

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

TERRI SCOTT, *Applicant*

vs.

**CITY OF LOS ANGELES, permissibly self-insured; administered by TRISTAR RISK
MANAGEMENT, *Defendants***

**Adjudication Number: ADJ9671636
Van Nuys District Office**

**OPINION AND ORDER GRANTING
PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Applicant's attorneys, Asvar Law, Christopher Asvar and Theresia Falter, seek reconsideration of the First Amended Order Imposing Sanctions and Costs Against Asvar Law, Christopher Asvar and Theresia Falter (Order) issued on February 11, 2022, wherein the workers' compensation administrative law judge (WCJ) ordered them to jointly and severally pay (1) sanctions to the general fund of \$1,500.00; and (2) costs to defendant of \$6,800.00.

Applicant's attorneys contend that the Order effectively denies their right to discovery in violation of the right of due process and that the evidence fails to show that they engaged in sanctionable conduct.

We did not receive an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition and the contents of the Report. Based upon our review of the record, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the Order and return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On December 30, 2021, defendant's attorney, Bryant Yip, filed a declaration of readiness to proceed to expedited hearing (DOR), identifying the issue of applicant's attorneys' alleged "bad faith, frivolous and harassing actions and tactics in setting deposition of opposing counsel" and conditioning "withdrawal of the [deposition] subpoena on withdrawal of defendant's petition for

reconsideration.” (Declaration of Readiness to Proceed to Expedited Hearing, December 30, 2021, p. 7.)

Also on that date, defendant’s attorney filed a motion to quash subpoena, a motion for protective order, and a petition for section 5813 sanctions against applicant’s attorneys, alleging that Mr. Asvar, through his associate Ms. Falter, brought perjury allegations against him and attempted to depose him as part of a scheme to gain a tactical advantage in this matter. (Motion to Quash Subpoena, Motion for Protective Order, Petition for Sanctions Pursuant to Section 5813, December 30, 2021, p. 9:4-21.)

On January 10, 2022, applicant’s attorneys filed a section 5813 petition against defendant’s attorney, alleging that Mr. Yip filed a verified petition for reconsideration containing intentional misrepresentations of fact. (Petition for Sanctions, January 10, 2022, p. 3:8-11.)

On January 11, 2022, applicant’s attorneys filed a section 132a petition for increased benefits, alleging entitlement to the benefits based upon “facts to be proven at trial.” (Section 132a Petition, January 11, 2022.)

On January 18, 2022, the WCJ filed a notice of intention to impose sanctions and costs against Asvar Law, Mr. Asvar, and Ms. Falter (NOI). (Notice of Intention to Impose Sanctions and Costs, January 18, 2022.)

On January 31, 2022, applicant’s attorneys filed an amended section 132a petition for increased benefits, alleging entitlement to the benefits based upon “(1) denial of Applicant’s medical retirement after filing of her workers’ compensation claim and (2) spurious appeal of the WCAB’s finding of 100% permanent disability.” (Amended Section 132a Petition, January 31, 2022.)

On February 7, 2022, defendant’s attorney filed a petition for costs in connection with the NOI, asserting a bill of particulars in the amount of \$7,650.00. (Petition for Costs, pp. 1:19-20, 2:6.)

In the Report, the WCJ states:

The Applicant, while employed on July 10, 2012, as a police officer by the City of Los Angeles, sustained an industrial injury to her right hand when, while she was using force with a suspect during an arrest, the fingers of her right hand were bent backwards and twisted. On July 10, 2014, the Applicant, while driving to an appointment with Steven Shin, M.D., for treatment to her right hand, she was involved in a motor vehicle accident and sustained a compensable consequence injury to her brain, neurological system (in the form of post-concussion syndrome), vestibular system (in the

form of a balance disorder), eyes (including her optic nerves), both lower extremities and internal system (in the form of a sleep disorder) and psychiatric system).

On October 22, 2021, the undersigned WCJ issued his Findings of Fact, Award & Order dated October 22, 2021 that the Applicant suffered 100% permanent disability.

On November 15, 2021, the Defendant filed its petition for reconsideration dated November 15, 2021, claiming to be aggrieved by the undersigned WCJ's decision in the above-captioned case.

While the case was pending at the Reconsideration Unit, on December 30, 2021, the Defendant filed a motion dated December 30, 2021 to quash the deposition of Bryant Yip, deputy city attorney, scheduled for January 7, 2022 at 10:00 a.m.

...
On January 12, 2022, the WCAB issued its opinion and order denying petition for reconsideration affirming the undersigned WCJ's decision dated October 22, 2021.

On January 18, 2022, the undersigned WCJ issued his notice of intention to impose sanctions and costs against Asvar Law, PC, Christopher Asvar and Theresia Falter. In his notice of intention, the undersigned WCJ wrote the following:

“On December 30, 2021, Bryan Yip, deputy city attorney of the City of Los Angeles, filed his motion to quash the deposition subpoena and petition for sanctions dated December 30, 2021. In his petition, Mr. Yip averred that, on December 14, 2021 at 6:37 p.m., a process server named Daniel Espinoza appeared at Mr. Yip's personal residence in order to personally serve a deposition subpoena on behalf of the Applicant. (2:23-27) This was followed-up by multiple e-mails from the Applicant's attorney, Christopher Asvar, threatening administrative, criminal and/or disciplinary complaints if the petition for reconsideration was not withdrawn. (3:3-12) The purpose of the scheduled deposition was an investigation of Mr. Yip's motivations behind filing a petition for reconsideration contending that it was filed in bad faith and contained false material statements of fact. On December 30, 2021, at 9:53 a.m., a second unsuccessful attempt was made by a process server from the Los Angeles County Sheriff's Office to personally serve Mr. Yip with a deposition subpoena. (3:24-28) The deposition subpoena dated December 10, 2021, was signed by Theresia Falter, an associate of Mr. Asvar's, and, in the cover letter addressed to Mr. Yip, accused him of violating

Professional Rules of Conduct Rule 3.3(a)(1) as well as Penal Code § 118.

On January 10, 2022, Ms. Falter filed her petition for sanctions dated January 7, 2022, essentially accusing Mr. Yip of making false material statements in his petition for reconsideration. Ms. Falter averred that Mr. Yip ‘[wa]s lying threw [sic] his teeth’ (6:5-7) with the ‘inten[tion] to disenfranchise a dedicated and decorated police officer from her rightful workers’ compensation benefits under the law.’ (9:21-22)

...

[I]n the absence of an adequate explanation to the contrary, the undersigned WCJ must infer that the purpose behind scheduling Mr. Yip’s deposition, and subsequent communications to him to withdraw and resubmit with factual modifications his petition for reconsideration to avoid his deposition being conducted, were intended by Mr. Asvar and Ms. Falter to harass Mr. Yip in order to obtain a strategic litigation advantage chilling his right to challenge the undersigned WCJ’s factual findings. Their actions cannot be tolerated and must be addressed by corrective judicial action.

Therefore, **NOTICE IS HEREBY GIVEN** that, absent written objection and demonstration of good cause to the contrary filed and served with the undersigned WCJ on or before **Monday, February 7, 2022**, the undersigned WCJ will impose sanctions payable to the Workers’ Compensation Appeals Board of up to one thousand five hundred dollars and zero cents (**\$1,500.00**), jointly and severally, against **ASVAR LAW, PC, CHRISTOPHER ASVAR** and **THERESIA FALTER**.

In addition, the **CITY OF LOS ANGELES** is **ORDERED** to file, on or before Monday, February 7, 2022, a bill of particulars for the reasonable value of its services rendered in connection with the attempted service of the deposition subpoena on Mr. Yip.”

In his order imposing sanctions dated February 9, 2022, the undersigned WCJ wrote the following:

“On February 8, 2022, **THERESIA FALTER** filed her objection dated February 7, 2022. In her verified declaration, she characterized the undersigned WCJ’s notice of intention to impose sanctions as inexplicable, (5:11) accusing the Defendant of engaging in a ‘knee-jerk’ reaction to her employer’s ‘over-zealous advocacy.’ (5:10-12) She conjectured that there may be inappropriate motivations behind the undersigned WCJ’s notice

of intention to impose sanctions claiming that Susan Kong, the managing city attorney, desired him ‘to be the arbiter of whether Mr. Yip will sit for a deposition after allegations of perjury.’ (6:13-18) Ms. Falter cited various examples of alleged criminal malfeasance against the **CITY OF LOS ANGELES** unrelated to the above-captioned case, (7:7-26 to 8:1-11) demanded that Ms. Kong initiate an internal investigation into Mr. Yip’s actions (8:12-24) and accused him of hiding and lying to the process server who was attempting to serve Mr. Yip with the deposition subpoena. (8:23-14)

Ms. Falter objected to the undersigned WCJ’s characterization that scheduling the deposition of Mr. Yip was seeking a strategic litigation advantage’ averring that it was intended to ‘stop criminal conduct’ and facilitate ‘removing perjurious allegations’ contained in his petition for reconsideration. (9:25-26)

Ms. Falter insisted that sanctions cannot be imposed in the absence of a factual finding opining on Mr. Yip’s alleged misconduct and that any imposition of sanctions will offend due process. (10:19-22)

Finally, Ms. Falter averred that a deposition is justified in accordance with the three pronged factors set forth in Carehouse Convalescent Hospital v. Superior Court (2006) 143 Cal.App.4th 1558, 1563 (‘First, does the proponent have other practicable means to obtain the information? Second, is the information crucial to the preparation of the case? Third, is the information subject to a privilege?’) (14:7-28 to 15:1-12) (Report, pp. 1-5.)

DISCUSSION

Without citing applicable statutory or case authority, applicant’s attorneys contend that the Order effectively denies their right to discovery in violation their right of due process. Specifically, they argue their “belief that there cannot be an adjudication of the issue of sanctions without an adjudication of the underlying issue of defense counsel’s misconduct.” (Petition, p. 19:10-12; and see p. 7:10-13.) In other words, applicant’s attorneys argue that they are entitled to depose defendant’s attorney and to a determination of the merits of their petition against defendant’s attorney before the WCJ may determine this issue of whether sanctions should be imposed against them.

Here we observe that ordinarily a party may take the deposition of any person. (Code Civ. Proc. § 2025.010.) However, "[d]epositions of opposing counsel are presumptively improper, severely restricted, and require "extremely" good cause—a high standard." (*Carehouse Convalescent Hospital v. Superior Court* (2006) 143 Cal.App.4th 1558, 1562.) The circumstances under which opposing counsel may be deposed are limited to where (1) no other means exist to obtain the information than to depose the opposing counsel; (2) the information sought is relevant and not privileged; and (3) the information is crucial to the preparation of the case. (*Spectra-Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487, 1496; *Carehouse, supra*, 143 Cal.App.4th at p. 1563.)

Notably, the party seeking to depose the opposing attorney holds the burden to show "'extremely' good cause" for the deposition; namely, that the opposing attorney has information "crucial to the preparation of the case" and that deposing the attorney is the only means to obtain the information. (*Carehouse, supra*, 143 Cal.App.4th at pp. 1562-1563.) If the party seeking to depose the opposing attorney establishes these elements, the burden falls on the opposing attorney to prove that the deposition would impinge upon privileged information. (*Id.* at p. 1563.)

In this case, the pleadings record lacks a motion to allow applicant's attorneys to depose defendant's attorney or an order issued by the WCJ to allow his deposition. The pleadings record also reveals that defendant's attorney filed the petition for sanctions alleging that applicant's attorneys attempted to depose defendant's attorney, Mr. Yip, on December 30, 2021; and that applicant's attorneys filed the petition for sanctions alleging that Mr. Yip filed a verified petition for reconsideration containing intentional misrepresentations on January 10, 2022. (Motion to Quash Subpoena, Motion for Protective Order, Petition for Sanctions Pursuant to Section 5813, December 30, 2021, p. 9:4-21; Petition for Sanctions, January 10, 2022, p. 3:8-11.)

Hence, the pleadings posture in this case is that defendant's attorney sought sanctions against applicant's attorneys before applicant's attorneys made any attempt, much less a successful one, to establish their alleged entitlement to depose him.

In addition, applicant's attorneys' pleadings fail to raise an issue about which defendant's attorney could possess information "crucial to the preparation of [applicant's] case" which might be discoverable only through his deposition.

In particular, applicant's attorneys' petition for sanctions and applicant's amended section 132a petition allege that defendant's attorney intentionally misrepresented facts in a petition for reconsideration of the WCJ's finding that applicant is one hundred percent disabled. But since the

merits of applicant's disability claim as well as defendant's petition for reconsideration of the findings thereon have been determined in applicant's favor, we are unable to discern what, if any, issue pending in applicant's case could be ripe for discovery, much less how defendant's attorney could be in possession of information crucial to the issue which would only be discoverable through deposition.

Hence, based upon the posture of the parties' sanctions petitions and the failure of applicant's pleadings to identify an issue pending in his case for which discovery is needed and about which defendant's attorney could possess crucial information only discoverable through deposition, we conclude applicant's attorneys' argument that that they should be allowed to depose defendant's attorney and have their sanctions petition determined before sanctions may be imposed against them lack merit.

Having determined the merits of applicant's attorneys' argument, we nevertheless recognize that WCAB Rule 10421(a) provides:

On its own motion or upon the filing of a petition pursuant to rule 10510, the Workers' Compensation Appeals Board may order payment of reasonable expenses, including attorney's fees and costs and, in addition, sanctions as provided in Labor Code section 5813. Before issuing such an order, **the alleged offending party or attorney must be given notice and an opportunity to be heard.** In no event shall the Workers' Compensation Appeals Board impose a monetary sanction pursuant to Labor Code section 5813 where the one subject to the sanction acted with reasonable justification or other circumstances make imposition of the sanction unjust. (Cal. Code Regs., tit. 8, former § 10561, now § 10421 (eff. Jan. 1, 2020) [Emphasis added].)

Labor Code section 5502(d)¹ provides, in pertinent part:

(2) The settlement conference shall be conducted by a workers' compensation administrative law judge . . . At the mandatory settlement conference, the . . . workers' compensation administrative law judge shall have the authority to resolve the dispute, including the authority to approve a compromise and release or issue a stipulated finding and award, **and if the dispute cannot be resolved, to frame the issues and stipulations for trial. . . .**

(3) If the claim is not resolved at the mandatory settlement conference, **the parties shall file a pretrial conference statement noting the specific issues in dispute, . . .**
(§ 5502(d)(2)-(3) [Emphasis added].)

¹ Unless otherwise stated, all further statutory reference are to the Labor Code.

As stated in *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 704 [57 Cal.Comp.Cases 230]:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citation.]' (*Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1453 [56 Cal.Comp.Cases 537].) Due process requires that all parties 'must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. [Citations.]' (*Fidelity & Cas. Co. of New York v. Workers' Comp. Appeals Bd. (Harris)* (1980) 103 Cal.App.3d 1001, 1015 [45 Cal.Comp.Cases 381].) (*Katzin, supra*, at 711-712.)

As we explained, defendant's attorney filed a DOR and a petition for section 5813 sanctions, alleging that applicant's attorneys took a negotiating position whereby they conditioned "withdrawal of the [deposition] subpoena on withdrawal of defendant's petition for reconsideration" and asserted perjury allegations against him in furtherance of a scheme to gain a tactical advantage herein. (Declaration of Readiness to Proceed to Expedited Hearing, December 30, 2021, p. 7; Motion to Quash Subpoena, Motion for Protective Order, Petition for Sanctions Pursuant to Section 5813, December 30, 2021, p. 9:4-21.) Thereafter, applicant's attorneys filed their section 5813 petition alleging that defendant's attorney had intentionally misrepresented facts to the court. (Petition for Sanctions, January 10, 2022, p. 3:8-11.) After the parties filed their respective sanctions petitions, the WCJ issued the NOI. (Notice of Intention to Impose Sanctions and Costs, January 18, 2022.)

Instead of issuing the NOI and determining the sanctions issue based upon applicant's attorneys' written response, we are persuaded that the WCJ should have obtained a pretrial conference statement from the parties on the sanctions issues, held a pretrial conference at which the specific issues and stipulations on the petitions could be framed, and held a hearing thereon. Because the NOI's allegations originated with defendant's attorney and concerned conduct outside of court which the WCJ did not observe, it did not fully apprise applicant's attorneys of the evidence against them or provide a meaningful opportunity for them to offer evidence against sanctions. (See also, e.g., Cal. Code Regs., tit. 8, former § 10561(a)(b) now § 10421(a)(b); see also Cal. Code Regs., tit. 8, former § 10349 now § 10832 (authorizing the WCJ to impose

sanctions and costs *on the court's own motion* through the notice of intention procedure) [Emphasis added.].) Accordingly, we will grant reconsideration and rescind the Order.

However, the Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261, 264–265].) Accordingly, we will return the matter to the trial level so that the WCJ may develop the record as to the sanctions issues.

Accordingly, we will grant reconsideration, rescind the 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 Reconsideration of the First Amended Order Imposing Sanctions and Costs Against Asvar Law, Christopher Asvar and Theresia Falter issued on February 11, 2022 is **GRANTED**.

IT IS FURTHER ORDERED that First Amended Order Imposing Sanctions and Costs Against Asvar Law, Christopher Asvar and Theresia Falter issued on February 11, 2022 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 9, 2022

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

**TERRI SCOTT
ASVAR LAW
LOS ANGELES CITY ATTORNEY**

SRO/pc

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