

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

RONALD PAYNE, *Applicant*

vs.

**CDCR, administered by STATE COMPENSATION INSURANCE FUND/STATE
CONTRACT SERVICES, *Adjusting Agency, Defendants***

**Adjudication Number: ADJ9887085
Long Beach District Office**

OPINION AND ORDER DENYING PETITION FOR REMOVAL

Applicant Ronald Payne, in pro per, seeks removal of the Opinion and Order Denying Petition for Disqualification (Decision) issued by the Workers' Compensation Appeals Board (Appeals Board) on August 9, 2021.¹ In that Decision, the Appeals Board determined that the Petition for Disqualification filed by applicant on April 30, 2021 (2021 Petition for Disqualification) was untimely pursuant to WCAB Rules 10960 and 10605 (Cal. Code Regs., tit. 8, §§ 10960, 10605). The WCAB also stated that if the petition were not untimely, it would be denied on the merits for the reasons stated in the Report and Recommendation filed by the workers' compensation administrative law judge (WCJ).

Applicant contends that the Petition for Disqualification filed on April 30, 2021 was untimely filed because his initial attempt to file the petition was thwarted given that the Long Beach District Office moved locations without informing applicant of the change of address; and, that his Objection to Judge Marsteiner's Objection to Disqualification was not a supplemental petition, but was an answer/objection. Applicant also reiterates allegations set forth in the 2021 Petition for Disqualification that defendant may not defend itself because it failed to file an objection to an unidentified declaration of readiness to proceed filed by applicant. Finally,

¹ Applicant filed an "objection" to the Decision on August 12, 2021, which we are treating as a petition for removal of the Decision. (Cal. Code Regs., tit. 8, § 10955.)

applicant contends that the Appeals Board is playing games with applicant, is committing fraud against applicant, is corrupt, and fails to follow established law.

Without waiting for a response from the WCAB, applicant filed a request on September 22, 2021 that the Appeals Board respond to the August 12, 2021 petition for removal. The September 22, 2021 request is not an answer filed to a petition for reconsideration, removal, or disqualification and is therefore is a “supplemental pleading” pursuant to WCAB Rule 10964. (Cal. Code Regs., tit. 8, § 10964 [“When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses *other than the answer* shall be considered only when specifically requested or approved by the Appeals Board.”], emphasis added.) We find no petition to file a supplemental pleading in the record of this matter, even though applicant was cautioned in the Decision to comply with WCAB Rule 10964. (Cal. Code Regs., tit. 8, § 10964 [“A party seeking to file a supplemental pleading *shall file a petition* setting forth good cause for the Appeals Board to approve the filing of a supplemental pleading and shall attach the proposed pleading.”], emphasis added.) Consequently, we do not accept the September 22, 2021 request for filing as a supplemental pleading, and thus, do not consider the allegations in the September 22, 2021 request.

In addition, and again without waiting for a response from the WCAB to his August 12, 2021 removal of the Decision, applicant filed another Petition to Disqualify Judge Diana Marsteiner (2022 Petition to Disqualify) on January 5, 2022, requesting that the presiding judge remove WCJ Diana Marsteiner as the WCJ assigned to applicant’s case. The presiding judge did not rule on the 2022 Petition to Disqualify, and we will therefore respond to the January Petition to Disqualify herein. (Cal. Code Regs., tit. 8, § 10960 [“A petition for disqualification shall be referred to and determined by a panel of three commissioners of the Appeals Board in the same manner as a petition for reconsideration.”].)

Applicant contends in the 2022 Petition to Disqualify that despite the Decision wherein the Appeals Board denied his request to disqualify the WCJ, the WCJ has yet to put applicant’s matter back on calendar; that the WCJ has failed to rule on applicant’s petition to reopen and it is “abundantly clear” that the WCJ never will do so; that the WCJ ignored applicant’s allegations in his objection to defendant’s objection to his February 25, 2021 Petition to Disqualify (filed April 30, 2021) that defendant’s attorney falsified evidence and made false arguments in that objection; that the WCJ is therefore protecting defendant because she has no intention of ever ruling on

applicant's petition to reopen his claim because although she knows that defendant committed fraud, does not want to decide in applicant's favor.

Defendant filed an Objection to Applicant's Petitions for Disqualification of WCJ and Removal of Defense Counsel (Answer).² We find no report and recommendation filed by the WCJ to the 2022 Petition to Disqualify.

Applicant filed an Employee's Objection to State Fund Objection to Petition to Disqualify Judge Diana Marsteiner, and to State Fund Objection to Remove Attorney David J. Arnold from Employee's Claim (Objection), and an Amendment to Objection Filed by Employee Dated 02/15/2022 (Supplemental Objection). However, we find no petition to file supplemental pleadings pursuant to WCAB Rule 10964 in the record of this matter related to the Objection or the Supplemental Objection. As stated above, applicant was specifically cautioned in the Decision to comply with WCAB Rule 10964, but has not done so. As a result of his failure to comply with WCAB Rule 10964, we do not accept either the Objection or Supplemental Objection as supplemental pleadings, and therefore do not consider the allegations of the Objection or the Supplemental Objection.

PETITION FOR REMOVAL OF THE APPEALS BOARD'S DECISION

We have reviewed the record in this case, and applicant's objection, i.e., petition for removal. Based on our review of the record and the Decision, we deny applicant's Petition for Removal of the Decision based on the grounds stated therein, including but not limited to the following:

WCAB Rule 10960 provides that when the WCJ and "the grounds for disqualification" are known, a petition for disqualification "shall be filed not more than 10 days after service of notice of hearing or after grounds for disqualification are known." As noted by the WCJ in the report, in this case, the latest alleged instance of bias occurred at the trial setting on January 5, 2021. The January 5, 2021 Minutes of Hearing were served by defendant on January 20, 2021. Based on the authority cited above, and providing five days for mailing, at the latest, applicant had until Thursday, February 4, 2021 to file a Petition for Disqualification for allegations associated with the January 5, 2021

² Applicant filed a Petition to Remove Attorney David J. Arnold from Employee's Claim in the WCAB (Petition to Remove Attorney). We find no order, award, or decision issued from the trial court on that petition, nor any petition for removal on any such order, award, or decision on that petition from any party in this matter. Therefore, we do not address the Petition to Remove Attorney.

hearing. (Cal. Code Regs., tit. 8, §§ 10960, 10605.) Therefore, *even if we take the date that the petition is dated, February 25, 2021, the Petition for Disqualification is still untimely.* (Decision, p. 2, emphasis added.)

Applicant’s contention that the change of address for the Long Beach District Office caused the petition to be untimely filed is therefore without merit. In other words, it was *already* untimely before he allegedly mailed it to the wrong address. We also clarify that even if we accepted the verification of applicant’s petition in lieu of a declaration under the penalty of perjury, applicant did not set forth facts sufficient to establish disqualification as set forth in detail by the WCJ in her Report and Recommendation (Report), which was incorporated in full by the Decision.

We disagree with applicant that “it is simply not possible to come to a conclusion that the facts” set forth in the 2021 Petition for Disqualification do not establish grounds for disqualification. Contrary to applicant’s allegation, we did not disregard the allegations made by applicant in the 2021 Petition for Disqualification. However, our own review of the record in this case confirmed the summary of the facts and circumstances set forth in the WCJ’s Report – and, in turn, did *not* confirm the allegations made by applicant in the petition.

We note applicant’s frustration with the workers’ compensation process, which we must assume is based on applicant’s very real desire to proceed to trial in this matter. However, we remind applicant that accusing the Appeals Board of playing games with applicant, of committing fraud against applicant, of being corrupt, and of failing to follow established law may be grounds for the imposition of sanctions when based on subjective perceptions and opinions with no objective evidence to support such serious allegations. (Cal. Code Regs., tit. 8, § 10421(b)(9) [bad faith actions include the use of language that is “patently insulting, offensive, insolent, intemperate, foul, vulgar, obscene, abusive or disrespectful,” or “impugns the integrity of the Workers’ Compensation Appeals Board or its commissioners, judges or staff...”].)

2022 PETITION FOR DISQUALIFICATION

“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...” (Lab. Code, § 5311.) Code of Civil Procedure states that “[a] party may object to the appointment of any person as referee, on one or more of the following grounds: ... (g) The existence of a state

of mind in the potential referee evincing enmity against or bias toward either party.” Applicant seeks disqualification of the WCJ in this case based on an alleged bias against applicant and in favor of defendant.

In workers’ compensation proceedings, any attempt to disqualify a WCJ pursuant to section 5311 “shall be initiated by the filing of a petition for disqualification supported by an affidavit or declaration under the penalty of perjury stating in detail facts establishing grounds for disqualification of the workers’ compensation judge...” (Cal. Code Regs., tit. 8, § 10960.) In addition, “[i]f the workers’ compensation judge assigned to hear the matter and the grounds for disqualification are known, the petition for disqualification shall be filed not more than 10 days after service of notice of hearing.” (*Ibid.*) “A petition for disqualification shall be referred to and determined by a panel of three commissioners of the Appeals WCAB...” (*Ibid.*)

The 2022 Petition for Disqualification was filed on January 5, 2022, approximately five months after the Decision. There was no “affidavit or declaration under the penalty of perjury” filed with the petition as required by WCAB Rule 10960. This is not an insignificant requirement. The rationale for permitting a declaration under penalty of perjury in lieu of testimony under oath is that the potential for application of criminal sanctions of perjury where material facts declared to be true are, in fact, not true or are not known to be true provides a sufficient deterrent against false and/or unknowing declarations. (*In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214; *Ancora-Citronelle Corp. v. Green* (1974) 41 Cal.App.3d 146, 150; see Code Civ. Proc., § 2015.5.) Therefore, applicant’s failure to follow this requirement is grounds to deny the petition, especially given that applicant was informed by the Board in the Decision that such a declaration is required when seeking disqualification of a WCJ. (See Decision, p. 1.)

In addition, no hearing is currently set in this case, and thus, no petition for disqualification is ripe for hearing. (Cal. Code Regs., tit. 8, § 10960 [petitions for disqualification are to be filed “not more than 10 days *after service of notice of hearing*”], emphasis added.) We disagree that this state of affairs is the fault of the WCJ. We remind applicant that the WCAB Rules require that a party seeking to set a case for hearing file a declaration of readiness to proceed. (Cal. Code Regs., tit. 8, § 10742(a) [“no matter shall be placed on calendar unless one of the parties has filed and served a Declaration of Readiness to Proceed in the form prescribed by the Appeals Board”].) In other words, applicant has the power to request his case be set for hearing simply by filing a declaration of readiness to proceed.

We reviewed the entire record in EAMS and found no declaration of readiness to proceed filed in EAMS by any party since 2020, i.e., there was no declaration of readiness to proceed filed in EAMS since applicant filed his Petition to Reopen on April 30, 2021. For this reason, we disagree with applicant's allegation that bias on the part of the WCJ can be inferred against applicant and in favor of defendant because this case has not been reset for hearing.

Applicant also alleges that the WCJ's bias is shown because she "completely ignored irrefutable falsified evidence" filed by defense counsel in answering the 2021 Petition to Disqualify. However, the factual issues related to the September 21, 2016 P&S report have been identified by applicant as relevant to the underlying issues in this case – and there has been no evidentiary hearing in this case on any issue, including the threshold issue of whether there is good cause to set aside the December 5, 2017 Stipulation with Request for Award and Award. (See Minutes of Hearing, February 18, 2020, p. 2.) Therefore, and even if applicant has strong opinions on the matter, *it has yet to be determined* if defendant disputed the P&S report.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions, including defendant. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing includes, but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) Consequently, we cannot interpose our own findings on the issue of the P&S report raised by applicant without violating defendant's right to due process. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584] citing *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158).

As all parties in workers' compensation proceedings are entitled to due process of law, all issues of material fact must be adjudicated so that all parties have the opportunity to present their own evidence. Then, the matter must be submitted for decision by the WCJ. We remind applicant that the WCJ is the finder of fact, and no party is entitled to insist that their side of the story is

“irrefutable” *before* the issues and facts have been adjudicated and all parties given the opportunity to present their own evidence.

Finally, as stated above, we found no declaration of readiness to proceed filed in EAMS at or near the time of applicant’s Petition to Reopen, which was filed on April 30, 2021. Therefore, there was no declaration for defendant to object to following the filing of the Petition to Reopen. Regardless, WCAB Rule 10744 states that the *only* consequences for not filing an objection to a declaration for readiness to proceed is “that party shall be deemed to have waived any and all objections to proceeding on the issues specified in the declaration, absent extraordinary circumstances.” (Cal. Code Regs., tit. 8, § 10744.) In other words, if there is no objection, then the case is set for hearing as requested in the declaration of readiness to proceed. Contrary to applicant’s arguments, neither WCAB Rule 10744 nor any other WCAB Rule states that a party who does not object to setting the case for hearing is somehow precluded from defending their interests at that hearing. Indeed, it may be that a party chooses not to object because that party *also* wants the case set for hearing.

We therefore deny the 2022 Petition for Disqualification for failure to comply with the requirements of WCAB Rule 10960 that a petition for disqualification be filed after a notice of hearing is issued, and that a declaration under the penalty of perjury be filed with the petition detailing the grounds for disqualification. In addition to these procedural grounds for denial, we also deny the 2022 Petition for Disqualification because applicant failed to state grounds sufficient to establish that the WCJ is biased against applicant and in favor of defendant.

For the foregoing reasons,

IT IS ORDERED that applicant's objection to the Opinion and Order Denying Petition for Disqualification issued by the Workers' Compensation Appeals Board on August 9, 2021 is **DENIED**.

IT IS FURTHER ORDERED that applicant's January 5, 2022 Petition to Disqualify Judge Diana Marsteiner is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER



CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 20, 2022

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

**RONALD PAYNE, IN PRO PER
STATE COMPENSATION INSURANCE FUND**

AJF/abs

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