

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

**DOMINGA FRIAS, *Applicant***

**vs.**

**CANCUN TAQUERIA INC. AND ROSTIZERIA INC.;  
REPUBLIC UNDERWRITERS INSURANCE COMPANY,  
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ10371478  
San Francisco District Office**

**OPINION AND ORDERS DENYING APPLICANT'S PETITION FOR  
DISQUALIFICATION, GRANTING PETITION FOR REMOVAL  
AND DECISION AFTER REMOVAL**

On August 1, 2022, applicant's attorney (petitioner) filed a Petition for Disqualification (Petition) seeking to disqualify the workers' compensation administrative law judge (WCJ) from the proceeding, based upon the appearance of bias stemming from the issuance of an Order on July 29, 2022. By the Order, the WCJ denied petitioner's request to hold a hearing electronically, rather than in person, in order avoid the risk of exposing petitioner's father to COVID-19. (Order Denying Request for Electronic Hearing, July 29, 2022.)

In the Petition, petitioner claims that the WCJ violated his right to due process by issuing the Order without a hearing, preventing him from presenting evidence of his father's health, as well as evidence that defense counsel had allegedly consented to the electronic hearing. Petitioner argues that this evidence would have established good cause to grant his request for the electronic hearing, and that the WCJ's failure to consider this evidence prior to issuing the Order created the appearance of bias, such that disqualification is warranted.

No answer was received. The WCJ filed a Report and Recommendation on Petition for Disqualification (Report), recommending that the Petition be denied. The WCJ states that she had no bias against petitioner or his client (applicant), and that the request was denied based upon the failure to comply with the Appeals Board Rules governing requests for electronic hearings, as well as the fact it was made at the last minute.

We have considered the record in this matter, as well as the allegations of the Petition and the contents of the Report with respect thereto. Upon review, we will deny the petition for disqualification, as it fails to demonstrate an appearance of bias. However, we conclude that, in the interests of due process, the petition should be treated as a petition for removal. For the reasons discussed below, we will grant removal, rescind the WCJ's July 29, 2022 Order, and return the matter to the trial level for further proceedings consistent with this decision.

### **FACTUAL BACKGROUND**

On July 12, 2022, defendants filed a declaration of readiness to proceed (DOR) on the issue of a medical-legal exam. The matter was set for an expedited hearing on the matter for August 1, 2022.

On July 29, 2022, petitioner filed a letter petition addressed to the WCJ, stating: "ALL PARTIES JOINTLY REQUEST LIFE-SIZE BY AGREEMENT DUE TO HEALTH CONCERNS." (Report, p. 2.) Attached to the petition was a letter from Lisa Tsang, M.D., addressing the health of petitioner's father, as well as an email string with a date range of July 18-19, 2022 between petitioner and defense counsel from the Law Offices of Park Guenthart, indicating the latter's consent to hold the expedited hearing via Lifesize. (Report, p. 2.) A proof of service attached to the letter petition stated that service was made to "WCAB by EAMS" and "Park by email." (Report, p. 4.)

The same day, the WCJ issued the Order denying petitioner's request for the electronic hearing. The Order stated, in full:

Applicant, through her counsel, having filed on July 29, 2022 an unverified letter requesting the expedited hearing on August 1, 2022 be held virtually, indicating that defendant is in agreement with the request, and

IT APPEARING THAT the request fails to comply with Board Rules 10816 and 105[10],

IT IS HEREBY ORDERED that the request for an electronic trial be, and it hereby is, DENIED.

(Order, July 29, 2022.)

On August 1, 2022, petitioner filed the instant petition seeking to disqualify the WCJ from the proceeding.

## DISCUSSION

In the Petition, petitioner contends that disqualification is warranted based on the appearance of bias. Specifically, petitioner claims:

[Petitioner's] father is at high risk for COVID. [Petitioner's] father has a doctor, Dr. Tsang, seeking accommodation that [petitioner] not appear in enclosed conference rooms.

Defendants had agreed to a Lifesize Trial.

\* \* \*

A reasonable person would find that denying Lifesize without comment on the health of [petitioner's] father and without comment on Defendant's consent to Lifesize is apparent bias. There has been no due process study of the medical evidence and the defendant's consent...The above actions are sufficient grounds to disqualify the trial judge for purposes of this trial.

(Petition, pp. 1, 3.)

Due process requires a fair hearing before a neutral, unbiased decision maker, including in administrative proceedings. (*Robbins v. Sharp Healthcare* (2006) 71 Cal.Comp.Cases 1291, 1306 (*Robbins*), citing *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1024-1027 (*Haas*)). Due process is violated where there is even an appearance of bias or unfairness in administrative hearings. (*Haas*, at p. 1034.) The "appearance of bias" test is "an objective one, i.e., would a reasonable person with knowledge of the facts entertain doubts concerning the WCJ's impartiality." (*Robbins*, at p. 1303.)

The WCJ denies that her ruling was based upon bias. (Report, p. 3.) Instead, the WCJ explains that she denied the request because it failed to comply with the WCAB Rules of Practice and Procedure governing requests for electronic hearings, specifically, WCAB Rules 10816, 10510, and 10625. (Report, pp. 3-4.) WCAB Rule 10816 states: "If a party intends to appear electronically at any hearing, they shall file a petition showing good cause pursuant to rule 10510." (Cal. Code Regs., tit. 8, § 10816.) WCAB Rule 10510 requires, among other things, that "a request for action by the [WCAB]...shall be made by petition," and that "[a]ll petitions and answers shall be verified under penalty of perjury...." (Cal. Code Regs., tit. 8, § 10510.) WCAB Rule 10625 addresses proof of service, and states: "Proof of service" means a "dated and verified declaration identifying the document(s) served and the parties who were served, and stating that the service has been made and the method by which it has been made....If a document is served electronically,

the proof of service must also state the names and email addresses of the person serving electronically and the person served electronically.” (Cal. Code Regs., tit. 8, § 10625.)

In her Report, the WCJ explains that she denied petitioner’s request because it did not conform to WCAB Rule 10816, where the request: 1) was a “letter,” rather than a pleading in accordance with WCAB Rule 10510, and 2) was not verified in accordance with WCAB Rule 10510. The WCJ also states that the letter lacked valid proof of service in accordance with WCAB Rule 10625. The WCJ explains that, although it did appear that defense counsel’s law office was served via email, the proof of service failed to provide the specific name(s) and email address(es) of the person(s) serving the document and the person(s) served. (Report, p. 4.)

Upon review, we conclude that the WCJ’s decision to deny the request for an electronic hearing was based upon a misunderstanding of the WCAB Rules of Practice and Procedure, rather than bias. (Report, pp. 3-4.) Although petitioner’s letter request for an electronic hearing lacked the formality typically associated with such a request under our rules, the WCJ was mistaken that anything less than strict compliance with these rules was grounds for denying the request. The WCAB Rules “serve the convenience of the tribunal and the [litigants] and facilitate the proceedings. They do *not* deprive the tribunal of the power to dispense with compliance when the purposes of justice require it, particularly when the violation is formal and does not substantially prejudice the other party.” (*Rubio v. Workers’ Comp. Appeals Bd. (Rubio)* (1985) 165 Cal.App.3d 196, 200 [50 Cal.Comp.Cases 160], italics added.) “[I]t is better to dispose of ‘...causes upon their substantial merits, rather than with strict regard to technical rules of procedure. The discretion of the court ought always to be exercised in such manner as will subserve rather than impede or defeat the ends of justice.’ [Citation.]” (*Carrara v. Carrara* (1953) 121 Cal.App.2d 59, 63 (*Carrara*).)

When we created these rules of procedure, we did not intend to create a barrier to electronic hearings, or that failure to technically comply with these rules would constitute grounds to deny a request for lack of good cause. Instead, we adopted these rules to ensure that no party is surprised or prejudiced by such a request from the other side. (See *Fortich v. Workers’ Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1453 [56 Cal.Comp.Cases 537] [“[A] fundamental requirement of due process...is notice reasonably calculated [] to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”].) As noted in the WCJ’s Report, petitioner’s request for an electronic hearing appears to have been sent *and* consented to by defense counsel, and defense counsel has not filed anything in the proceeding

claiming otherwise. (Report, pp. 2, 4.) Thus, in denying petitioner's request, the WCJ erroneously exalted form over substance, requiring strict technical compliance with our rules of procedure, despite the absence of prejudice to the other side and at the expense of issuing a decision on the merits. (*Rubio, supra*, 165 Cal.App.3d at p. 200; *Carrara, supra*, 121 Cal.App.2d at p. 63.) That said, such a decision did not create an appearance of bias. "A judge's errors on questions of law, no matter how gross, do not constitute bias or prejudice or a disqualification to proceed with the trial of the case in which the errors were made. [citations] Erroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias or prejudice, especially when they are subject to review." (*Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 400.) Based on the foregoing, we disagree with petitioner that there is an appearance of bias that would justify disqualifying the WCJ from the proceeding.

We do, however, agree with petitioner that the WCJ violated his right to due process by issuing the Order without a hearing. 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. (*Rucker v. Workers' Comp. Appeals Bd. (Rucker)* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is "...one of 'the rudiments of fair play' assured to every litigant...." (*Id.* at p. 158.) 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].)

The lack of a hearing prevented either party from exercising their right to call witnesses, cross-examine witnesses and/or introduce evidence in support of their positions, which is a deprivation of the constitutional guarantee of due process of law. (*Rucker, supra*, 82 Cal.App.4th at p. 157.) In order to address this due process issue, we will exercise our discretion under Labor Code section 5310 and remove the case to ourselves. (Lab. Code, § 5310.)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd. (Cortez)* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd. (Kleemann)* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal when substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, it must be established that reconsideration will not

be an adequate remedy if a final decision averse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

A violation of due process obviously causes substantial prejudice and irreparable harm that reconsideration cannot cure. Moreover, the WCJ failed to issue an Opinion on Decision, therefore is no meaningful opportunity to review the Order. (Lab. Code, § 5313; *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).)

Consequently, although we will deny the petition for disqualification, we will treat the petition as a petition for removal and grant removal. In granting removal, we will rescind the WCJ's July 29, 2022 Order and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Disqualification of the WCJ is **DENIED**.

**IT IS FURTHER ORDERED** that the Petition for Disqualification of the WCJ is **GRANTED** as a Petition for Removal.

**IT IS FURTHER ORDERED**, as the Decision After Removal of the Workers' Compensation Appeals Board, that the Order issued on July 29, 2022 by the WCJ is **RESCINDED** and this matter **RETURNED** to the trial level for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**



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

**MARCH 10, 2023**

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

**DOMINGA FRIAS  
KENNETH MARTINSON  
PARK GUENTHART**

**AH/cs**

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