

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

JESUS RIOS, *Applicant*

vs.

**BRYAN JONES dba THE KB GROUP, ILLEGALLY UNINSURED;
UNINSURED EMPLOYERS BENEFITS TRUST FUND, *Defendants***

**Adjudication Number: ADJ1471935
Pomona District Office**

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

Applicant seeks removal¹ in response to the Order for Further Development of the Record and Order Taking Matter Off Calendar (Order), issued by the workers' compensation administrative law judge (WCJ) on May 10, 2023. Therein, the WCJ acknowledged the assertion made by defendant that the WCJ had altered an agreement regarding the provision of home health care after the defendant had signed the agreement. The WCJ's Order took the matter off calendar and further directed the parties to undertake the deposition of the defendant employer.

We have not received an answer from any party. The WCJ issued a Report and Recommendation on Petition for Removal recommending that the Petition be denied.

We have considered the allegations of the Petition for Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant the Petition for Removal, rescind the WCJ's decision, and return this matter to the Associate Chief Judge for reassignment to another WCJ, and for further proceedings and decision.

¹ Chairwoman Caplane and Commissioners Brass and Sweeney, who were previously members of this panel, no longer serve on the Workers' Compensation Appeals Board. Other panelists have been assigned in their place.

BACKGROUND

Applicant sustained injury to the bladder, pelvis, and lumbar spine while employed as a marble polisher laborer/fabricator, on April 10, 2006.

On March 26, 2019, the WCJ approved an agreement between applicant and employer Bryan Jones, an individual doing business as The KB Group, where defendant agreed to provide home health assistance reimbursement to applicant's spouse for a period on one year with WCAB jurisdiction reserved over retroactive and future home health services. (Ex. 1, Interim Stipulation and Award and/or Order, March 26, 2019, at p. 1.)

On February 25, 2020, the parties filed joint Stipulations with Request for Award, and a corresponding Award issued the same day. (Minutes of Hearing and Summary of Evidence (Minutes), November 29, 2022, at p. 2:3.)

On May 24, 2022, applicant filed a Declaration of Readiness to Proceed to Expedited Hearing, averring an improper denial of a Request for Utilization by defendant and WCAB jurisdiction over the disputed treatment.

The Minutes of Hearing for the June 14, 2022 conference appear to be unavailable in the Electronic Adjudication Management System (EAMS). Applicant's Petition asserts that defendant Mr. Jones was not in attendance, and that the matter was continued. (Petition, at 6:16.)

On July 26, 2022, the parties attended a Mandatory Settlement Conference (MSC). The WCJ continued the matter over applicant's objection and instructed that the parties complete the Pre-trial Conference Statement (PTCS) prior to the next MSC setting.

On August 23, 2022, the parties finalized the PTCS at MSC, and set the matter for trial.

On September 8, 2022, the UEBTF filed a request for continuance, citing a calendar conflict on the proposed trial date of September 28, 2022.

On October 25, 2022, the WCJ noted a calendar conflict and continued the matter to November 29, 2022 over applicant's objection.

On November 14, 2022, applicant filed a Petition for Removal, averring prejudicial delay in the commencement of trial proceedings, and requesting the rescission of the WCJ's order continuing the matter. (Petition for Removal, November 14, 2022, at p. 8:15.)

On November 15, 2022, the WCJ issued a Notice of Amended Hearing, noting that in response to applicant's Petition for Removal, the trial setting set for November 29, 2022 at 1:30PM was amended to an all-day in person trial.

On November 29, 2022, the parties proceeded with supplemental trial proceedings, framing issues of “[w]hether the WCAB retains jurisdiction over the retrospective medical care needs, current medical care needs, and future medical care needs [of applicant].” (Minutes, at p. 2:17.) The parties also framed issues of defendant’s liability for home healthcare, and the admissibility of sub rosa films. The applicant testified, and the matter was continued to January 31, 2023.

On January 31, 2023, trial proceedings continued with the testimony of defense witness Susan Lew. The WCJ thereafter ordered the matter submitted 15 days from the date of service of the minutes plus five days for mailing unless timely objection showing good cause was submitted in writing. (Minutes of Hearing and Summary of Evidence, dated January 31, 2023, at p. 6:2.)

On February 27, 2023, the WCJ issued an Order determining that the matter was not ready for submission, and that development of the record was necessary. The Order states, in relevant part:

The WCJ has reviewed the Post-Trial Briefs, the Summary of Evidence, as well as the voluminous previous record of prior proceedings in this matter and has determined that further testimony from UEBTF Adjuster, Susan Lew, is necessary to complete the record. She should be prepared to testify regarding any and all indemnity payment made by the UEBTF as well as payments made to Martha Rios or any other Home Health Care Provider in this case. The court will also question the witness concerning the Application of Policy and Procedure Rule 1.93 to prior Stipulations and Awards issued and/or Orders in this case.

Bryan Jones will be Ordered to appear and testify. The Court will question him about his participation in this case, to include all fees, indemnity and medical payments made by him. He should bring any financial documents which will aid this inquiry.

(Order for Further Development of the Record, dated February 27, 2023.)

On the same day, the WCJ issued corresponding orders for the appearance of both Ms. Lew and Mr. Jones at the upcoming trial setting set for April 25, 2023.

On March 15, 2023, the Uninsured Employers Benefits Trust Fund (UEBTF) requested a continuance due to a calendar conflict.

On April 25, 2023, the parties appeared at trial. However, the WCJ continued the matter over applicant’s objection, noting a possible settlement. The WCJ further ordered all witnesses to appear at continued trial set for May 9, 2023.

On May 9, 2023, the WCJ ordered the matter taken off calendar over applicant's objection, with a minute reflection that a supplemental discovery order would issue.

On May 10, 2023, the WCJ issued the Order for Further Development of the Record and Taking the Matter Off Calendar, indicating that defendant employer Bryan Jones had stated to the court "that the March 26, 2019, Interim Stipulation and Award (EAMS Doc #69725453) was altered by the Workers' Compensation Judge to include this language, 'WCAB to retain Jurisdiction over retro-future services rendered/needed', after Mr. Bryan Jones signed the document." (Order, at p. 1.) The WCJ ordered the parties to depose Mr. Jones on the issue, and further ordered Mr. Jones to produce at the deposition a record of all payment made to applicant's caregiver. The WCJ also directed that Mr. Jones be questioned as to why he failed to appear for the afternoon trial session on January 13, 2023. (*Id.* at p. 2.)

Applicant's Petition for Removal (Petition) avers substantial prejudice from the matter being repeatedly continued and eventually ordered taken off calendar, resulting in the delayed award of medical treatment. (Petition, at p. 10:4.) Applicant contends that he remains prepared to proceed to trial and to have the matter submitted for decision, and that the May 10, 2023 Order will further delay the provision of his medical treatment. (*Id.* at p. 13:23.)

The WCJ's Report describes the complex nature of the underlying dispute, including whether the applicant's requests for home health care assistance are subject to the Utilization Review and Independent Medical Review process because the March 26, 2019 ostensibly indicates, "WCAB to retain jurisdiction over retro-future services rendered/needed." (Report, at p. 1.) The Report continues:

At the trial setting of April 25, 2023, Bryan Jones stated in open court for the first time in these proceedings that when he signed the Interim Stipulation and Award (EAMS Doc. 6972453), it did not contain the above language and that the WCJ added that language at a later trial. The WCJ responded that this was a very serious accusation. It was at that time that WCJ contemplated the need for further discovery on this issue.

(Report, at p. 3.)

The WCJ further noted that throughout the proceedings, the WCJ had found the defendant to be generally credible. Accordingly, the WCJ was persuaded that Mr. Jones should be questioned at deposition regarding the circumstances of the March 29, 2019 Interim Stipulation to include

questions about any language that was present when he signed it, and that Mr. Jones should further provide records regarding his payments to the applicant's home health care provider. (*Id.* at p. 4.)

DISCUSSION

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); *Cortez v. Workers' Comp. Appeals Bd.*, *supra*, 136 Cal.App.4th at p. 599, fn. 5; *Kleemann v. Workers' Comp. Appeals Bd.*, *supra*, 127 Cal.App.4th at p. 280, fn. 2.) Additionally, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

Here, applicant contends he is substantially prejudiced by the WCJ's order to develop the record via deposition of the employer.

We observe that the current dispute with respect to applicant's home health care has been pending since applicant filed a request for Expedited Hearing on May 24, 2022. Following multiple continuances, trial proceedings were held on November 29, 2022, and again on January 31, 2023. Following submission of the matter for decision on January 31, 2023, the WCJ determined that additional testimony from the employer as well as the defense witness was necessary. Accordingly, the WCJ vacated the submission, and restored the matter to trial calendar. However, the witness testimony identified by the WCJ was not adduced at the scheduled trial proceedings held on April 25, 2023 because the WCJ ordered the matter continued while the parties attempted to reach amicable settlement. On May 9, 2023, the WCJ ordered the matter taken off calendar, and the following day, issued the Order for development of the record by deposition of the employer.

The WCJ's Order describes an allegation raised by employer Mr. Jones on April 25, 2023, that the WCJ altered the March 26, 2019 Interim Order to include language reserving the Appeals Board's jurisdiction over "retro-future services rendered/needed," and that such amendment was made only after the parties had executed the agreement. (Order, at p. 1.) The WCJ responded by ordering the parties to depose the employer to obtain additional information about the employer's allegations and ordered the matter taken off calendar pending completion of the deposition.

The WCJ's Report observes that "[t]hroughout these proceedings, applicant's attorney has maintained that the UR/IMR process does not apply to any home health care issues because the Interim Stipulation and Award [] included this language." (Report, at p. 3.) The WCJ also noted that "[t]hroughout the proceedings, the WCJ has interacted with Mr. Bryan Jones and has found him to be generally credible."

The issues raised by Mr. Jones appear relevant to whether the Appeals Board maintains continued jurisdiction over the home health care issue. Following our review of the record, we discern no error in the WCJ's identification of the issue or in his determination to have it addressed as an integral part of the current proceedings.

However, we also observe that the filing of applicant's Petition follows multiple delays in the adjudication of this matter for a variety of reasons, including alleged failure of notice to the parties, and the failure of parties to testify at trial despite court orders for their appearance. Applicant avers the WCJ's determination to take the matter off calendar for an unspecified period of time pending the deposition of the employer will result in undue prejudice to applicant arising out of the delay in adjudicating this matter.

We also note that the WCJ has described the testimony thus far of Mr. Jones as "generally credible." The credibility determinations of the WCJ are entitled to great weight because of the WCJ's opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand" (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal. 3d 312, 319 [35 Cal. Comp. Cases 500].) However, the Order that the testimony of the party defendant be taken in deposition, outside the court's presence, will necessarily preclude the WCJ from weighing the credibility of the testimony of Mr. Jones in the first instance.

Thus, while we discern no error in the WCJ's rationale for development of the record, we agree with applicant that the taking of the necessary testimony *by deposition* will add prejudicial delay in this matter. In addition, development of the record by deposition testimony will effectively preclude the WCJ from making the necessary credibility determinations with respect to the witnesses. We therefore conclude that the testimony of the appropriate witnesses should be adduced in trial testimony, which will also allow the WCJ to personally evaluate the credibility of the witnesses.

We further observe that per the PWCJ's Report, the employer has alleged that the WCJ altered the March 26, 2019 Interim Stipulation by adding language with respect to the Appeals

Board’s continuing jurisdiction over home healthcare services. (Report, at pp. 2-3.) We agree with the PWCJ’s characterization of these allegations as “very serious” in nature. (*Id.* at p. 3.) However, we also note that allegations are not documented in the April 25, 2023 Minutes, nor is there any independent pleading reflecting the employer’s contentions. Thus, there is no evidentiary documentation of the employer’s allegation other than the statements contained in the WCJ’s Report.

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp.Cases 473, 476 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Board en banc) (*Hamilton*). Furthermore, decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ’s decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) “It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence.” (*Hamilton, supra*, at p. 475.)

Accordingly, we believe a record must be created to document any allegations advanced by the parties, and a hearing conducted by the WCJ to afford the parties their due process rights to address these allegations. Once a record has been created, the WCJ may issue a determination as to any allegations advanced by the parties with respect to the Interim Stipulation.

Moreover, to the extent that the employer is alleging the PWCJ personally altered the March 26, 2019 Interim Stipulation, the PWCJ is a potential witness, whose testimony may be germane to the issue of whether the March 26, 2019 Interim Stipulation was altered at any point after the employer’s signature.

All WCJs are subject to the Code of Judicial Ethics and its commentary. (Lab. Code, § 123.6(a).) Canon 2(A) provides, in relevant part, that “[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” The Advisory Committee commentary to Canon 2(A) observes that, “[t]he prohibition against behaving with impropriety or the appearance of impropriety applies to

both the professional and personal conduct of a judge,” and that “[t]he test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence.” We are further mindful that due process is violated when there is an appearance of bias or unfairness in administrative hearings. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1024-1027 [119 Cal.Rptr.2d 341].)

With due consideration of the facts and circumstances presented in this case, and to the extent that a reasonable person could entertain doubts concerning the WCJ’s impartiality because he is a potential witness to this case, and based on the allegations raised by the employer, we believe a different WCJ should be assigned to conduct further proceedings in this case. We are persuaded that this action is necessary to avoid the appearance of bias and to maintain confidence in the integrity of the Workers’ Compensation adjudicatory system. Accordingly, we will return this matter to the Associate Chief Judge for reassignment to another WCJ.

In summary, we agree with the WCJ’s determination that additional development of the record is necessary, but we are also persuaded that the necessary credibility determinations must be made by the WCJ from a hearing, rather than through development of the record at deposition. We further believe that a record of the employer’s allegations must be made in the first instance, and an evidentiary hearing undertaken to address and adjudicate those allegations. Finally, we believe that the nature of the allegations and the PWCJ’s status as a potential witness require that the matter be reassigned to another WCJ to avoid the appearance of bias or impropriety.

Accordingly, we will grant the Petition, rescind the May 10, 2023 Order, and return this matter to the Associate Chief Judge for reassignment to another WCJ, and for further proceedings and decision in accordance with this opinion. We recommend that the WCJ create a record of any allegations advanced by the parties with respect to the March 26, 2019 Interim Stipulations, and obtain the necessary clarification of the parties’ respective contentions via trial testimony. After the WCJ issues a trial decision, any person aggrieved by the decision may thereafter seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the Order for Further Development of the Record and Order Taking Matter Off Calendar, issued May 10, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the order of May 10, 2023 is **RESCINDED** and that the matter is **RETURNED** to the Associate Chief Judge for reassignment to another WCJ, and for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
PARTICIPATING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 17, 2024

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

**JESUS RIOS
GLAUBER BERENSON VEGA
BRYAN JONES (dba THE KB GROUP)
OFFICE OF THE DIRECTOR-LEGAL UNIT (LOS ANGELES)
UNINSURED EMPLOYERS BENEFITS TRUST FUND (LOS ANGELES)**

SAR/abs

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