, the record of this matter is insufficient to allow reasonable reconsideration of the F&O. We therefore grant reconsideration and as our decision after reconsideration, we rescind the F&O and return this case to the trial level for further proceedings. Given the acrimony apparent on the surface of the pleadings in this matter, which we believe gives rise to the inability of the WCJ to prepare a proper record for review on reconsideration despite the attempt to guide the process in the 2023 Decision, we conclude that the parties would be better served by a re-assignment to a new WCJ. (Lab. Code, §§ 5300, 5301, 5708.) We therefore return the matter to the presiding WCJ for re-assignment as to another WCJ. (Cal. Code Regs., tit. 8, § 10346(a).)

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Orders issued by a workers' compensation administration law judge on November 29, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Orders issued by a workers' compensation administration law judge on November 29, 2023 is **RESCINDED** and this case is **RETURNED** to the trial level to the presiding workers' compensation administrative law judge for re-assignment as to another workers' compensation administrative law judge pursuant to WCAB Rule 10346, subdivision (a) (Cal. Code Regs., tit. 8, § 10346(a)).

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 12, 2024

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

DAVID LIN
FIELD LAW GROUP, PC
LAW OFFICES OF WEITZMAN & ESTES
PREET G. SHAH LAW

AJF/abs

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