

MAR 21 2017

Sherri R. Carter, Executive Officer/Clerk

By Jan Josef Manrique Deputy
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JANICE PAGE; DORENE HANSEN;
LETICIA GONZALEZ, and SERVICE
EMPLOYEES INTERNATIONAL UNION
CALIFORNIA STATE COUNCIL,

Plaintiffs,

vs.

ACTING ADMINISTRATIVE DIRECTOR OF
THE DIVISION OF WORKERS'
COMPENATION GEORGE PARISOTTO, in
his official capacity; THE DIVISION OF
WORKERS' COMPENSATION; DIRECTOR
OF INDUSTRIAL RELATIONS CHRISTINE
BAKER, in her official capacity; THE
CALIFORNIA DEPARTMENT OF
INDUSTRIAL RELATIONS; THE
WORKERS' COMPENSATION APPEALS
BOARD; WORKERS' COMPENSATION
APPEALS BOARD MEMBERS FRANK M.
BRASS, DEIDRA E. LOWE, JOSE H. RAZO,
MARGUERITE SWEENEY, AND
KATHERINE SALEWSKI, in their official
capacities; SECRETARY OF THE LABOR
AND WORKFORCE DEVELOPMENT
AGENCY DAVID LANIER, in his official
capacity, and DOES 1-20, inclusive,

Defendants.

CASE NO. BC625992

RULING RE DEMURRER

1 Defendants' Demurrer is sustained without leave to amend on grounds of Labor Code
2 section 5955. Defendants' Motion to Strike is moot.

3
4 "A demurrer challenges only the legal sufficiency of the complaint, not the truth of its
5 factual allegations or the plaintiff's ability to prove those allegations." (*Picton v. Anderson*
6 *Union High Sch. Dist.* (1996) 50 Cal.App.4th 726, 732.) The court must treat as true all of the
7 complaint's material factual allegations, but not contentions, deductions or conclusions of fact
8 or law. (*Id.* at 732–33.) The complaint is to be construed liberally to determine whether a
9 cause of action has been stated. (*Id.* at 733.) A general demurrer lies where the allegations in a
10 complaint or matters judicially noticed clearly disclose a defense or bar to recovery. (*Cryolife,*
11 *Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1152.) It is proper to challenge subject
12 matter jurisdiction by demurrer. (*Greener v. Workers' Compensation Appeals Board* (1993) 6
13 Cal.4th 1028, 1036.)

14
15 The three named individual plaintiffs, Janice Page, Dorene Hansen, and Leticia
16 Gonzalez, each filed a claim for workers' compensation benefits that was eventually settled.
17 (Complaint ¶22–24.) Plaintiff Service Employees International Union California State Council
18 ("SEIU") represents approximately 700,000 California workers, including approximately
19 497,000 women workers. (*Id.* at ¶25.) Its mission is to improve the lives of working people
20 and their families by advocating for fair compensation, benefits, and safe conditions for all
21 workers. (*Id.*) The named defendants include Acting Administrative Director of the Division
22 of Workers' Compensation ("DWC") George Parisotto, the DWC, Director of Industrial
23 Relations Christine Baker, the California Department of Industrial Relations ("DIR"), the
24 Workers' Compensation Appeals Board ("WCAB"), WCAB members Frank M. Brass, Deidra
25 E. Lowe, Jose H. Razo, Marguerite Sweeney, and Katherine Zalewski, and Secretary of the
26 California Labor and Workforce Development Agency David Lanier. Each named individual
27 defendant is sued in his or her official capacity. (*Id.* at ¶¶27–33.)

1 Plaintiffs allege that California’s workers’ compensation system unlawfully
2 discriminates on the basis of sex in the calculation of permanent disability benefits in two
3 ways: (1) the permanent disability benefits to which injured women workers are entitled are
4 reduced for no reason other than a worker’s gender; and (2) women receive fewer permanent
5 disability benefits than the extent of their injuries merit because harm unique to women is
6 ignored. (Complaint ¶2.) The Complaint broadly alleges three claims: (1) that women have
7 been discriminated against in “apportionment” determinations made by physicians in their
8 workers’ compensation cases because some medical reports have referred to the worker’s
9 female gender, gender-related conditions, or gender-based “risk factors” when apportioning
10 causation of disability; (2) that the system discriminates against women because the disability
11 rating assigned to breast cancer, which is alleged to be a harm “unique to women,” is too low
12 and “similar harms unique to men are not assigned a negligible rating;” and (3) that the system
13 discriminates against women because defendants have not adequately supervised and trained
14 workers’ compensation administrative law judges (“ALJs”), Qualified Medical Evaluator
15 physicians (“QMEs”), and other personnel so as to prevent discrimination against women.
16 Plaintiffs allege that this discrimination is a direct result of policies and practices permitted
17 and condoned by defendants. (*Id.* at ¶3.)

18
19 Plaintiffs filed a class action complaint against defendants on July 6, 2016, asserting
20 causes of action for: (1) violation of Article 1, section 7(a) of the California Constitution; (2)
21 violation of California Government Code section 11135; (3) violation of the Fourteenth
22 Amendment of the U.S. Constitution, 42 U.S.C. §1983; (4) negligent training and/or
23 supervision under California common law and Government Code section 815.2; and (5)
24 violation of California Code of Civil Procedure section 526a. The first, second, and fifth
25 causes of action are asserted against all defendants. The third cause of action is asserted
26 against the individual defendants. The fourth cause of action is asserted against the DIR, the
27 DWC, Parisotto, Baker, and Lanier.

1 Defendants demur to plaintiffs' complaint on several grounds. The court need only
2 address one. Defendants' challenge to this court's subject matter jurisdiction is dispositive.

3
4 Labor Code section 5955 provides:

5
6 No court of this state, except the Supreme Court and the courts of appeal to the
7 extent herein specified, has jurisdiction to review, reverse, correct, or annul
8 any order, rule, decision, or award of the appeals board, or to suspend or delay
9 the operation or execution thereof, or to restrain, enjoin, or interfere with the
10 appeals board in the performance of its duties but a writ of mandate shall lie
11 from the Supreme Court or a court of appeal in all proper cases.

12
13 In various ways, all of plaintiffs' causes of action seek to eliminate what they allege to
14 be gender bias in the decisions of the WCAB.

15
16 The California Supreme Court interpreted Labor Code section 5955 in a case involving
17 a challenge similar to the one at issue here. In *Greener v. Workers' Compensation Appeals*
18 *Board* (1993) 6 Cal.4th 1028, the California Supreme Court concluded that a Superior Court
19 lacks subject matter jurisdiction over an action to declare provisions of the Workers'
20 Compensation Act invalid and to enjoin their enforcement. (*Id.* at 1032–33.) Plaintiffs in the
21 Superior Court action were law school graduates who were not members of the State Bar. The
22 Legislature had amended sections 4903 and 5710 of the Labor Code, terminating the power of
23 the WCAB to make awards of, and allow liens for, attorney fees to non-attorneys and
24 unlicensed attorneys. Plaintiffs filed an action in the Sacramento Superior Court naming the
25 WCAB as defendant. The complaint sought a declaration that the bills were invalid because
26 they had been adopted in violation of the open and public hearing requirements of
27 Government Code sections 9029, *et seq.*; denied equal protection in violation of the
28 Fourteenth Amendment to the United States Constitution and article I, section 7, subdivision

1 (a) of the California Constitution; and violated the separation of powers provisions of article
2 III, section 3 of the California Constitution. A separate count sought an injunction “prohibiting
3 the amendment from taking effect.”
4

5 The California Supreme Court found that if the Superior Court granted the relief sought
6 by plaintiffs, the effect would be to interfere with the WCAB in carrying out the duty imposed
7 on it by the statutes restricting fee awards. (*Id.* at 1042–43.) Drawing on its decision in *Sexton*
8 *v. Atchison, T. & S.F. Ry. Co.* (1916) 173 Cal. 760 construing section 67 of the Public Utilities
9 Act, which the court noted is almost identical to section 5955 of the Labor Code, the
10 California Supreme Court explained that no review of any order or decision of the WCAB on
11 any ground is permitted to any court except as provided in the Workers’ Compensation Act.
12 *Greener* states that the Legislature clearly intended for the WCAB to be free from interference
13 by any court and limited state court jurisdiction to accomplish this. The Superior Court has no
14 power to render any judgment that would interfere with the performance of official duties of
15 the WCAB prescribed by the Workers’ Compensation Act. (*Greener*, 6 Cal.4th at 1042.)
16

17 Thus the California Supreme Court concluded that plaintiffs’ challenge to the validity
18 of sections 4903 and 5710 was not within the subject matter jurisdiction of the Superior Court.
19 (*Id.* at 1044.) Plaintiffs’ remedies were limited to “(1) a petition for review if the Board fails to
20 award fees for their representation of an applicant and/or a lien for such fees, or (2) if they are
21 able to satisfy the Court of Appeal that mandamus is appropriate under Code of Civil
22 Procedure section 1085, a petition for writ of mandate.” (*Id.* at 1046.)
23

24 The Court of Appeal recently examined the *Greener* and *Sexton* decisions in *PegaStaff*
25 *v. California Public Utilities Commission* (2015) 236 Cal.App.4th 374. Like *Sexton*, *PegaStaff*
26 addresses a provision in the Public Utilities Code that is virtually identical to Labor Code
27 section 5955. Plaintiff brought an action in Superior Court alleging that a general order of the
28 Public Utilities Commission was unconstitutional. The Court of Appeal rejected the argument

1 that the jurisdictional limitation in the Public Utilities Code applied only to review of orders of
2 the California Public Utilities Commission, finding instead that the Superior Court was barred
3 from suits that would directly interfere with or undermine policies or regulatory programs of
4 the commission. (*Id.* at 391.)

5 Section 5955 does not completely insulate the workers' compensation system from
6 judicial review of constitutional challenges. If a plaintiff can satisfy the requirements for writ
7 review in the Court of Appeal, that remedy is available. (*Chorn v. Workers' Compensation*
8 *Appeals Board* (2016) 245 Cal.App.4th 1370, 1379–80, as modified on denial of reh'g (Apr.
9 20, 2016), review denied (July 13, 2016).) Insofar as section 5955 may limit the feasibility of
10 class actions and require plaintiffs to seek individual relief, such an inequity does not provide
11 a basis for the Court to refuse to apply section 5955. (See *Koszdin v. State Compensation Ins.*
12 *Fund* (2010) 186 Cal.App.4th 480, 496 (finding that “[a]ny inequities that Appellants believe
13 may exist in the limited superior court jurisdiction mandated by the Workers' Compensation
14 Act must be addressed to the Legislature, not the Court of Appeal.”).)

15
16 *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, relied
17 on heavily by plaintiffs, is not on point. Indeed, it does not even cite section 5955. The case
18 addresses workers' compensation exclusivity, an aspect of the workers' compensation system
19 that limits the remedies available against an employer or insurer for injuries covered by the
20 Workers' Compensation Act. (*Id.* at 811.) This is part of the “compensation bargain” on which
21 the workers' compensation system is premised. (*Id.*) Employees give up certain remedies in
22 exchange for quick and definite payment without proof of fault for industrial injuries. (*Id.*) The
23 California Supreme Court granted review in *Vacanti* to determine whether the claims asserted
24 by a group of medical providers against a group of workers' compensation insurers were
25 barred by workers' compensation exclusivity. (*Id.* at 810.) Plaintiffs in this case are not
26 asserting claims against employers or insurers, and the jurisdictional issue before this Court
27 does not concern the nature of the substantive claims that may be asserted against employers
28 or insurers. Plaintiffs here are asserting claims against state agencies and officials that

1 administer the workers' compensation system. What we are called upon to interpret is the
2 subject matter jurisdiction of the Superior Court.

3
4 The first, second, and fifth causes of action are asserted against all defendants. The
5 third cause of action for violation of the federal equal protection clause is asserted against the
6 individual defendants. The WCAB and a number of its members are defendants in this case
7 and plaintiffs are seeking declaratory relief that their actions, omissions, policies, and
8 procedures violate the equal protection clauses of the state and federal constitutions and
9 violate Government Code section 11135 because they result in decisions of the WCAB that
10 discriminate against women. Such a declaration will, and is intended to, compel defendants,
11 including the WCAB and its named members, to reevaluate and revise their policies and
12 procedures so as to eliminate alleged gender bias in the decisions of the WCAB. Thus, the
13 relief sought would "restrain, enjoin or interfere with the appeals board in the performance of
14 its duties" (Lab. Code, § 5955.) Accordingly, the Superior Court is deprived of
15 jurisdiction by section 5955 and the demurrer must be sustained with respect to the first,
16 second, third, and fifth causes of action.

17
18 The fourth cause of action alleges negligent training and/or supervision of Disability
19 Evaluation Unit employees, ALJs, and QMEs. It is asserted only against the DIR, the DWC,
20 Parisotto (Acting Administrative Director of the DWC), Baker (Director of Industrial
21 Relations), and Lanier (Secretary of the Labor and Workforce Development Agency).
22 Plaintiffs seek a declaration that these defendants, through their negligent training and/or
23 supervision, violate California common law and California Government Code §815.2.
24 Plaintiffs also seek injunctive relief requiring these defendants to take reasonable and effective
25 steps to eliminate the apportionment of permanent disability awards to risk factors of gender
26 or female reproductive biology.

1 Although the fourth cause of action is not asserted against the WCAB or its members,
2 the declaratory and injunctive relief sought by plaintiffs will interfere with the WCAB due to
3 the broad scope of the WCAB's duties under the Workers' Compensation Act. The WCAB is
4 empowered to regulate the nature and extent of proofs and evidence, and to adopt rules of
5 practice and procedure. (Lab. Code, § 5307.) Such regulations and rules encompass the work
6 of QMEs and ALJs.

7
8 Title 8 of the California Code of Regulations, Chapter 1 is devoted to regulations of
9 QMEs, including, in Article 4, specification of procedures for QMEs' evaluation of particular
10 disability conditions, and, in Article 6, procedures for disciplining QMEs.

11
12 The WCAB is expressly empowered to formulate rules governing the powers,
13 jurisdiction, and authority of ALJs. (Lab. Code, § 5310.) The WCAB also has the power to
14 appoint ALJs in any proceeding, and may refer, remove to itself, or transfer to an ALJ the
15 proceedings on any claim. (*Id.*) The WCAB is authorized to direct ALJs to try the issues in
16 any proceeding before the WCAB and make and file a finding, order, decision, or award based
17 thereon. (Lab. Code, §§ 27, 5309.) The WCAB may direct ALJs to hold hearings and ascertain
18 facts necessary to enable the WCAB to determine any proceeding or to make any order,
19 decision, or award that the WCAB is authorized to make under Divisions 4 and 5 of the Labor
20 Code, or necessary for the information of the WCAB. (*Id.*) Orders, findings, decisions, and
21 awards of ALJs become those of the WCAB unless reconsideration is granted. (Cal. Code
22 Regs., tit. 8, § 10348.) Thus, the direction of ALJs is statutorily committed to the WCAB, and
23 decisions of ALJs become the decisions of the WCAB unless further review is sought.

24
25 Accordingly, the requested declaratory and injunctive relief directed to the training and
26 supervision of QMEs and ALJs in an attempt to direct their evaluations and decisions would
27 interfere with the WCAB in the performance of its duties. Therefore, this Court has no
28

1 jurisdiction to issue the relief sought in plaintiffs' fourth cause of action. The demurrer to the
2 fourth cause of action is sustained for lack of subject matter jurisdiction.

3
4 Plaintiffs do not suggest any amendment that would cure the jurisdictional defect of
5 their complaint and it does not appear to this Court that any amendment would permit this
6 Court to maintain jurisdiction over the plaintiffs' claims. For the reasons stated above, the
7 demurrer is sustained without leave to amend.

8
9 The Motion to Strike is therefore moot.

10
11 With respect to the parties' respective requests for judicial notice, this Court has not
12 considered any of the documents proffered by defendants and therefore need not rule on
13 defendants' requests for judicial notice. Plaintiffs' requests for judicial notice are granted as to
14 Exhibits A, E, F and G and are denied as to Exhibits B, C and D.

15
16 **IT IS SO ORDERED.**

17
18 Dated:

March 21, 2017 Carolyn B. Kuhl

HONORABLE CAROLYN B. KUHL
JUDGE OF THE SUPERIOR COURT