

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

MARIA TORRES, *Applicant*

vs.

**ABM INDUSTRIES, INC.; AMERICAN HOME ASSURANCE
Administered by ESIS, *Defendants***

**Adjudication Number: ADJ2882050, ADJ745634
Long Beach District Office**

**OPINION AND ORDER
DISMISSING PETITION FOR
DISQUALIFICATION**

We have considered the allegations of the Petition for Disqualification and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record and for the reasons stated in the WCJ's report, which we adopt and incorporate except as noted below, we will dismiss the Petition for Disqualification.

We do not adopt or incorporate the WCJ's recommendation that we deny the Petition for Disqualification. Rather, because we find it untimely pursuant to WCAB rule 10960, for the reasons stated in the report, we dismiss the Petition for Disqualification.

If we were not dismissing the petition, we would deny it on the merits also for the reasons stated in the report.

For the foregoing reasons,

IT IS ORDERED that the Petition for Disqualification is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 9, 2021

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

PAG:acw

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

SERVICE LIST

ABM INDUSTRIES
ALCALA ASSOCIATES
ALTOS INC
COMPREHENSIVE TOXICOLOGY
DENNIS FUSI
DOCTORS SURGERY CENTER
EDWARD ANGUIZOLA, M.D.
ESIS
ESSENTIAL DIAGNOSTIC
FLOYD SKEREN
GLOBAL INTERPRETATION
HAMID RAHMAN
HEALTH SOLUTIONS
HEALTHCARE RESOURCE GROUP
INNOVATIVE MEDICAL MANAGEMENT
JOYCE ALTMAN INTERPRETERS
LEGAL SERVICE BUREAU
LR MEDICAL BILLING
MARIA TORRES
MAXIMUM MEDICAL
MEDICAL LIEN MANAGEMENT
MED SOURCE DIAGNOSTICS, INC.
MESA PHARMACY
MONARCH MED MANAGEMENT
NEW AGE PHARMACEUTICALS, INC.
ONE SOURCE
PACIFIC HOSPITAL
POST SURGICAL REHAB
PRESCRIBED EQUIPMENT
RM SCHILLING, INC.
RX FUNDING
SOCAL MEDICAL TRANSPORTATION
THOMAS HEWKO, D.C.
UNICORN MEDICAL TRANSPORTATION
VOCATIONAL GUIDANCE
WEST COAST ORTHOPEDIC
WORLD WIDE MARKETING

REPORT AND RECOMMENDATION ON PETITION FOR DISQUALIFICATION

I INTRODUCTION

1. Applicant's Occupation: Janitor
Dates of Injury: May 11, 2005; November 15, 2014 – November 15, 2015
Parts of Body Injured: Knees, back, neck, GERD, diabetes, and hypertension.
2. Identity of Petitioner: Dan Escamilla, representative for Lien Claimant Thomas Hewko, D.C., filed the petition.
Verification: The petition was verified by Mr. Escamilla.
Timeliness: The petition is untimely pursuant to Cal. Code Regs. §10960.
Cal. Code Regs. § 10625(a) The petition was not served on all affected parties.
3. Date of Next Hearing: June 9, 2021 (Lien Conference)
4. Petitioner's Contentions: That this WCJ has demonstrated an appearance of bias against Mr. Escamilla and should be disqualified from overseeing further proceedings in this matter.

II FACTS

The underlying case-in-chief in this matter resolved via Compromise and Release in early 2017, and this matter was subsequently set for Lien Trial in front of this WCJ. On March 27, 2019, Defendant American Building Maintenance Industries, Inc., permissibly self-insured and administered by ESIS Chatsworth (hereinafter "Defendant"), and Lien Claimants Thomas Hewko, D.C. and Joyce Altman Interpreters proceeded to Lien Trial. The stipulations and issues were read into the record and the matter was continued to another date due to the lateness of the hour.

After a few continuances, the parties returned for another Lien Trial hearing on February 18, 2020. At that time, Lien Claimant Hewko's representative, Dan Escamilla with Legal Service Bureau, raised a new issue. Specifically, Mr. Escamilla argued that defense counsel Ghazal Youssefi, along with the defense firm of record Floyd, Skeren, Manukian, Langevin, LLP (hereinafter "Floyd Skeren"), both had a conflict of interest that required their disqualification in this case. The matter was continued so that the parties could brief the conflict of interest issue. Mr. Escamilla was given until March 9, 2020, to file his brief and Ms. Youssefi was given until April 3, 2020, to file her responsive brief. Mr. Escamilla was also given the option to file a reply brief no later than April 13, 2020. [See Minutes of Hearing, dated February 19, 2020, EAMS Doc ID 72264851.]

Mr. Escamilla filed his Memorandum of Points and Authorities re: Conflict of Interest on February 26, 2020, and defense counsel filed her response thereto on April 3, 2020. Both the petition and response were timely filed. In Defendant's Response to Memorandum of Points and Authorities re: Conflict of Interest, **defense counsel identified the existence of a conflict of interest between Mr. Escamilla and his client, Dr. Hewko**, based on Mr. Escamilla's "own personal agenda and economic concern" in this matter. [See Response to Lien Claimant's Memorandum of Points and Authorities, filed April 3, 2020, p. 5, lns. 1-14, EAMS Doc ID 32068794.] No reply brief was filed by Mr. Escamilla.

The parties subsequently appeared for another Lien Trial hearing on October 29, 2020, at which time this WCJ issued the following ruling/orders concerning the conflict of interest issue: Ms. Youssefi was disqualified from her representation of Defendant pursuant to State Bar Rule 3.7(a)(1) and Mr. Escamilla was disqualified from his representation of Lien Claimant Hewko based on his "personal and economic interest in this matter". The matter was continued so that the parties could obtain new representation in this matter. With respect to Defendant, the new representation could be received through Floyd Skeren, as this WCJ did not see a valid conflict of interest with them. [See Minutes of Hearing and Supplement to Minutes of Hearing, dated October 29, 2020, EAMS Doc ID 73447091.]

On November 20, 2020, Mr. Escamilla filed a Petition for Removal of WCJ's Decision Disqualifying Lien Claimant's Hearing Representative from Further Representing Lien Claimant and Declining to Disqualify Floyd Skeren. In the Petition for Removal, Mr. Escamilla argued, among other things, that he had been given no notice of the issue of his disqualification, which he alleged had been raised "*sua sponte*" by this WCJ in violation of Section 10510 of the California Code of Regulations. [See Petition for Removal, filed November 20, 2020, p. 15, lns. 23-28, EAMS Doc ID 34596145.]

On December 3, 2020, this WCJ issued a Joint Order Rescinding Minute Order and Setting Further Proceedings based upon the panel decision of *McKenna v. City of Sacramento*, 2015 Cal.Wrk.Comp. P.D. Lexis 327, which states that an evidentiary record relevant to the issue of disqualification must be created before a decision on the issue can be rendered. It was noted in the Joint Order Rescinding Minute Order that the disqualification issue would be addressed at the December 29, 2020 Lien Trial, at which time the procedure for creating an evidentiary record for the disqualification proceedings would be discussed with the parties. [See Joint Order Rescinding Minute Order and Setting Further Proceedings, dated December 3, 2020, EAMS Doc ID 73578351.]

The December 29, 2020 Lien Trial was subsequently rescheduled and the parties next appeared before this WCJ on March 30, 2021. At that time, Mr. Escamilla informed the Court and the parties that he had just filed a Petition to Disqualify this WCJ, but it was too soon for the document to be seen in Filenet¹. Mr. Escamilla explained that he believed this WCJ to have demonstrated bias against him by disqualifying him via a conflict of interest issue raised *sua sponte* and without notice. This WCJ explained to Mr. Escamilla and the parties on the teleconference

¹ It has been this WCJ's experience that documents e-filed by the parties usually take two to four hours to appear in Filenet after they are uploaded.

line that the issue had not been raised *sua sponte*. Rather, it had come directly from Defendant's April 3, 2020 brief, and this WCJ had simply ruled on an issue raised by Defendant. This WCJ further explained that due process had been afforded here because Mr. Escamilla had been given the opportunity to file a reply brief in response to Defendant's responsive brief, but no such reply had been filed.

The March 30, 2021 Lien Trial was then continued to a Lien Conference on June 9, 2021, because, among other things, further discovery was needed on the conflict of interest issue and Mr. Escamilla needed to file a Notice of Representation in compliance with the 2020 Rules of Practice and Procedure (Cal. Code Regs., tit. 8). Mr. Escamilla also requested time to amend or withdraw his Petition for Disqualification in light of the discussion with the Court.

The Petition to Disqualify this WCJ was filed on March 30, 2021², and appeared in Filenet after the Lien Trial was continued. To date, this WCJ has received no amendment to, nor withdrawal of, the Petition for Disqualification.

III DISCUSSION

Pursuant to *Labor Code* § 5311, 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. This objection shall be heard and disposed of by the appeals board. It is further specified in Section 10960 of the California Code of Regulations (Title 8) that the petition for disqualification shall be filed not more than **ten days** after service of notice of hearing or after grounds for disqualification are known.

A. Timeliness of Petition

The Petition for Disqualification was filed untimely on March 30, 2021. The basis for the petition is the allegation that this WCJ demonstrated an appearance of bias by disqualifying Lien Claimant's representative *sua sponte* and without prior notice to Petitioner or his client. This alleged ground for disqualification was known to Petitioner when he signed his Petition for Removal on November 19, 2020, as it comprises one of several arguments made in said petition. *See* Petition for Removal, *supra*, p. 15, Ins. 23-28.] Since Petitioner was aware of the herein alleged ground for disqualification as early as November 19, 2020 (if not sooner at the Lien Trial on October 29, 2020), the Petition for Disqualification should have been filed no later than the end of November 2020 to be in compliance with the ten day filing requirement. (Cal. Regs., tit. 8, § 10960.) Instead, Petitioner waited over four months to file the Petition for Disqualification. As such, the filing of the Petition for Disqualification on March 30, 2021, was untimely and the petition should be denied accordingly.

² It should be noted that the Proof of Service for the Petition for Disqualification does not indicate service on Alcalá Associates Long Beach, the representative of Joyce Altman Interpreters, who is a party to the Lien Trial. Thus, the petition appears to be defective pursuant to Cal. Code Regs., tit. 8, § 10625(a), as it was not served upon all affected parties. Pursuant to Cal. Code Regs. tit. 8, § 10410(b), the Court served the Petition for Disqualification upon Alcalá Associates Long Beach on April 12, 2021.

B. Whether Good Cause Exists to Disqualify this WCJ

Pursuant to Section 641 of the California Code of Civil Procedure, a party may object to the appointment of any person as a referee on one or more of seven grounds, including (in pertinent part, per subsection (g)) “the existence of a state of mind in the potential referee evincing enmity against or bias toward either party”. Such is the basis of Petitioner’s Petition for Disqualification, namely that this WCJ demonstrated an appearance of bias by disqualifying Petitioner from his representation of Lien Claimant Hewko without notice and on the Court’s own motion. Respectfully, this argument is without merit as it is based on incorrect facts.

As noted in the Facts section above, Petitioner’s conflict of interest was raised by defense counsel in the Response to Lien Claimant’s Memorandum of Points and Authorities, filed April 3, 2020. In the Response, defense counsel identified Petitioner’s “own personal agenda and economic concern” in this matter. [See Response to Lien Claimant’s Memorandum of Points and Authorities, *supra*, p. 5, lns. 1-14.] Petitioner had been given the opportunity to file a reply brief addressing this issue, yet chose not to respond.

With the conflict of interest issue having been raised by defense counsel, and seeing that Petitioner had been given an opportunity to respond, this WCJ believed that due process had been afforded and that this issue needed to be addressed by the Court³. A ruling was then made on the conflict of interest on October 29, 2020, disqualifying both defense counsel and Petitioner. Upon receipt of Petitioner’s Petition for Removal and after further research into the issue, this WCJ rescinded the disqualification order (as it pertained to Petitioner and the allowance of continued representation of Defendant by Floyd Skeren) in order to ensure proper compliance with the law and create a record relevant to the disqualification issue pursuant to the panel decision of *McKenna v. City of Sacramento*, 2015 Cal.Wrk.Comp. P.D. Lexis 327. This WCJ also wanted to be absolutely sure that proper due process was afforded to the parties on this issue.

Respectfully, this WCJ believes she has acted in a fair and impartial manner in this case and does not see an appearance of bias having been demonstrated toward Petitioner given the foregoing facts. Rather, it seems as though this was an unfortunate misunderstanding as to how the disqualification issue was raised and addressed in this matter. Accordingly, this WCJ believes that no bias has been shown toward Petitioner and respectfully requests that the petition be denied.

³ See *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 901, wherein it was held that a trial court has the inherent and statutory power to intervene on its own initiative to inquire into any appearance of impropriety, control the proceedings to remedy the defect, and even disqualify an attorney if that appears necessary. In the matter at hand, although the conflict of interest issue was not raised by the Court, this WCJ used her inherent and statutory power to intervene when the issue was raised by Defendant and remedy the situation.

**IV
RECOMMENDATION**

For the reasons stated above, it is respectfully recommended that the Petition for Disqualification be denied.

Respectfully submitted,

DATE: April 13, 2021

Diana L. Marsteiner
WORKERS' COMPENSATION JUDGE