

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

DONACIANO LOPEZ, *Applicant*

vs.

**GKN PLC; SAFETY NATIONAL CASUALTY CORPORATION,
administered by BROADSPIRE, *Defendants***

**Adjudication Number: ADJ15095314
San Diego District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
DISQUALIFICATION AND DECISION
AFTER DISQUALIFICATION**

We have considered the allegations of the Petition for Disqualification filed by the defendant and the contents of the report of the workers' compensation administrative law judge with respect thereto. Based on our review of the record, we will grant defendant's petition for disqualification of the assigned trial judge, order the assigned trial judge disqualified, and return this matter to the Presiding Judge for reassignment of the case to a new Workers' Compensation Administrative Law Judge (WCJ).

While the WCJ may not have "formed or expressed an unqualified opinion or belief as to the merits of the action" (Code Civ. Proc., § 641(f)) or has demonstrated "[t]he existence of a state of mind ... evincing enmity against or bias toward either party" (Code Civ. Proc., § 641(g)), we find there is an appearance of bias sufficient to warrant disqualification.

BACKGROUND

Applicant alleges an industrial injury arising out of and during the course of employment on July 11, 2021 in the form of Covid-19. Defendant has denied the injury.

On July 26, 2023, the parties proceeded to trial where evidence was admitted and testimony commenced. Further proceedings were held on October 2, 2023, at which time the parties appeared on Lifesize for continued testimony. Pursuant to the Transcript of Proceedings (Transcript), the

WCJ expressed frustration with the continued cutting out of audio and video at the electronic hearing of a defense witness, as well as the substance of the testimony of the witness, which included the following exchange:

Q BY MR. URIBARRI: Mr. Montes, did you identify anyone who was in close contact with the applicant at the time he reported COVID?

MR. DeBENEDETTO: Objection, foundation.

THE COURT: I will allow it.

THE WITNESS: From what I –

THE COURT: He is cutting out.

THE WITNESS: Can you hear me?

THE COURT: Yes.

THE WITNESS: From the information I retained, there was no close contact on site. The only close contact that tested positive is his family members.

Q BY MR. URIBARRI: So he did have family members that tested positive that you are aware of?

MR. DeBENEDETTO: Objection, your Honor, foundation.

THE WITNESS: That is correct, from what he stated.

THE COURT: Wait a minute. Let me ask you this, so the applicant got COVID, he is in the hospital with COVID, and it's the defendant's position that he never provided a COVID test? He never provided an actual test, but the guy was in the hospital; is that the testimony?

THE WITNESS: That is correct. I did not receive a COVID test.

THE COURT: Okay. But you know that the COVID test is included in the medical records and reports that were contained in the hospital records; right?

THE WITNESS: Yes, I believe so. But I can't get those records until the employee provides it to me.

THE COURT: Okay. If somebody's in the hospital because they are in the hospital due to COVID, don't you think it's a little useless to request that they provide it to you right at that moment?

THE WITNESS: No, I understand. I understand that he was in the hospital. But I said, "Whenever you get an opportunity, please provide a COVID test." I understand. There's people that, in the hospital –

THE COURT: I get it. All right. I'm sorry. Mr. –

MR. DeBENEDETTO: Your Honor, can I just make a comment? We have a witness who is testifying about an unknown individual. We don't have names. I don't have any of the records of unknown individuals that he is claiming had COVID and he is claiming they were in close contact with the applicant, that the gentleman, my understanding, does not work the same shift as applicant.

THE COURT: Okay, Mr. DeBenedetto, I understand your comments, but the defendant has a right to put on a witness and ask questions.

MR. DeBENEDETTO: Okay, I will get him on cross.

Q BY MR. URIBARRI: Mr. Montes, what building or location did Mr. Lopez work in?

A Building 4.

Q When you checked, were there any other cases of COVID-19 in July of 2021 in Building 4?

A Not in Building 4.

Q In any of the buildings that are at the GKN facility, were there any other cases of COVID in July of 2021?

A July, there was only one in Building 7, which is almost half, like a half a mile away, so, total distance. And then there was another employee that was positive, but this employee works from home.

Q The employee who works from home would not go to the GKN facility?

A No.

Q The individual in Building 7, without identifying who that individual is, what kind of work does that individual do?

A She was actually the medical, she was actually the -- (Computer glitch.)

THE COURT: You cut out, I'm sorry.

THE WITNESS: She was actually an employee that worked next to me.

THE COURT: What was her job title? What did she do?

THE WITNESS: She was the nurse on site.

THE COURT: I just have a question. What is the basis for the defendant's denial, Mr. Montes?

THE WITNESS: The basis of the Defendant's denial?

THE COURT: Mm-hmm, of this –

THE WITNESS: What does that mean?

THE COURT: Well, it means that this case has been denied. Okay? And I want to know, my first question is, who makes the decision to accept or deny an injury, a work-related injury for the company?

THE WITNESS: I do. I do.

THE COURT: Okay. Hold on. In this case, did you deny the applicant's claim for COVID?

THE WITNESS: I did not deny because he got COVID, but I'm denying that he got it here at work.

THE COURT: Okay. My question is, who was responsible for denying the applicant's case? Was that you that made that decision?

THE WITNESS: Correct.

THE COURT: And the basis or the rationale for that decision is your claiming that he did not get it at work?

THE WITNESS: That is correct.

THE COURT: Okay. Do you have a medical report or an investigative report or any type of expert report that indicates that the applicant did not get COVID at the employer?

THE WITNESS: Yeah, I got -- yeah, absolutely. I got some information here.

THE COURT: Okay. Was that provided? Is that in evidence, Mr. Uribarri?

MR. URIBARRI: No. We have the denial letter, of course, in evidence.

THE COURT: That's not my question.

MR. URIBARRI: I'm not aware of a medical report of the type that you described.

THE COURT: So first of all, Mr. Montes, are you reading something? Because you are not looking in the camera. It looks like you are looking down and you are referring to something. Are you reading anything? Are you looking at notes?

THE WITNESS: No, I'm just -- no, I'm not reading anything. I just got the information of this case, that's it.

THE COURT: Okay. But you are not supposed to be reading any information about the case. No, you are not supposed to be reading or referring to anything. You are supposed to be doing this, so --

THE WITNESS: Okay.

THE COURT: You know what? I'm going to order -- this is what I'm doing. I'm going to continue this case and I'm going to order all the parties, except for the applicant, to be in person, including Mr. Montes. And I want Mr. Montes' boss to come in.

Because this is the problem that I see; okay? What I see on this case, and I want this on the record, is the case where an applicant contacted COVID, was in the hospital, and Mr. Montes is the one that made the decision to deny the claim as industrial because he did not feel that the applicant got COVID at work. But that's your individual decision. Courts go by evidence. Courts go by documents.

So what I'm hearing is this case was denied because Mr. Montes did not feel that the applicant got COVID at work.

Well, you are not a medical doctor. You are not an expert. And to me, that's bad faith denial. And I'm having a real hard time with your testimony cutting in, cutting out. It looks like you are reading something. You are not supposed to be referring to anything.

So I am going to continue this probably for two weeks, because I want to get it back on calendar so there is no longer a delay and I want it in person.

So I'm going to order Mr. Montes, the applicant attorney, Mr. DeBenedetto, to be in person to continue this testimony.

MR. DeBENEDETTO: Are you going to give us a date now, your Honor?

THE COURT: No, because Julissa is out until next week.

In the interim, I would strongly encourage the parties to settle this case. Because, to me, this is bordering on a bad faith denial and subjects the defendant to sanctions, penalties, and perhaps an insurance audit. That's all I'm going to say.

(Reporter's Transcript of Proceedings, October 2, 2023, pp. 11-17).

DISCUSSION

Labor Code section 5311 provides that a party may seek to disqualify a WCJ upon any one or more of the grounds specified in Code of Civil Procedure section 641. (Lab. Code, § 5311; see also Code Civ. Proc., § 641.) Among the grounds for disqualification under section 641 are that the WCJ has “formed or expressed an unqualified opinion or belief as to the merits of the action” (Code Civ. Proc., § 641(f)) or that the WCJ has demonstrated “[t]he existence of a state of mind ... evincing enmity against or bias toward either party” (Code Civ. Proc., § 641(g)).

Under WCAB Rule 10960, proceedings to disqualify a WCJ “shall be initiated by the filing of a petition for disqualification supported by an affidavit or declaration under penalty of perjury stating in detail *facts* establishing one or more of the grounds for disqualification” (Cal. Code Regs., tit. 8, § 10960, italics added.)

It has long been recognized that “[t]he allegations in a statement charging bias and prejudice of a judge must set forth specifically the facts on which the charge is predicated,” that “[a] statement *containing nothing but conclusions and setting forth no facts* constituting a ground for disqualification may be ignored,” and that “[w]here no *facts* are set forth in the statement *there is no issue of fact to be determined.*” (*Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 399, italics added.)

Here, defendant's verified petition indicated that the WCJ placed a number of opinions on the record, including opinions regarding whether the claim was denied in good faith, the propriety of denying the claim, and that this was a “bad faith denial”. Further alleged are that the WCJ made statements indicating that this claim and/or issues set for trial should be resolved, and absent such an agreement by the next trial date, sanctions would be issued (Petition, p. 2:25-28). Petitioner urged a review by the WCAB of the transcript of proceedings they had requested.

We conclude that while the WCJ states in her report that she has not formed an unqualified opinion as to the case's merits or demonstrated bias to any party, and we have no reason to doubt

the honesty or integrity of the WCJ's representations, our inquiry cannot end there because actual bias is not the only grounds for disqualification.

The appearance of bias may be sufficient to require disqualification. As to the appearance of bias, the objective test to be applied is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with impartiality (*Robbins v. Sharp Healthcare* (2006) 71 Cal.Comp.Cases 1291, 1307).

Based upon the transcript as reviewed and stated above, we determine that the appearance of bias in this case merits disqualification.

While we appreciate the frustration that may be experienced by a WCJ under a number of different situations, and while a judge's mere frustration or irritation does not suggest bias or prejudice (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 303; *Scott v. Family Ministries* (1976) 65 Cal.App.3d 492, 502 & 509; see also, *Offutt v. United States* (1954) 348 U.S. 11, 17 [75 S.Ct. 11, 99 L.Ed. 11] ("a modicum of quick temper ... must be allowed even judges").) it is helpful to remember that: "A judge shall avoid impropriety and the appearance of impropriety in all of the Judges' activities" (Code of Judicial Ethics, Canon 2).

For the foregoing reasons,

IT IS ORDERED that the Petition for Disqualification is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Disqualification that the assigned Workers' Compensation Administrative Law trial judge is **DISQUALIFIED** and this case is **RETURNED** to the Presiding Workers' Compensation Administrative Law Judge for reassignment to a new Workers' Compensation Administrative Law Judge.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 15, 2024

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

**DONACIANO LOPEZ
LAW OFFICE OF THOMAS M. DEBENEDETTO
LAW OFFICES OF BRADFORD & BARTHEL, LLP**

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