

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

3
4 **Misc. No. 254**

5
6 **IN RE: DANIEL ESCAMILLA,**
7 *Respondent.*

8 **OPINION AND ORDER**
9 **DISMISSING PETITION FOR**
10 **CHANGE OF VENUE, DENYING**
11 **REQUEST FOR IMMEDIATE**
12 **STAY OF PROCEEDINGS,**
13 **GRANTING PETITION FOR**
14 **REMOVAL, AND DECISION**
15 **AFTER REMOVAL**

16 Daniel Escamilla, in propria persona, filed two petitions on January 6, 2012: a Petition for
17 Change of Venue [Labor Code section 5501.6] and a Petition for Removal and Request for Immediate
18 Stay of Proceedings. While the relief sought in the Petition for Change of Venue is not clearly stated, it
19 appears that Mr. Escamilla seeks a change of venue to an unspecified Workers' Compensation Appeals
20 Board (WCAB) district office in Southern California. In his Petition for Removal, Mr. Escamilla seeks
21 review of the December 20, 2011 orders by workers' compensation administrative law judge (WCJ)
22 David Hettick, serving as the designated hearing officer for the Appeals Board, relieving Traci Hinden as
23 petitioner's counsel of record, denying appointment of an attorney under Code of Civil Procedure section
24 285.4, denying a 60-day continuance of the January 27, 2011 hearing, and requiring Mr. Escamilla, by
25 January 6, 2011, to disclose the names and addresses of all witnesses, together with a short, concise offer
26 of proof as to their anticipated testimony. Mr. Escamilla also seeks a stay of the proceedings so that we
27 may address the issues raised in his petition and so that he may engage in discovery and obtain counsel.

Mr. Escamilla contends that it was beyond the scope of the hearing officer's appointment to make
a decision on Ms. Hinden's motion to be relieved as counsel; that the hearing officer exceeded his
authority and violated due process by ordering Mr. Escamilla's attorney to disclose in camera her reasons
for withdrawing; that there was no good cause for Mr. Escamilla's counsel to be relieved, and that it
caused Mr. Escamilla substantial prejudice; that he was not afforded sufficient notice of his counsel's

1 withdrawal; that he is entitled to protection of his constitutional right to counsel because of the quasi-
2 criminal nature of this proceeding; and that the hearing officer erred in ordering him to file any Petition
3 for Removal, to disclose his witnesses, and to make an offer of proof as to their anticipated testimony by
4 January 6, 2011.

5 We have considered the petitions and the replies filed by John Shields, prosecuting attorney for
6 the WCAB, and we have reviewed the record in this matter.

7 For the reasons discussed below, we will dismiss the Petition for Change of Venue and deny the
8 Request for Immediate Stay of Proceedings. We will grant removal, affirm the order relieving Ms.
9 Hinden as Mr. Escamilla's counsel, continue the January 27, 2012 hearing, and direct the hearing officer
10 to reschedule the pre-hearing conference for no sooner than 45 days from the date of this decision, and a
11 hearing approximately 45 days after the conference.

12 First, we will address the Petition for Change of Venue. This proceeding on the issue of
13 suspension or removal of Mr. Escamilla's privilege to appear in WCAB proceedings as a representative
14 of any party was not initiated by the filing of an application, the mechanism by which an applicant both
15 invokes the WCAB's jurisdiction in a proceeding to receive compensation and selects venue pursuant to
16 the factors set forth in Labor Code section 5501.5.¹ The Appeals Board initiated this proceeding under
17 section 4907, and the Appeals Board has only one location, San Francisco. No district office has venue
18 in this proceeding; venue is with the Appeals Board. While the Appeals Board requested that a WCJ
19 employed in the San Francisco district office serve as our hearing officer, he performs this function on a
20 direct delegation from the Appeals Board for our convenience, not because the San Francisco district
21 office has venue.² Because the Appeals Board has no offices outside of San Francisco, there is no other
22 office to which to transfer venue. Accordingly, we will dismiss the Petition for Change of Venue.

23 Notwithstanding the above, the Appeals Board has statewide jurisdiction. (See Lab. Code, § 130;
24 *City of Anaheim v. Workers' Comp. Appeals Bd. (Beteag)* (1981) 116 Cal.App.3d 248, 255 [46
25

26 ¹ All further statutory references are to the Labor Code, unless otherwise indicated.

27 ² Another reason for our selection of a Northern California WCJ to serve as hearing officer is that this WCJ has no familiarity
with Mr. Escamilla. Several Southern California WCJs have sanctioned Mr. Escamilla, and Mr. Escamilla might perceive
them to be less than wholly impartial.

1 Cal.Comp.Cases 318, 322].) In our discretion, we may conduct a hearing or direct a hearing officer to
2 conduct a hearing at any location in the state. If, after the pre-hearing conference and determination of
3 the witnesses who will be appearing at the hearing, we determine that a location other than San Francisco
4 is more appropriate, we may schedule the hearing on this matter in a different location. In his Petition for
5 Change of Venue, petitioner listed only five witnesses, three in Southern California and two in
6 Sacramento. This witness list does not justify moving the hearing to Southern California.

7 We will now address petitioner's Petition for Removal.

8 In our September 21, 2011 "Notice of Hearing Regarding Suspension or Removal of Privilege of
9 Daniel Escamilla to Appear in Any Proceeding as a Representative of Any Party Before the Appeals
10 Board or Any Workers' Compensation Administrative Law Judge (En Banc)" (NOH), citing section
11 5309(b), we delegated authority to the Honorable David Hettick to "act as hearing officer for the Appeals
12 Board to receive evidence and arguments regarding this matter," and to "prepare and submit the hearing
13 record to the Appeals Board for its consideration and decision." Section 5309(b) authorizes the Appeals
14 Board "of its own motion, and with or without notice" to direct and order a WCJ "[t]o hold hearings and
15 ascertain facts necessary to enable the appeals board to determine any proceeding or to make any order,
16 decision, or award that the appeals board is authorized to make under Divisions 4 or 5, or necessary for
17 the information of the appeals board." Pursuant to section 4907 and implicit in the Appeals Board's
18 direction and order is the authority to make the procedural decisions required to conduct such hearings.
19 This authority includes decisions regarding continuances, evidence, and representation. It defies logic to
20 direct a WCJ to hold a hearing without giving the WCJ the tools to manage the proceeding. Regulation
21 of how, when, and from whom evidence and argument will be received is within the scope of our
22 delegation to the hearing officer, subject to our review.

23 The hearing officer not only had the authority to relieve Ms. Hinden as counsel of record for Mr.
24 Escamilla; it was entirely appropriate for him to do so, based on the circumstances as explained by Mr.
25 Escamilla and by Ms. Hinden in her declaration in support of her motion to be relieved as counsel. Mr.
26 Escamilla says that he selected Ms. Hinden because of her expertise in this area of law, but he admits he
27 rejected her advice, relying instead of the advice of his appellate counsel, Roger Diamond. Even if we

1 considered only Mr. Escamilla's representations at the December 20, 2011 hearing and in his petition, it
2 is apparent that relieving Ms. Hinden was both reasonable and appropriate.

3 While the hearing officer acted properly in granting Ms. Hinden's motion, we agree with Mr.
4 Escamilla that, to the extent he had a right to seek review of the hearing officer's action via a Petition for
5 Removal, he had 20 days within which to file his petition. (Cal. Code Regs., tit. 8, § 10843(a).) Because
6 Mr. Escamilla did, in fact, file a timely Petition for Removal and we are granting that petition, the
7 hearing officer's limit on the number of days for filing the Petition for Removal was harmless and is now
8 moot.

9 We understand the inconvenience posed to Mr. Escamilla by his attorney's withdrawal of
10 representation. However, as noted by Mr. Shields, this inconvenience was largely the result of Mr.
11 Escamilla's own choices. The NOH was served on Mr. Escamilla on September 21, 2011. He did not
12 retain Ms. Hinden until December 1, 2011, and she represented him for less than two weeks before his
13 unwillingness to listen to her advice made continuing representation pointless. Any unfavorable
14 consequences of Mr. Escamilla's lack of counsel are only minimally related to the withdrawal of Ms.
15 Hinden. If Mr. Escamilla's claim that he spoke to 20 attorneys before Ms. Hinden agreed to represent
16 him is true, it is probable that a third continuance will not enable him to find a new attorney. We also
17 note that Mr. Escamilla's comments on the status of Mr. Diamond as his attorney are not clear or
18 consistent.

19 Nevertheless, to afford Mr. Escamilla "utmost due process" (Petition for Removal, 11:27, 15:27-
20 28), as he requests, we will afford him one final additional opportunity to retain counsel to represent him
21 in this matter prior to any further conference or hearing. For this purpose, we will continue the January
22 27, 2012 hearing. We will direct the hearing officer to schedule a pre-hearing conference in San
23 Francisco no less than 45 days from service of this decision, and to provide notice to Mr. Escamilla and
24 Mr. Shields. At that conference, Mr. Escamilla, whether represented or not, shall present all
25 documentary evidence and a list of the names and addresses of witnesses he intends to call at the hearing,
26 and a specific and non-generalized offer of proof as to the anticipated testimony of each individual
27 witness specified. The general and summary offer of proof contained in his Petition for Change of

1 Venue is not adequate. He shall also provide an explanation as to why each witness should testify in
2 person, as opposed to testifying by affidavit.³ We will order Mr. Escamilla to provide a copy of the
3 documentary evidence and witness list to Mr. Shields no later than 15 days before the date of the
4 conference. Failure to do so shall result in exclusion of the evidence or testimony. No further
5 documentary evidence or witnesses will be allowed at trial.

6 The hearing officer is empowered to rule on the admissibility of all evidence and to exclude
7 evidence that is duplicative, repetitive, redundant, irrelevant, or non-probative on the issues before us.
8 Mr. Escamilla's Petition for Change of Venue indicates a broad range of issues on which he proposes to
9 present testimony; however, many of those issues are beyond the appropriate scope of witness testimony.
10 For example, testimony is not appropriate and should be excluded if it conveys an opinion on purely
11 legal issues that are within the purview of the Appeals Board. Testimony on factual issues that have been
12 previously and finally determined should also be excluded. We will not be re-opening or re-examining
13 the factual basis for past sanction orders, and we direct the hearing officer to exercise his discretion in
14 rejecting such evidence.

15 Mr. Escamilla has not offered any viable authority for the WCAB to appoint an attorney to
16 represent him in this proceeding, regardless of indigence; and we are not aware of any authority for doing
17 so. Mr. Shields is correct that Code of Civil Procedure section 285.4, cited by Mr. Escamilla, is
18 inapplicable, as it pertains only to an appointment to replace a legal service agency attorney who has
19 withdrawn due to a reduction in public funding. Mr. Escamilla's concerns about the expense of hiring an
20 attorney are undoubtedly sincere, but his history of frequent and multiple sanctions should have been a
21 lesson to him that repeated misconduct in WCAB proceedings bears a cost. This proceeding is neither a
22 criminal nor a quasi-criminal matter, and obtaining counsel is solely Mr. Escamilla's choice and
23 responsibility.

24 In sum, we will dismiss the Petition for Change of Venue, because there is no venue other than
25 with the Appeals Board in San Francisco. Pending consideration of any further credible information
26

27 ³ We do not preclude Mr. Shields from objecting to admission of affidavits in lieu of testimony, in the event he wishes to cross-examine any of the witnesses.

1 received prior to or at the pre-hearing conference, we may consider conducting the hearing at a location
2 other than San Francisco. A stay is not necessary, but we will grant a continuance. The continued pre-
3 hearing conference will be set no sooner than 45 days from service of this decision, and the hearing will
4 be set approximately 45 days thereafter. No further continuances will be granted due to Mr. Escamilla's
5 inability to obtain either representation or witnesses. He shall provide a copy of his documentary
6 evidence and witness list to Mr. Shields no later than 15 days before the date of the conference, or the
7 evidence or testimony shall be excluded. Also, although we previously accepted Mr. Escamilla's
8 November 7, 2011 Petition for Reconsideration as a response to our NOH, he may file additional non-
9 duplicative written comments directly with the Appeals Board prior to the date of the hearing in this
10 matter. If Mr. Escamilla does not appear at the conference and the hearing, or if he appears but is
11 unprepared to proceed, we will issue our decision based on the record as it exists on the date of the
12 hearing.

13 We emphasize that Mr. Escamilla is not required to appear, to present witnesses, or to file
14 additional written comments. We extend these opportunities to be heard so that he may, if he chooses,
15 present evidence or comment on the issue of suspension or removal of his privilege to appear in WCAB
16 proceedings on behalf of any party, as discussed in our September 21, 2011 NOH.

17 We are now granting a third and final continuance to allow Mr. Escamilla one additional
18 opportunity to obtain counsel and to prepare his list of witnesses, despite his dilatory efforts to date.
19 While we have taken every precaution to safeguard due process and Mr. Escamilla's right to counsel, we
20 cannot protect Mr. Escamilla from the consequences of his own poor decisions and failures to protect his
21 own interests. Whatever difficulties Mr. Escamilla has encountered in obtaining or retaining counsel in
22 this case, those difficulties are not a denial of his right to counsel by the Appeals Board. It has now been
23 approximately four months since Mr. Escamilla was served with the NOH, which provided notice and
24 offered him the opportunity to be heard. That is ample time to obtain counsel and conduct discovery in
25 this matter. "Utmost due process" has been accorded.

26 For the foregoing reasons,

27 **IT IS ORDERED** that Daniel Escamilla's Petition for Change of Venue is **DISMISSED**.

1 **IT IS FURTHER ORDERED** that Daniel Escamilla’s Request for Immediate Stay of
2 Proceedings is **DENIED**.

3 **IT IS FURTHER ORDERED** that Daniel Escamilla’s Petition for Removal is **GRANTED**.

4 **IT IS FURTHER ORDERED**, as the Decision After Removal of the Workers’ Compensation
5 Appeals Board, that

6 1. The order relieving Traci Hinden as attorney of record for Mr. Escamilla is
7 affirmed.

8 2. The hearing scheduled for January 27, 2012, is continued.

9 3. The pre-hearing conference is continued to a future date no less than 45 days
10 from service of this opinion, at a time and date to be set and noticed by the hearing
11 officer, the Honorable David Hettick, to be followed by a hearing approximately
12 45 days thereafter, at a time and date to be set and noticed by the hearing officer.

12 / / /

13 / / /

14 / / /

15 / / /

16 / / /

17 / / /

18 / / /

19 / / /

20 / / /

21 / / /

22 / / /

23 / / /

24 / / /

25 / / /

26 / / /

27 / / /

1 4. At the pre-hearing conference, Mr. Escamilla shall present: (1) all documentary
2 evidence he intends to offer at the hearing; (2) a list of the names and addresses of
3 witnesses he intends to call at the hearing; and (3) a specific and non-generalized
4 offer of proof as to each individual witness's anticipated testimony. He shall also
5 provide an explanation as to why each witness should testify in person at the
6 hearing, as opposed to testifying by affidavit. Mr. Escamilla shall provide copies
7 of the documentary evidence and witness list to Mr. Shields no later than 15 days
8 prior to the date of the conference. A failure to comply with any of these
9 requirements shall result in exclusion of the evidence or testimony.

7 **WORKERS' COMPENSATION APPEALS BOARD**

8 /s/ Ronnie G. Caplane

9 **RONNIE G. CAPLANE, Chairwoman**

10 /s/ Frank M. Brass

11 **FRANK M. BRASS, Commissioner**

12 /s/ Joseph M. Miller

13 **JOSEPH M. MILLER, Commissioner**

14 /s/ Alfonso J. Moresi

15 **ALFONSO J. MORESI, Commissioner**

16 /s/ Deidra E. Lowe

17 **DEIDRA E. LOWE, Commissioner**

18
19
20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

21 **1/20/2012**

22 ***SERVICE BY MAIL EFFECTED ON ABOVE DATE ON THE FOLLOWING PARTIES:***

23 **DANIEL ESCAMILLA**
24 **JOHN SHIELDS, Staff Attorney**
25 **ROGER DIAMOND**
26 **TRACI HINDEN**
27 **HONORABLE DAVID HETTICK**

CB:bea/jmp