

**BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION**

IN THE MATTER OF:

DAVID WEINSTOCK)
Petitioner,)
) SEAC NO. 03-13-018
vs.)
)
INDIANA DEPARTMENT OF)
TRANSPORTATION)
Respondent.)

FURTHER PROCEDURAL ORDER UNDER AOPA

Pursuant to a previous email order of December 3, 2013, the parties appeared in person on December 11, 2013 at SEAC's Main office for two purposes: a mediation with Mediator Gibbs and a trial preparation status conference with this ALJ. Petitioner appeared pro se. Respondent's appeared by counsel, Ms. Butcher, and client representatives, Mr. Fox and Mr. Sullivan.

Settlement Status. The Mediator reported that mediation was not successful on December 11, 2013. The ALJ appreciates the parties' and Mediator's efforts in trying. However, at the end of the status conference, Petitioner indicated he may contact Ms. Butcher for another round of settlement talks. This is not required, but is encouraged. If the parties jointly desire Mediator Gibbs to hold a second mediation session before March 4, 2014, a joint request (email is acceptable) can be filed with the ALJ, cc the Mediator. This ALJ respectfully asks the Mediator to make time for the parties again, at least by phone, if they so desire.

New Hearing Date. By agreement the evidentiary hearing is reset for March 4-5, 2014 to commence at **9:00 a.m.** (Indianapolis time) at SEAC's Main Office (address below) on **March 4, 2014**. The parties and counsel are ordered to so appear.

Witnesses. Pursuant to AOPA¹, the ALJ worked at some length with both parties on developing a group of witnesses that would take only 1-2 days of evidentiary hearing time. The ALJ, by this AOPA order, attempts to balance a large number of factors, including: (a) avoiding irrelevant or cumulative evidence, (b) to fashion a witness group consistent with the ALJ's previous partial summary judgment decision that in paraphrase stated only the Petitioner's WBL claim shall proceed to trial; (b2) but still allowing concise exploration of background circumstances or on claims that were denied at summary judgment but might touch on, however remote, with the preserved WBL claim; (c) judicial economy; (d) allowing both parties to pick witnesses and control their cases; (e) making sure both parties could fully explore the WBL claim at trial, and (f) hearing out both parties' objections. The ALJ took input and comments from both parties. The parties did not object to certain parts of the order below, but each party

¹ I.C. 4-21.5-3-1 et seq., 25-26 (AOPA).

had one major objection they wanted stated on the record, which is duly done. Both parties' objections are OVERRULED for the reasons above and because, as is obvious from the opposite directions of the objections, it proved impossible for the ALJ to find a solution that simultaneously pleased both parties, much the less either party. The net effort of the ALJ's order below is to set the total number of likely trial witnesses to 10-11, down from about 22. AOPA gives the ALJ such authority.

A. Petitioner's deemed final witness group for his case in chief (may be called in any order):

1. Petitioner Weinstock
2. Ronald Walker
3. "Brandi J" (Brandi Jittijumnongk)
4. Kimberly Pearson – standby only. Petitioner thinks she may have relevant information on HR policies, harassment claims or other topics (Respondent disagrees she has specific knowledge of the WBL claim but accepted listing her as standby). It was agreed that Ms. Pearson would be available to be called into the trial, but does not have to appear on the morning of March 4, 2014.
5. Robert Rees
6. Rick Ray
7. Jim Stuart

*Petitioner selected Witnesses 5, 6 and 7 above on the topics of Petitioner's treatment by the Respondent, including Petitioner's perceived lifting capacity, safety of the Concrete Section, and sick leave requests; and the general treatment of nearby former co-workers.

B. Respondent's deemed final witness group for its case in chief (may be called in any order)

1. Rick Fox
2. Tony Zander
3. Mark Antich²
4. Ricky Harris

C. Petitioner's major objection: Petitioner wanted every witness on his list to be called without exception. In essence, Petitioner suggests that his entire list is non-cumulative or relevant, which the ALJ disagrees with. For instance, a large group of the witnesses on Petitioner's Amended Witness List (witnesses labeled nos. 6-13) were all explained by Petitioner as being offered to provide similar or identical evidence on the topics of Petitioner's treatment by the Respondent, including Petitioner's perceived lifting capacity, safety of the Concrete Section,

² Petitioner objected to Mr. Antich as a witness. Petitioner asserts him as being a non-decision maker (e.g. irrelevant), but the objection must be overruled. Mr. Antich was on Petitioner's interview panel, which allegedly decided Petitioner had lied about his lifting ability leading to discharge. Mr. Antich is a clearly relevant witness to describe for the ALJ what the panel did or did not do, and what role it played in the discharge decision. Moreover, Petitioner has been permitted more total witnesses than Respondent so Mr. Antich stays.

and sick leave requests; and the general treatment of nearby former co-workers.³ Therefore, the ALJ had Petitioner pick his top three, “strongest” witnesses on these sub-topics out of the larger group, which Petitioner did.

D. Respondent’s major objection: Respondent objects that Petitioner’s list is still over-broad and not focused on the remaining WBL claim. In Respondent’s view (as the ALJ takes it), Petitioner wants to call large numbers of state employees off their duties to discuss alleged harassment on grounds not surviving summary judgment, or the safety or workplace operations as a whole rather than as applied to Petitioner’s specific WBL claim. Respondent might be right, but the ALJ overrules the objection to still let Petitioner ‘pick any three’ witnesses. The ALJ recognizes Petitioner’s trial right to be able to flush out background circumstances and the indirect workplace context of his discharge (just not as excessively as Petitioner’s wants to).

E. The ALJ hereby repeats to both parties that the parties need to stay primarily focused on the WBL claim at trial. The ALJ will listen to background and indirect information too, and rule on any specific objections as they come. One-two days of trial should be more than enough to complete the tasks at hand, if used efficiently.

Discovery is Closed. It is also reconfirmed from previous orders that discovery is completely closed. Both parties already had plenty of opportunity to seek depositions, documents and interrogatories. Both parties have already filed their exhibit (and witness) lists. The only exhibits that may be offered, except for rebuttal, shall be those on the parties’ existing exhibit lists.

Miscellaneous and Reminders. Petitioner, foreign born, states that he sometimes needs extra time to pick an exact English word of choice. However, Petitioner confirms that he is fluent in English, understands the proceedings and does not want a translator. Petitioner may certainly ask the ALJ to have repeated a given instruction or witness question at trial if he so needs.

The filing of another round of witness and exhibit lists is not necessary. This order states the names of each witness on each party’s final trial list, and comments on topics.

General trial order was without objection and so ordered: Petitioner has the burden of proof on the remaining WBL claim, Petitioner shall open, Respondent shall open, Petitioner⁴ shall present his case (with Respondent cross exam), Respondent shall present its case (with

³ At first, Petitioner indicated the “whole office knew” what was going on, and these witnesses would all tell the same story, but then reflected and suggested there might be slight differences in their testimony. The guess about minor differences, if any, does not justify extra days of trial because Petitioner is being given leave to pick his three strongest witnesses. For further example, Petitioner has concerns about how allegedly Mr. Zander treated Petitioner or co-workers, which Mr. Stuart can speak to making it unnecessary to call Ms. Barnes or Ms. Staroselsky on the exact same topic. Mr. Zander is also a state witness there for cross exam. Finally, Petitioner made clear that he himself can testify as to his exact interactions with the witnesses that were not being retained on the list (such as Ms. Brenda Tinsley and many others), minimizing any perceived prejudice.

⁴ Petitioner, pro se, may himself testify in the narrative.

Petitioner cross exam), Petitioner shall close, Respondent shall close, and then the ALJ will give instructions on post-hearing briefing and procedures.⁵

Respondent INDOT is tasked, without objection, with making sure effected state employees appear for the hearing, without subpoenas, and otherwise have their schedules open March 4-5, 2014. Parties must bring four copies of each offered exhibit.

So ordered as above.

DATED: December 12, 2013



Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
Indiana Government Center North, Rm N501
100 N. Senate Avenue
Indianapolis, IN 46204
(317) 232-3137
Email: araff@seac.in.gov

A copy of the foregoing was sent to the following:

David Weinstock
Petitioner
9661 Prairiewood way
Carmel, Indiana 46032

Lynn Butcher, Staff Counsel
Indiana Department of Transportation
100 N Senate Ave. Room N730
Indianapolis, IN 46204

Additional copy to:

Mediator Hon. Catherine Gibbs

⁵ Rebuttal was not discussed. The ALJ will handle any rebuttal time limits at trial. Witnesses shall be separated.