

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION

JACK HABLIAN,

Applicant

vs.

ZURICH US, et al.,

Defendants.

Case No: VNO 0425788

FINDINGS & ORDER**FINDINGS OF FACT**

1. APPLICANT in this consolidated matter has stated a cause of action for the recovery of benefits under the Labor Code within the jurisdiction of the WCAB.
2. The law of the case, specifically the Opinion on Reconsideration in Hablian vs. Zurich US, et al. (2003) 68 CCC 1867 mandates that further discovery occur on the issue of whether a viable class may exist for which class action certification should be granted.

ORDER

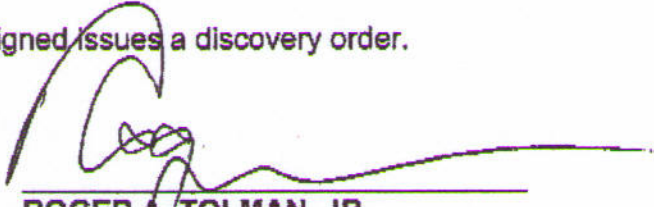
IT IS ORDERED that the parties meet and confer to create a discovery plan to address the class action viability issues. This meet and confer need not be in person and may be conducted by conference call.

IT IS FURTHER ORDERED should the parties be unable to come to an agreed discovery plan, representative sides may contact the secretary for the undersigned and schedule a discovery conference provided that all parties be given ten days notice of the conference.

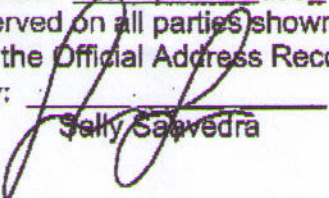
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IT IS FURTHER ORDERED the discovery stay shall remain in effect until the discovery stipulation is signed or until the undersigned issues a discovery order.



ROGER A. TOLMAN, JR.
WORKERS COMPENSATION JUDGE

Dated: 12/27 2005
Served on all parties shown
In the Official Address Record
By: 
Sally Saavedra

CASE NO.: LAO 0425788

JACK HABLIAN

Vs.

ZURICH US, et al

WORKERS' COMPENSATION JUDGE:

ROGER A. TOLMAN, JR.

OPINION ON DECISION**Existence of a Cause of Action under the Labor Code:**

Applicant has pled causes of action alleging that defendants have deprived a class of injured workers of their benefits. These benefits include permanent disability, temporary disability, vocational rehabilitation maintenance allowance and penalties. These benefits are provided for under Labor Code and enforceable under the jurisdiction of the Workers Compensation Appeals Board. Therefore, applicant has stated a cause of action as required by the decision of the Appeals Board in Hablian vs. Zurich US, et al. (2003) 68 CCC 1867.

Whether the WCAB has the Power to Certify a Class Action:

Applicant argues the WCAB has the power to certify a class action citing Addington vs. Jim Cavey Richfield Service (1970) 35 CCC 39. In what is arguably dicta, the Appeals Board, in an en banc decision, points out that Labor Code §5300 gives the Workers Compensation Appeals Board broad authority. Focusing on the language that gives the Board jurisdiction they quote § 5300(a) which gives the Board authority over "the recovery of compensation, or concerning any right or liability arising out of or incidental thereto." The

Defendant has argued in the past that while the WCAB has the power under Addington to certify a class, it would be difficult to do so in general and impossible to do so, on these facts. They point to the commonality factor in particular to support the fact that all of these cases are by their very nature distinct and different. This is a powerful argument but one that is based on speculation as no one has conducted discovery in this case.

More recently, defendant questions whether the WCAB even has the power to certify a class action. Citing the more recent case of Rea vs. WCAB (Milbauer) (2005) 127 Cal.App 4th 625; ___ Cal.Rptr 2d ___; 70 CCC 312 [hereinafter "Milbauer III"] the defendants point out that the WCAB has no rules by which to conduct a class action workers compensation case. They point out that in Milbauer III the Court of Appeal rejected an en banc decision of the Appeals Board that enunciated new procedures for processing uninsured employers' cases. Citing the Administrative Procedures Act and Labor Code §5307, the Court of Appeal found that these procedures could not be created by

the Appeals Board after the fact and the Uninsured Employees Benefits Trust Fund (UEBTF) would not be bound by such regulations.

Here the facts are even more compelling. The Appeals Board has issued a decision in this case opining that the California Code of Civil Procedure follows the Federal Rules and that the undersigned is bound to use these rules to adjudicate the viability of the class action. Thus, one could craft a compelling argument that the Board has no power, in this case, to impose a class action because no rules have been crafted to regulate and permit adjudication of class actions.

However, the undersigned is bound by the law of the case and the Appeals Board's prior decision which finds that the Board does have this power and mandates that the trier of fact begin discovery on the viability of the class action, once the applicants have stated a cause of action. Since applicants have now stated a class action, it is the belief of the undersigned that only the Appeals Board can countermand this decision. Therefore, the undersigned will begin the process of discovery to determine the viability of a class action under the Code of Civil Procedure.

Considerations for the Discovery Meeting:

Defendants have expressed concern that discovery in this case may prove to be expensive, time consuming and oppressive. Applicants have expressed an interest in taking a few depositions of high-level executives and compelling the various carriers to use their computers to search their data bases to obtain the information that is necessary.

Discovery in this case is complicated by the fact that the only authorized means of conducting discovery in workers compensation cases are depositions and deposition subpoenas. See Labor Code §§130, 4055.2, 5710, and 8 CCR Rules 10530 – 10537. These forms of discovery do not include Requests for Production of Documents, Requests for Admission, or Interrogatories. See Hardesty vs. McCord (1976) 41 CCC 111. These forms of discovery make simple cases more complex but in a civil setting often make complex cases simpler and less expensive as they often obviate the need for depositions. Therefore, the forms of discovery that are less expensive in complex litigations cases are barred in workers compensation proceedings.

Therefore, the parties are encouraged to begin by deposing those persons who are likely to know about how to identify information needed to assess numerosity of an ascertainable class, commonality of interest, and impracticality of deciding the cases individually.

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Jack Hablian RE: VNO 425788
Opinion on Decision

Should the parties be unable to agree on a discovery plan, the undersigned stands ready to decide disputes. Furthermore, the discovery stay shall remain in effect until the discovery stipulation is approved by the undersigned or the undersigned issues a detailed discovery order after a hearing.



ROGER A. TOLMAN, JR.
Workers' Compensation Judge

Jack Hablian RE: VNO 425788
Opinion on Decision