

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

**CHRISTOPHER JOHNSON, *Applicant***

**vs.**

**LEXMAR DISTRIBUTION dba LDI TRUCKING, INC.; CLEAR SPRING PROPERTY  
AND CASUALTY COMPANY administered by CANNON COCHRAN MANAGEMENT  
SERVICES, INC., *Defendants***

**Adjudication Number: ADJ14203968  
Anaheim District Office**

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

Defendant Lexmar Distribution dba LDI Trucking, Inc., insured by Clear Spring Property and Casualty Company and administered by Cannon Cochran Management Services, Inc. seeks removal of the June 15, 2021 trial order excluding defendant's exhibits consisting of dashcam videos. The Honorable Howard Lemberg, workers' compensation administrative law judge (WCJ), sustained applicant's objection to the dashcam videos on the ground of lack of authentication and foundation and disallowed defendant to call Ines Guzman to authenticate the dashcam videos because she was not listed as a witness in the Pre-Trial Conference Statement.

Defendant contends that the exclusion of the dashcam videos violates defendant's due process rights because (1) authentication of the videos was not listed as an issue for trial and defendant was not provided prior notice and opportunity to be heard when the videos were excluded, (2) the WCJ has provided no authority establishing that the dashcam videos needed to be authenticated when Labor Code section 5708 establishes that the Workers' Compensation Appeals Board (WCAB) is not bound by common law or statutory rules of evidence and procedure, and (3) even if the dashcam videos needed to be authenticated, the WCJ applied the incorrect standard because the videos could be authenticated by applicant's testimony, circumstantial evidence, content and location, or any means provided by law. Defendant further contends that WCJ Lemberg must be disqualified from conducting further proceedings in this matter because he

has formed or expressed an unqualified opinion or belief as to the merits of the action and because a person might reasonably entertain doubts concerning his impartiality.

We received an answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant defendant's petition for removal and petition for disqualification and order the matter returned to the Presiding WCJ to assign a new WCJ to conduct further proceedings in this matter according to this Opinion.

## FACTS

As the WCJ stated in his report:

Applicant, born 03/29/1971 while employed on 01/03/2021 as a truck driver at Pomona, California by Lexmar Distribution doing business as LDI Trucking, Inc., then insured by Clear Springs Property & Casualty Company administered by Cannon Cochran Management Services, claims to have sustained injury arising out of and occurring in the course of employment to bilateral ankles, right foot, bilateral knees, bilateral wrists, ribs, back, head, high blood pressure, kidneys and psyche. The issues in dispute are aoe/coe and the affirmative defense of initial physical aggressor pursuant to Labor Code section 3600(a) (7).

On 04/08/2021 defendant filed declaration of readiness to proceed requesting the case be set for priority conference on the issue of AOE/COE. The DOR states, in pertinent part, that:

***“APPLICANT ALLEGES INDUSTRIAL INJURIES, BUT DASH CAM FOOTAGE REVEALS THAT APPLICANT REFUSED TO COOPERATE WITH AND PROVOKED POLICE OFFICERS. APPLICANT'S ENTIRE CONFRONTATION WITH POLICE WAS CAPTURED ON VIDEO.”*** (Emphasis added.)

A priority conference was held on 04/28/2021 at 1:30 p.m. The parties were unable to resolve the case at the priority conference and the matter was set for trial.

Day one of trial was held on 06/21/2021. Stipulations of facts and issues and the party's exhibits were read into the record, the court issued rulings in response to objections to evidence raised by applicant and defendant and testimony of applicant was taken. Direct examination of applicant was

completed but cross-examination was not. The trial was continued to 9/23/2021. (Report, p. 2.)

At the June 21, 2021 trial, WCJ Lemberg sustained applicant's objection to defendant's offer of dashcam video evidence consisting of four video clips. (Minutes of Hearing and Summary of Evidence (MOH/SOE) dated June 21, 2021, pp. 5:7-6:1.)

On June 25, 2021, defendant filed a Petition for Removal and Petition for Disqualification of WCJ Lemberg. (Petition.) Defendant contends that the dashcam video evidence was improperly excluded based on an incorrect authentication standard. (Petition, pp.10:13-13:14.) Defendant further contends that WCJ Lemberg should be disqualified from presiding over this matter in the future because of the following comments he made to defense counsel at trial, all of which were made off the record and are not found in the trial transcript:

- a. "I suggest you look at your boss' treatises", and that "you clearly don't understand your boss' treatises"
- b. "WOW! I think you need to read your boss' treatise. You might want to review it, that would be helpful for you to review." (Petition, p. 20:4-16; Affidavit of Daphne H. Walsh in Support of Petition for Disqualification of WCJ Lemberg, ¶¶ 17 and 21.)

## **DISCUSSION**

There are two issues in this Petition: (1) whether the dashcam videos should have been admitted into evidence and were improperly excluded, and (2) whether WCJ Lemberg should be disqualified from conducting further proceedings in this matter.

### **A. Dashcam Videos**

At trial, applicant's counsel objected to the admissibility of the dashcam videos on the ground of lack of authentication and lack of foundation. (MOE/SOE dated June 21, 2021, p. 5:10-11.) Applicant's counsel called into question the reliability of the dashcam videos because the videos are not one continuous footage, but has been cut out into four different segments. (MOE/SOE dated June 21, 2021, p. 5:19-22.) The WCJ sustained the objection, which appears to be on the grounds that defendant did not list a witness in the Pre-trial Conference Statement who can testify as to the videos' chain of custody, how the films were prepared, what equipment was used to film, and whether there has been any editing, splicing, or alteration of the film. (Transcript dated June 21, 2021, pp. 23:9-24:5; MOE/SOE dated June 21, 2021, pp. 5:23-6:1.)

Defendant contends that the WCJ applied the incorrect standard for authentication of the dashcam videos because the videos could be authenticated by applicant’s testimony, circumstantial evidence, content and location, or any means provided by law. (Petition, p. 8:3-5.) The panel decision in *Johnson v. Tennant Co.* (May 21, 2009, ADJ1620559) [2009 Cal. Wrk. Comp. P.D. LEXIS 234] provides us with guidance on the issue of the authentication of the dashcam videos:

. . . Labor Code § 5708 makes clear that the WCAB “shall not be bound by the common law or statutory rules of evidence and procedure . . . .” Thus, we are not bound by Evidence Code §§ 1400 and 1401. Our research reveals no published workers' compensation case requiring formal “authentication” of writings. In fact, it is routine in workers' compensation matters to allow almost all documents into evidence without formal authentication. For instance, medical evaluators are not called at trial to authenticate their reports. Thus, in the absence of a genuine question regarding whether writings sought to be introduced into evidence are forgeries, there is no need in workers' compensation proceedings for formal authentication of documents.

In any case, we note that even in criminal and civil cases, a chain of custody is not necessary to establish the authenticity of a video. “[T]he reliability and accuracy of the motion picture need not necessarily rest upon the validity of the process used in its creation, but rather may be established by testimony that the motion picture accurately reproduces phenomena actually perceived by the witness. Under this theory, though the requisite foundation may, and usually will, be laid by the photographer, it may also be provided by any witness who perceived the events filmed. Of course, if the foundation testimony reveals the film to be distorted in some material particular, exclusion is the proper result.” (*Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440, quoting McCormick on Evidence (3d ed. 1984) § 214, pp. 673–674.) “A video recording is authenticated by testimony or other evidence ‘that it accurately depicts what it purports to show.’” (*People v. Gonzalez* (2006) 38 Cal.4th 932, 952.) We note that in this case, Mr. De La Torre testified that the tapes were a fair and accurate representation of what he observed. (November 13, 2008 Summary of Evidence at p. 4.)

The more recent panel decision in *Milla v. United Guard Security, Inc.* (2020) 86 Cal. Comp. Cases 71, 82-83 [2020 Cal. Wrk. Comp. P.D. LEXIS 330] also guides us:

In any event, a writing (in this case a photograph) may be authenticated by “(a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.” (Evid. Code, § 1400.) As outlined in [*People v. Goldsmith* (2014) 59 Cal.4th 258, 267-268]:

The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case. (2 *McCormick, supra*, § 221, pp. 82–83.) The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered.

...

A photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. (*People v. Gonzalez* (2006) 38 Cal. 4th 932, 952 [44 Cal. Rptr. 3d 237, 135 P.3d 649]; *People v. Cheary* (1957) 48 Cal. 2d 301, 311–312 [309 P.2d 431].) This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. (*People v. Mehaffey* (1948) 32 Cal. 2d 535, 555 [197 P.2d 12]; *People v. Doggett* (1948) 83 Cal. App. 2d 405, 409 [188 P.2d 792]; 2 Witkin, Cal. Evidence (5th ed. 2012) Documentary Evidence, § 7, pp. 154–156 (Witkin).)

(*Goldsmith, supra*, 59 Cal. 4th at pp. 267–268.)

We, thus, conclude that the dashcam videos were improperly excluded and that defendant should be given the opportunity to authenticate the dashcam videos through applicant’s testimony and, if necessary, through the testimony of Ines Guzman. We acknowledge that applicant was the only witness listed in the Pre-Trial Conference Statement.

## **B. Disqualification of WCJ Lemberg**

Labor Code section 5311 provides,

Any party to the proceeding may object to the reference of the proceeding to a particular workers’ compensation judge upon any one or more of the grounds specified in Section 641 of the Code of Civil Procedure and the objection shall be heard and disposed of by the appeals board. Affidavit may be read and witnesses examined as to the objections. (Lab. Code, § 5311.)

Defendant seeks WCJ Lemberg’s disqualification based on subdivisions (f) and (g) of section 641 of the Code of Civil Procedure, which provides:

A party may object to the appointment of any person as referee, on one or more of the following grounds:

...

(f) Having formed or expressed an unqualified opinion or belief as to the merits of the action.

(g) The existence of a state of mind in the potential referee evincing enmity against or bias toward either party. (Code Civ. Proc., § 641, subs. (f) and (g).)

Defendant further contends that disqualification is further warranted based on the appearance of bias. (Petition, p. 16:4-6, citing to Cal. Code Regs., tit. 8, § 9721.12, subd. (a)(11).)

“Preliminarily, due process requires a fair hearing before a neutral, unbiased decision maker, including in administrative proceedings. [citations omitted.]” (*Robbins v. Sharp Healthcare* (2006) 71 Cal.Comp.Cases 1291, 1302 [2006 Cal. Wrk. Comp. LEXIS 314].) “Due process is violated where there is even an appearance of bias or unfairness in administrative hearings. [citations omitted.]” (*Ibid.*)

Labor Code section 123.6, subdivision (a), requires WCJs to subscribe to the Code of Judicial Ethics. (Lab. Code, § 123.6, subd. (a).) The WCAB is to determine, on a case by case basis, whether there has been a sufficient showing from an objective viewpoint of the appearance of impropriety to require the disqualification of the assigned WCJ.

Canon 1 of the Code of Judicial Ethics provides, in pertinent part:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective. [quotations omitted.]

Canon 2 is entitled: “A judge shall avoid impropriety and the appearance of impropriety in all of the Judges' activities.” Canon 2(A) requires, in pertinent part, that a judge shall “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” The Advisory Committee Commentary under Canon 2(A) states, in relevant part:

A judge must avoid all impropriety and appearance of impropriety. . . . The 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. [quotations omitted.]

(*Robbins, supra*, 71 Cal.Comp.Cases 1291, 1303.)

“Thus, the ‘appearance of impropriety’ test, as set forth in Canon 2 and in the Commentary to Canon 2(A), is an objective one, i.e., would a reasonable person with knowledge of the facts entertain doubts concerning the WCJ’s impartiality.” (*Ibid.*)

Here, we are persuaded that defendant has presented sufficient grounds for the WCJ’s disqualification based upon the appearance of impropriety. Defense counsel Daphne H. Walsh submitted an affidavit attributing two comments from the WCJ, which we agree may be construed as belittling of her and her ability to litigate. (Petition, p. 20:4-16; Affidavit of Daphne H. Walsh in Support of Petition for Disqualification of WCJ Lemberg, ¶¶ 17 and 21.) We take note that the WCJ did not address these allegations in his Report. Our conclusion that there is sufficient grounds for the WCJ’s disqualification is based on defense counsel’s affidavit attributing these comments to the WCJ, which we are accepting as true, in light of the fact that these comments do not appear in the trial transcript and there is nothing in the record to refute them. Our decision to disqualify the WCJ is not based on his ruling to exclude the dashcam videos.

Finally, we note that the 10-day time limit to file a petition for disqualification found in WCAB Rule 10960 is not applicable here because the grounds for disqualification were not known until the date of trial. (Cal. Code Regs., tit. 8, § 10960.)

For the foregoing reasons, we grant defendant’s petition for removal and petition for disqualification and order the matter returned to the Presiding WCJ to assign a new WCJ to conduct further proceedings in this matter according to this Opinion.

**IT IS ORDERED** that defendant Lexmar Distribution dba LDI Trucking, Inc.'s Petition for Removal and Petition for Disqualification dated June 25, 2021 is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Removal of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the Presiding Workers' Compensation Judge for assignment of a new Workers' Compensation Judge to conduct further proceedings.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**October 19, 2021**

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

**CHRISTOPHER JOHNSON  
LAW OFFICES OF TOUS & ASSOCIATES  
MICHAEL SULLIVAN & ASSOCIATES LLP**

**LSM/bea**

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