WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DAVID LIN, *Applicant*

vs.

AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA; THE HARTFORD INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ8233486
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Workers' Compensation Appeals Board (Appeals Board) issued an Opinion and Order Granting Petition for Reconsideration[1] in this matter on November 18, 2020 to provide an opportunity to study further the legal and factual issues raised by the petition. This is our Opinion and Decision after Reconsideration.

Applicant seeks reconsideration of the Findings of Fact and Orders (F&O) issued on September 15, 2020 by a workers' compensation administration law judge (WCJ), wherein the WCJ found that applicant did not sustain injury arising out of and in the course of his employment (AOE/COE) and reserved jurisdiction related to Labor Code[2] section 5813 matters. The WCJ entered various exhibits into evidence, but denied the introduction of applicant's deposition transcript, Volumes I and II, into evidence. The WCJ then ordered that applicant "shall take nothing from the claims he has filed herein." (F&O, Order no. 5.)

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[1] Commissioners Lowe and Sweeney, who were on the panel that issued a prior decision in this matter, no longer serve on the Appeals Board. Two other panelists have been assigned in their place.

[2] All further references are to the Labor Code unless otherwise noted.

Applicant contends that the WCJ conflated the issue of applicant's refusal to testify based on an alleged medical reason with the determination of AOE/COE, and that because defendant was able to cross-examine applicant at deposition, those deposition transcripts provide adequate due process protection to defendant on the AOE/COE issue. Applicant also contends that the WCJ should not have allowed defendant to introduce rebuttal evidence on the issue of whether applicant was medically restricted from testifying at trial; and, that the WCJ should not have drawn an adverse inference after refusing to admit applicant's deposition transcripts without developing a reasonable plan to develop the record on the issue of whether applicant could testify.

Applicant filed a request to file a supplemental pleading pursuant to WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964). Applicant's request is granted.

Defendant filed an Answer to Petition for Reconsideration (Answer). Defendant contends that there is no substantial evidence in the record on the issue of AOE/COE because applicant's credibility is an "essential issue" given its allegations that applicant manufactured a stress claim on the same day he was allegedly caught engaging in unethical insurance practices, and then gave a false history to his treating doctor (PTP) and the Panel Qualified Medical Evaluator (PQME) to support the alleged false claim. Defendant contends that applicant claimed inability to testify based on mental incapacity (Evid. Code, § 240), in order to avoid "critical cross-examination and assessment of his demeanor and credibility." (Answer, pp. 2-3.)

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition for Reconsideration be denied.

We have reviewed the record in this case, our prior decisions,[3] the allegations of the Petition for Reconsideration, applicant's supplemental pleading, the Answer, and the contents of the Report. Based on our review of the record, it is our decision after reconsideration to rescind the F&O in its entirety, and to return this matter to the trial court for further proceedings as

[3] We refer to our decisions in this case dated December 19, 2016, April 6, 2017, July 24, 2017, January 18, 2018, and May 6, 2020.

required, after which the parties and the WCJ will have the opportunity to prepare a full and complete record consistent with this decision.

I.

On May 6, 2020, we issued an Order and Decision after Reconsideration (May Decision), wherein we affirmed the WCJ's April 16, 2018 decision to draw an adverse inference against applicant regarding his ability to work and to testify, thereby overruling applicant's objection to defendant's notice that he appear and testify at trial. (May Decision, pp. 16-17.) Our decision after reconsideration was "to affirm the WCJ's order that applicant appear as an adverse witness at the next trial date." (*Ibid.*) We specifically noted "that 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*." (*Id.*, p. 16, fn. 9, emphasis added.)

The parties returned to trial on August 27, 2020. (Minutes of Hearing and Summary of Evidence, August 27, 2020 (MOH).) Once again, applicant refused to submit to cross-examination. (*Id.*, p. 2.) Applicant requested that Volume I and II of his deposition testimony be admitted in lieu of his testimony at trial, and defendant objected. (*Ibid.*) The WCJ sustained defendant's objection. (*Id.*, pp. 2-3.) Defendant also re-asserted its petition to dismiss applicant's case because he was unable to cross-examine applicant, which the WCJ deferred. (*Id.*, p. 2.)

The MOH does not identify the issues submitted for decision, the admissions or stipulations of the parties, nor the admitted evidence. (MOH, p. 2.) In addition, there is no discussion of the substance of defendant's objection to the deposition volumes, nor the WCJ's basis to sustain the objection. (*Id.*)

The WCJ issued the F&O following trial, finding that applicant did not sustain an industrial injury, and ordering that applicant take nothing as a result of his claims. (F&O, Finding no. 1, Order no. 5.) The F&O also ordered that two volumes of applicant's deposition introduced by applicant in lieu of his testimony not be admitted into evidence. (*Id.*, Order no. 2.) The two volumes of applicant's deposition were not uploaded into the Electronic Adjudication Management System (EAMS).

The opinion on decision did not provide clarification on defendant's objections to the admission of two volumes of applicant's deposition, nor the reason(s) the WCJ sustained the

objections. The opinion on decision does explain that the WCJ's "take nothing" order against applicant was based on a violation of defendant's right to due process resulting from applicant's refusal to submit to cross-examination at trial:

> Applicant had the burden to prove that while employed during the period 4/7/2007 through 5/11/2011, as a Sales Manager, Occupational, Group Number 212, at Encino, California, by Automobile Club of Southern California, he sustained injury arising out of and in the course of employment to his neck, back, digestive tract, psyche, internal (in the form of asthma), sleep, sexual dysfunction, shoulders, chest and headaches. *Part of that burden is to submit to cross-examination by defendant. Applicant refused to submit to cross-examination. This resulted in the drawing of an adverse inference against the applicant on the issue of AOE/COE. The undersigned found that defendant was denied due process by applicant because applicant refused to submit to cross examination. Thus, the undersigned found applicant failed to sustain his burden to prove injury* to his neck, back, digestive tract, psyche, internal (in the form of asthma), sleep, sexual dysfunction, shoulders, chest and headaches arising out of and in the course of employment with defendant. (F&O, Opinion on Decision, p. 2, emphasis added.)

The WCJ's Report provided some more insight into the basis for the take nothing order, stating essentially that the adverse inference was made as to applicant's credibility which therefore rendered all medical reporting relied on by applicant insubstantial and incapable of supporting a finding of injury AOE/COE.

> If applicant had submitted to cross-examination at time of trial the undersigned would have made a factual finding on applicant's credibility with respect to applicant's truthfulness in telling the reporting doctors about his ability to testify and work given the fact that he was the CEO of Advanced Communications Technology Research Group Corporation as of 2/3/2014. See defense exhibit DD, Secretary of State Statement of Information. Because applicant refused to be cross-examined at trial by defendant the undersigned was not able to make that determination, and instead drew an adverse inference against applicant on the issue of AOE/COE. *In other words, the undersigned found applicant was not truthful in telling the reporting doctors about his ability to testify and work given the fact that he was the CEO of Advanced Communications Technology Research Group Corporation as of 2/3/2014. As a result, the reporting relied upon by applicant is not substantial evidence on the issue of AOE/COE.* (Report, pp. 2, emphasis added.)

II.

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; *Hamilton 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).

Next, 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.)

Unfortunately, the record in this matter is incomplete and as a result, there can be no meaningful right to reconsideration. The MOH did not include basic information required by WCAB Rule 10787, and the opinion on decision merely concluded that applicant take nothing on his claim because of an adverse inference taken against his credibility based on his refusal to submit to cross-examination at trial. Although the WCJ did clarify in the Report that the adverse inference drawn against applicant's credibility resulted in the rejection of all evidence produced to support applicant's burden to establish AOE/COE, there is no identification or discussion of that evidence and/or an analysis of how applicant's lack of credibility supports the rejection of all of that evidence. Thus, in order to provide meaningful review on reconsideration, there needs to be a complete MOH, and full and comprehensive opinion on decision supporting the take nothing order by citation to the procedural record, to the evidence in the record, and to legal principles.

Moreover, the issues identified in the MOH and discussed in the opinion on decision must also include any evidentiary issues, i.e., objections to evidence and the legal grounds for overruling or sustaining any objections made. If an evidentiary issue arises, the evidence must also be uploaded into EAMS as any other proposed evidence, and thereafter marked as admitted or not. If not, and should a party dispute an evidentiary ruling, there is no way to review that on removal or reconsideration unless the evidence is in the EAMS record of the case.

To be clear, we have no objection to the WCJ drawing an evidentiary inference against the applicant's credibility. WCAB Rule 10670, subdivision (d), states, "Where a willful suppression of evidence is shown to exist, it shall be presumed that the evidence would be adverse, if produced." (Cal. Code Regs., tit. 8, § 10670(d).) However, this rule creates a rebuttal presumption, not a conclusive presumption. (*Postural Therapeutics v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 551, 556 [51 Cal.Comp.Cases 162].)[4] We specifically stated 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.)

> A WCJ may indeed draw evidentiary inferences against a party bearing the affirmative of an issue, and "may consider, *among other things*, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto ..." (Evid. Code, § 413, emphasis added; see *Skaff v. City of Stockton* (2017) 82 Cal. Comp. Cases 794 [2017 5 Cal.Wrk.Comp. P.D. LEXIS 148]; *Hamilton v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 265 [2011 Cal.Wrk.Comp. LEXIS 32] (writ. den.).) We agree with the WCJ that applicant has thwarted defendant's ability to conduct the limited discovery necessary **for response to applicant's objection to defendant's notice to appear and testify**. (May Decision, p. 17, italics in the original, bold added.)

In other words, an evidentiary inference against applicant's credibility is not dispositive of his claims, and 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.[5]

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[4] We note that *Postural Therapeutics* was disapproved by *Camper v. Workers' Comp. Appeals Bd*. (1992) 3 Cal.4th 679, 690 [57 Cal.Comp.Cases 644]), to the extent it is inconsistent with the holding in *Camper* that "section 1013 does not operate to extend the 45-day time period prescribed by Labor Code section 5950 in which to file a petition for review." (*Camper, supra,* 3 Cal.4th at p. 690.) Our citation to *Postural Therapeutics* is for purposes unrelated to the holding in *Camper*, and we therefore consider the citation as proper.

[5] 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.

III.

Next, the parties are not required to appear in person in workers' compensation proceedings if they are represented at trial by counsel – *unless* noticed by a party or ordered to appear by the WCJ. (Cal. Code Regs., tit. 8, § 10752.) The WCJ issued an order on April 16, 2018[6] that applicant could be examined by defendant pursuant to Evidence Code 776 as an adverse witness:

> The undersigned hereby orders that an adverse inference is drawn against applicant that applicant misrepresented to physicians regarding his ability to work and to testify for failure to comply with the December 19, 2017 discovery order. The undersigned has thus found applicant can be examined by defendant under 776 of the evidence code as an adverse witness. (April 16, 2018 Order, p. 6.)

There was also a notice of intention in the April 16, 2018 Order to "draw further adverse inference against applicant...on the merits of the dispute..." should he not "submit to examination by defendant" under Evidence Code section 776. (April 16, 2018 Order, p. 7.) Applicant filed a petition for reconsideration of the April 16, 2018 Order, which we considered an objection to that notice.

However, we find no order in the record that applicant appear on a date certain for trial to testify in this capacity. Should a separate order have issued to that effect, the WCJ might have considered a detailed notice of intention to dismiss applicant's case for violating a court order to appear and testify. (Cal. Code Regs., tit. 8, §§ 10752, 10756, 10832.)[7]

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).)

[6] See page 6 of the April 16, 2018 "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" (April 16, 2018 Order).

[7] "(b) A Notice of Intention may be served by designated service in accordance with rule 10629. ¶ (c) If an objection is filed within the time provided, the Workers' Compensation Appeals Board, in its discretion may: ¶ (1) Sustain the objection; (2) Issue an order consistent with the notice of intention *together with an opinion on decision*; or (3) Set the matter for hearing." (Cal. Code Regs., tit. 8, § 10832(b)-(c), emphasis added.)

IV.

Deposition transcripts are admissible evidence in workers' compensation proceedings. (Lab. Code, § 5708 [The Appeals Board "shall not be bound by the common law or statutory rules of evidence and procedure, but may 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 and provisions of this division."]; e.g., *Mote v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 902, 913 [62 Cal.Comp.Cases 891] [hearsay is admissible in workers' compensation proceedings].)

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. No reconsideration is possible without a proper record, especially given that defendant's claim could have been mitigated through admission of applicant's depositions.

In addition, the WCJ already issued a negative evidentiary inference as to applicant's credibility, which obviates one of the "important objects" of cross-examination, i.e., to "guarantee that the fact finder ha[s] an adequate opportunity to assess the credibility of witnesses." (*Ogden Entertainment Services v. Workers' Comp. Appeals Bd. (Von Ritzhoff)* (2014) 233 Cal.App.4th 970, 983 citing *Berger v. California* (1969) 393 U.S. 314, 315.)

> A denial of due process to a party ordinarily compels annulment of the Board's decision only if it is reasonably probable that, absent the procedural error, the party would have attained a more favorable result. (*Redner v. Workmen's Comp. Appeals Bd.* (1971) 5 Cal.3d 83, 93 [95 Cal.Rptr. 447, 485 P.2d 799].) However, if the denial of due process prevents a party from having a fair hearing, the denial of due process is reversible per se. (See *Dvorin v. Appellate Dept.* (1975) 15 Cal.3d 648, 651 [125 Cal.Rptr. 771, 542 P.2d 1363] [summary judgment ordered without motion]; *Spector v. Superior Court* (1961) 55 Cal.2d 839, 843-844 [13 Cal.Rptr. 189, 361 P.2d 909] [judge refused to allow party to present any evidence or argument]; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 364, p. 366.) (*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd.* (1994) 26 Cal.App.4th 789, 806 [59 Cal.Comp.Cases 461].)

Accordingly, the record of this matter is insufficient to allow reasonable reconsideration of the F&O. It is therefore our decision after reconsideration to rescind the F&O in its entirety, and to return this matter to the trial court for further proceedings as required, after which the parties and the WCJ will have the opportunity to prepare a full and complete record consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Orders issued on September 15, 2020 by a workers' compensation administration law judge is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings as required and consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 18, 2023

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
KEGEL, TOBIN & TRUCE

AJF/abs

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