IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Christopher Boughter,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 51 C.D. 2008
	:	
Workers' Compensation Appeal Board (Cavalier Sealcoating, LLC and Nationwide Insurance),	:	Submitted: July 3, 2008
	:	
Respondents	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: September 19, 2008**

Christopher Boughter (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) that affirmed a WCJ's decision dismissing Claimant's Claim Petition for lack of jurisdiction. On appeal, Claimant argues that the WCJ abused his discretion by refusing to allow Claimant to depose a witness central to the issue of jurisdiction one month after the deadline had passed for the taking of depositions.

The relevant facts are as follows. Claimant filed a Claim Petition alleging that he suffered a fractured right forearm, loss of elbow radius, and other serious injuries while working for Cavalier Sealcoating, LLC (Employer) on December 12, 2004. Employer filed an answer to the Claim Petition asserting that Claimant's injury was not covered by the Pennsylvania Workers' Compensation Act because the injury occurred within the state of North Carolina. The parties agreed to bifurcate the case for the purpose of allowing the WCJ to first determine whether he had jurisdiction over the claim before proceeding on the merits of the Claim Petition.

The WCJ conducted three hearings on the issue of jurisdiction. At the first hearing, on January 5, 2006, the WCJ discussed the posture of the case with the parties' attorneys. No testimony was presented. At the second hearing, on February, 21, 2006, Claimant called Janet Cavalier, sole shareholder of Employer, and Ron Cavalier, her husband, who was in charge of assigning Employer's crews. Janet Cavalier testified that she did not hire Claimant but, rather, Ron Cavalier, her husband, and another employee hired Claimant in North Carolina. Janet testified that Employer maintained a post office box in Lawrence County, Pennsylvania, but that it had no office or physical location in Pennsylvania. With regard to Claimant's work locations, Janet Cavalier testified that Claimant was "principally assigned to North Carolina." (WCJ Hr'g Tr. at 28, February 21, 2006.)

At the same hearing, Claimant next called Ron Cavalier, who testified that Claimant pursued him in gaining employment with Employer. Specifically, Ron explained that Claimant asked him for a job, but that he did not offer Claimant a

job because Employer did not have any employment in Pennsylvania. Ron testified that Claimant "found out that the crew was coming to North Carolina . . . to do a job in Roanoke Rapids, North Carolina. And [Claimant] asked . . . if he could ride along . . . [f]rom Hillsville, Pennsylvania . . . to North Carolina . . . [to] see what North Carolina was about." (WCJ Hr'g Tr. at 67-68.) Ron testified that he did not hire Claimant to do the work and that "[t]here was no mention of employment at that time." (WCJ Hr'g Tr. at 67.)

On cross-examination, and in subsequent rebuttal testimony of Janet Cavalier, Employer submitted payroll records for its labor crew for the year 2004, which documents that Claimant was hired on June 6, 2004. The payroll records do not indicate that Claimant worked for Employer in March, April, or May of that year. The records also indicate that Claimant worked a total of 1,023.5 hours: 205.5 of those hours were in Pennsylvania and 818 hours were in North Carolina. (Janet Cavalier's Dep. Ex. 1, page 5.) In further support of Employer's position that Claimant did not work primarily in Pennsylvania, Employer submitted the deposition testimony of Janet Cavalier in which she testified that 70% of the revenue from Employer came from North Carolina projects, while 30% of the revenue came from Pennsylvania/Ohio projects. (Janet Cavalier Dep. at 14.) Janet testified that 75% of the work Claimant performed was in North Carolina from June through December 2004. She also testified that she did not submit any tax information to the Pennsylvania Department of Labor because Claimant "was an employee of North Carolina and was taxed with North Carolina taxes, not Pennsylvania." (Janet Cavalier Dep. at 72-73.)

At the third hearing, held on March 24, 2006, Claimant testified that he was hired by Ron Cavalier at the end of March 2004 in Pennsylvania and that he worked in different locations other than Pennsylvania, such as North Carolina, Ohio, and Virginia. Claimant testified that there was no specific location of employment and that he would "work wherever the work was." (WCJ Hr'g Tr. at 25, March 24, 2006.)

The WCJ accepted the testimony of Janet and Ron Cavalier as credible and rejected the testimony of Claimant as not credible. The WCJ held that the credible evidence clearly shows that Claimant was not hired in Pennsylvania, which alone would negate jurisdiction under Section 305.2 of the Workers' Compensation Act (Act).[1] The WCJ stated that, even if Claimant was hired in Pennsylvania, Claimant

[1] Act of June 2, 1915, P.L. 736, added by the Act of December 5, 1974, P.L. 782, as amended, 77 P.S. § 411.2. Section 305.2(a) provides:

> (a) If an employe, while working outside the territorial limits of this State, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this act had such injury occurred within this State, such employe, or in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this act, provided that at the time of such injury:
>
> (1) His employment is principally localized in this State, or
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> (2) He is working under a contract of hire made in this State in employment not principally localized in any state, or
>
> (3) He is working under a contract of hire made in this State in employment principally localized in another state whose workmen's compensation law is not applicable to his employer, or

(Continued…)

still failed to establish that jurisdiction lies in this state pursuant to Section 305.2 of the Act because Claimant did not establish: (1) that his employment was not principally localized in any state; (2) that his employment was principally localized in another state, which did not have a workers' compensation law that applied to Employer; or (3) that his employment took place outside of the United States. (WCJ Decision at 4, August 10, 2006.)

Claimant appealed to the Board and argued, among other things, that the WCJ abused his discretion in not permitting the deposition testimony of Claimant's "key witness," John Cavalier, brother-in-law to Janet Cavalier and brother to Ron Cavalier. "Claimant proffered that John Cavalier would testify that [Claimant] was hired in Pennsylvania and that he worked [for Employer] in

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> (4) He is working under a contract of hire made in this State for employment outside the United States and Canada.

77 P.S. § 411.2(a). Section 305.2(d)(4) of the Act defines "principally localized" employment as:

> A person's employment is principally localized in this or another state when (i) his employer has a place of business in this or such other state and he regularly works at or from such place of business, or (ii) having worked at or from such place of business, his duties have required him to go outside of the State not over one year, or (iii) if clauses (1) and (2) foregoing are not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state.

77 P.S. § 411.2(d)(4).

Pennsylvania for several months." (Claimant's Br. at 7.) The Board disagreed with Claimant that the WCJ abused his discretion and stated:

> At the conclusion of the hearing on March 24, 2006, the WCJ allowed Claimant the opportunity to take the telephone deposition of John Cavalier, an over-the-road truck driver, within the next 30 days with the condition that a court reporter who is also a notary public be present with the witness for the purpose of administering an oath. (N.T., 03/24/2006, Pgs. 56-59). Claimant subsequently scheduled Mr. Cavalier's deposition for May 26, 2006. By Interlocutory Order issued on May 25, 2006, the WCJ sustained [Employer]'s objection to that deposition on the basis that it was to be concluded no later than April 24, 2006 and Claimant did not request an extension of time in which to take the deposition.
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> On May 27, 2006, Claimant's counsel preserved her objection to that ruling by submitting a formal Motion for Reconsideration. She stated that she was unaware of [Employer]'s objection to the deposition of John Cavalier until after it was made by facsimile transmission to the WCJ. She also described the difficulties she encountered in scheduling that deposition due to the fact that the witness was a truck driver. . . . The WCJ did not issue a formal ruling denying Claimant's Motion for Reconsideration. Thus, the motion was denied by operation of law.
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> . . . .
>
> We cannot agree with Claimant that the WCJ erred in refusing him the opportunity to take John Cavalier's deposition after April 24, 2006. The WCJ Rules provide that oral depositions shall be completed so as not to unreasonably delay the conclusion of the proceedings, and within a schedule agreed upon by the parties and approved by the WCJ. 34 Pa. Code § 131.63(b). At the March 24, 2006 hearing, the WCJ gave Claimant 30 days to take that deposition, and his counsel agreed to that schedule. While the record reflects that Claimant's counsel had great difficulties scheduling the deposition of John Cavalier, she did not request an extension, and instead allowed the WCJ's deadline to pass. In this circumstance, the WCJ's ruling denying Claimant the opportunity to take John Cavalier's deposition after April 24, 2006 was not an abuse of discretion.

(Board Op. at 7-9 (footnote omitted).) Claimant now petitions this Court for review.[2]

Claimant argues that the WCJ abused his discretion by sustaining Employer's objection to the deposition testimony of John Cavalier. Claimant contends that the preclusion of John Cavalier's deposition was particularly unfair in light of this Court's decision in Coyne v. Workers' Compensation Appeal Board (Villanova Univ.), 942 A.2d 939 (Pa. Cmwlth. 2008), which stressed the importance of fairness, because: Employer conducted an untimely deposition; the WCJ was aware of the difficulties in scheduling John Cavalier's deposition; and there was no final hearing that the deposition would have disrupted. Likewise, relying on Atkins v. Workers' Compensation Appeal Board (Stapley in Germantown), 735 A.2d 196 (Pa. Cmwlth. 1999), Claimant contends that the WCJ abused his discretion because Employer would not have been prejudiced by the deposition.

[2] This Court's review is limited to making a determination as to whether constitutional rights were violated, an error of law was committed, or whether necessary findings of fact are supported by substantial evidence of record. Atkins v. Workers' Compensation Appeal Board (Stapley in Germantown), 735 A.2d 196, 198 n.2 (Pa. Cmwlth. 1999).

In opposition, Employer argues[3] that the WCJ did not abuse his discretion by sustaining its objection to the deposition of John Cavalier because Claimant scheduled it one month after the deadline that the WCJ had established, April 24, 2006, and Claimant did not request an extension of time. Employer argues that it would have suffered prejudice because it would either: (1) have needed to have their witnesses testify again, or (2) be precluded from presenting rebuttal on the issue.

Section 131.63 of the Special Rules of Administrative Practice and Procedure before the Board (Special Rules) provides, in pertinent part:

> (b) Oral depositions shall be completed so as not to delay unreasonably the conclusion of the proceedings, and within a time schedule agreed upon by the parties and approved by the judge . . . .
> . . . .
> (f) If a party fails to abide by the time limits established by this section for submitting evidence, the evidence will not be admitted, relied upon or utilized in the proceedings or the judge's rulings.

[3] We note that, initially, Employer argues that Claimant waived the argument as to whether the WCJ abused his discretion because he did not use the specific words "abuse of judicial discretion" in his appeal documents to the Board. We disagree.

In the appeal to the Board, Claimant took issue with Findings of Fact Nos. 17-20, stating that these "specific findings of fact are not supported by specific substantial evidence. All evidence was not evaluated including evidence showing Claimant was not in North Carolina on days [Employer] claimed he was." (Appeal from WCJ's Findings of Fact and Conclusions of Law, September 1, 2006.) This statement, on appeal, fairly comprises the issue of whether the WCJ abused his discretion in excluding evidence claimed to be relevant by Claimant. The Board, in its determination, also understood the issue to be one of abuse of discretion as the Board devoted four pages to discussing the law regarding abuse of discretion and analyzing the law to the facts of the case. Accordingly, Claimant has not waived this issue.

34 Pa. Code § 131.63(b), (f). Additionally, the Special Rules provide that "[t]he judge may, for good cause, waive or modify a provision of this chapter upon motion of a party, agreement of all parties or upon the judge's own motion." 34 Pa. Code § 131.3(a). This Court has reasoned that prejudice may be a factor in determining whether a WCJ has properly waived the Special Rules. See Atkins, 735 A.2d at 199-200 ("Accepting arguendo that prejudice is an element in analyzing whether the WCJ should grant a waiver . . . the prejudice Claimant must demonstrate is not that if the deposition is admitted, she may lose her case but that the delay in obtaining the deposition compromised her ability to present her case."); Nevin Trucking v. Workmen's Compensation Appeal Board (Murdock), 667 A.2d 262, 270 (Pa. Cmwlth. 1995) ("Since the [WCJ] has the discretion to waive the requirements of the special rules and employer has not shown any prejudice as a result, we conclude that the [WCJ] did not err [in admitting certain bills into evidence].").

While Claimant is correct that Coyne discussed fairness, it also discussed efficiency. The Court, in Coyne, emphasized that "the WCJ's duty is to resolve the claims before her in a fair and *efficient* manner." Id., 942 A.2d at 950. Examining the WCJ's decision to prohibit a party from taking the deposition of a witness, the Court found that it would be inefficient and unfair to allow a deposition so late and that there was no abuse of discretion. Id.; see also City of Philadelphia v. Workers' Compensation Appeal Board (Rooney), 730 A.2d 1051, 1052-53 (Pa. Cmwlth. 1999) (finding no abuse of discretion where WCJ closed the record when a party failed to depose its medical witnesses within the WCJ-imposed deadlines.)

After reviewing the facts of this case, we agree with the Board that the WCJ did not abuse his discretion in sustaining Employer's objection to taking the deposition of John Cavalier. In the case at bar, the WCJ conducted three hearings on the preliminary issue of jurisdiction on January 5, 2006, February 21, 2006 and March 24, 2006. At the first hearing, on January 5, 2006, the WCJ and counsel discussed the procedural posture of the case, and the WCJ made it clear that he wanted the matter relisted "as soon as possible." (WCJ Hr'g Tr. at 19, January 5, 2006.) The WCJ was concerned that the case move forward, and he emphasized that the next hearing "will not be continued, make yourselves available. I want all witnesses here." (WCJ Hr'g Tr. at 16.) The WCJ relisted the matter for February 21, 2006 and stated that the hearing:

> will be for all testimony with regard to the issues of jurisdiction and late answer issues. . . . But I want all evidence to be in at that hearing with regards to the preliminary issues of jurisdiction and late answer. I will then decide the issue of jurisdiction, followed by the issue of late answer, so that the parties will know exactly where your burden of proof lies.

(WCJ Hr'g Tr. at 19-20.) The WCJ further cautioned the parties as to his strict deadlines because he did not want the case to drag out. The WCJ stated:

> So just so that we're clear here, here's what we're going to do. We're going to relist this for February 21st, 2006. It's going to be for all lay testimony. If employer deems it necessary to have an examination, that must be done by March 19, 2006. If medical evidence becomes necessary, [C]laimant's medical [sic] must be completed by May 5th, 2006. Employer's medical must be completed by July 5th, 2006. I will not extend those dates. I want stipulations -- written stipulations and identification of witnesses in my office by February 14, 2006 . . . .

(WCJ Hr'g Tr. at 22-23.)

Moreover, at this first hearing, Claimant's counsel indicated that there were witnesses whose testimony Claimant would want to present, "who were with the claimant when he was hired . . . in Pennsylvania," including Rob Cavalier, John Cavalier, Joe McCree, and Willie Martin. (WCJ Hr'g Tr. at 16-17.)[4]

At the second hearing, held on February 21, 2006, Claimant was instructed to "proceed forward with his burden with regards to establishing the jurisdiction of the case." (WCJ Hr'g Tr. at 7, February 21, 2006). Claimant first called Janet and Ron Cavalier, who traveled from North Carolina, to question them about Claimant's hiring and where he worked. At the conclusion of said hearing the WCJ directed that, at the next scheduled hearing on March 24, 2006, Claimant would present his own testimony on the jurisdictional issue. Throughout the proceedings the WCJ expressed his desire to expeditiously hear the jurisdictional issue because, if he did have jurisdiction over the case, he would then need to schedule hearings on the merits of the Claim Petition. Because Claimant wanted to present the testimony of John Cavalier on the jurisdictional issue, the WCJ said he would "permit his testimony to be taken by deposition, only because if he's out of state, I really can't compel him to come here. Even if you would go and seek enforcement of it, by that time we'd be at next Christmas . . . ." (WCJ Hr'g Tr. at 102.) The WCJ specifically told Claimant's counsel that, "I'm going to place this down for a re-listing as soon as possible for Claimant's testimony. In the meantime, take the deposition of your other witness[, John Cavalier]. [The

[4] Claimant did not subsequently discuss presenting the testimony of any of these individuals, other than John Cavalier, at any other time.

deposition of John Cavalier] must be concluded by the time we have this other hearing." (WCJ Hr'g Tr. at 103.)

At the third and final hearing on the preliminary issue of jurisdiction, held on March 24, 2006, Claimant's counsel informed the WCJ that she was unable to timely depose John Cavalier as directed by the WCJ because "I could not go forward and schedule a deposition with somebody who had such an indefinite schedule." (WCJ Hr'g Tr. at 7, March 24, 2006.) Claimant's counsel said she pressed John Cavalier to be available that afternoon and wanted to either depose him or have him testify over the phone from his truck. Because he was willing to testify for Claimant, the WCJ did not understand why arrangements could not have been made and why a subpoena would have been necessary. (WCJ Hr'g Tr. at 8.). The WCJ then reiterated that, initially, he wanted to hear the testimony of John Cavalier live at the February 21, 2006 hearing but, understanding that he could not due to his type of work, he had directed that John Cavalier's testimony could be taken by deposition: live deposition, telephone deposition, or "however it was necessary to get it in." (WCJ Hr'g Tr. at 9.) However, the WCJ stated that he would not allow it that afternoon because, "I don't have the power to swear anybody in from any other jurisdiction, and if he's not able to be sworn in because he's in his truck, I doubt very much there's a notary in his truck with him." (WCJ Hr'g Tr. at 10.) The WCJ did not initially grant an extension of time for Claimant to secure the testimony, but waited until after hearing Claimant's testimony to decide "whether or not I'll permit an extension of time." (WCJ Hr'g Tr. at 10.) Ultimately, the WCJ did grant an extension, specifying that "if you can, secure the deposition of John Cavalier within the next 30 days. Okay. I don't have to

physically have it in 30 days, but *it must be done within 30 days*. Make sure I get notices of the depositions so I know where we are on that." (WCJ Hr'g Tr. at 56 (emphasis added).)

On May 23, 2006, the WCJ received an objection from Employer to the deposition of John Cavalier, which had been scheduled by Claimant's counsel for May 26, 2006 because: (1) Employer was not given sufficient notice; and (2) the deposition was untimely pursuant to the WCJ's direction. On May 25, 2006, the WCJ issued a decision sustaining Employer's objection, noting that the deposition was to be concluded no later than April 24, 2006, in accord with the WCJ's directive at the March 24, 2006 hearing and that Claimant did not request an extension of time in which to take the deposition.[5]

The WCJ clearly expressed his concern at each of the three hearings that the case move forward so as not to hold up the decision on the merits for the Claimant, as well as Employer. Contrary to Claimant's argument, Claimant had a full and *fair* opportunity to secure either the live testimony or the deposition testimony of John Cavalier. Indeed, the WCJ understood the difficulty in securing John Cavalier's deposition, which is why he had already extended the time period to secure it. If Claimant needed more than 30 extra days to secure said deposition after the third hearing, Claimant could have requested additional time, and the WCJ could have decided whether to grant the request. However, Claimant did not

[5] We note that Employer's objection to the deposition of John Cavalier, which was filed with the WCJ, indicated that a copy of the objection had, in fact, been sent to Claimant's counsel.

request an extension of time. Additionally, we disagree with Claimant that the WCJ's ruling was unfair because a final hearing was not yet scheduled. Even though a final hearing on the merits was not already scheduled that the deposition could have disrupted, we note that the proceedings on the merits of the Claim Petition would certainly have been further delayed, as would the threshold jurisdictional determination.[6]

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[6] Claimant also argues, that pursuant to Atkins, the late deposition of John Cavalier should have been permitted because Employer would not have been prejudiced by said deposition, except for the fact that John Cavalier's testimony would run counter to Employer's jurisdictional argument.

In Atkins, the WCJ ruled that the late deposition testimony of employer's expert witness was admissible to support its termination petition even though it violated Rule 131.63(c), which required the deposition to be taken within 90 days of the date of the first hearing. Atkins, 735 A.2d at 197-98. On appeal, the Board affirmed and held that the WCJ acted within his discretion to excuse employer's delay in taking the deposition pursuant to 34 Pa. Code § 131.3, which provides that "[t]he referee may, for good cause shown, waive or modify a provision of this chapter [i.e., Chapter 131, entitled Special Rules of Administrative Practice and Procedure Before Referees] upon motion of a party, agreement of all parties, or upon the referee's own motion." Id. at 198 (quoting 34 Pa. Code § 131.3.) On appeal to this Court, we affirmed. This Court stated:

> Accepting arguendo that prejudice is an element in analyzing whether the WCJ should grant a waiver [of the Special Rules], we reject Claimant's argument that the WCJ abused its [sic] discretion by admitting the deposition because by doing so, the Claimant was prejudiced thereby. The prejudice Claimant is arguing herein is that her ability to win the case is hurt by the introduction of the deposition. Of course it is, but this is not what courts mean when utilizing the phrase prejudice in the context of determining whether delay by an opposing party ought to serve as grounds for precluding evidence which that opposing party wants to introduce. Rather the kind of prejudice intended is that because of the delay, the party objecting to the admission of such evidence has been rendered incapable of responding to such evidence, because e.g., a witness has died, evidence has been lost, etc.

Atkins, 735 A.2d at 199.

(Continued…)

Claimant also argues that the WCJ abused his discretion in not permitting the late deposition of John Cavalier in light of the fact that Employer conducted an untimely deposition. We disagree.

As we have already explained, the WCJ granted *Claimant* 30 additional days after the third hearing held on March 24, 2006 to finish presenting his case in chief on the issue of jurisdiction. Securing John Cavalier's testimony was part of Claimant's case in chief. Employer requested the opportunity for rebuttal when Claimant finished presenting his case, and the WCJ granted that request. Employer was permitted to call its defense witnesses by phone (as they were still under oath) to rebut Claimant's case. Employer conducted its rebuttal deposition of Janet Cavalier on April 28, 2006, only five days after the expiration of the thirty-day deadline in which *Claimant* was to finish presenting his case. This thirty-day extension and deadline applied only to *Claimant*, not to Employer. Thus, we disagree with Claimant and conclude that the rebuttal deposition testimony was timely. Moreover, we note that Claimant did not object to the scheduling of the rebuttal deposition testimony. Pursuant to Section 131.65(a) of the Special Rules,

> A party or witness may object to the oral deposition by serving, at least 10 days prior to the scheduled date of the oral deposition, a written notice upon the party who has scheduled the oral deposition,

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While Atkins stands for the proposition that a WCJ, in his discretion, may waive a Special Rule for good cause when there is no prejudice to the opposing party, Atkins does not preclude a WCJ from exercising his discretion not to waive the Special Rules when a deposition is untimely, particularly where the WCJ has already granted extensions of time, and there has been no finding of good cause for the untimeliness.

> counsel of record, unrepresented parties and the judge. The objections shall state the specific reason supporting the objections. The objections shall stay the deposition until it is ordered to be held by the judge.

34 Pa. Code § 131.65(a). Claimant did not object to the rebuttal deposition of Janet Cavalier, and the WCJ accepted the evidence into the record.

Based on the facts of this case, we cannot conclude that the WCJ's ruling denying Claimant the opportunity to take John Cavalier's deposition after April 24, 2006, was an abuse of discretion. Accordingly, we affirm the order of the Board.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Christopher Boughter,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 51 C.D. 2008
	:	
Workers' Compensation Appeal Board (Cavalier Sealcoating, LLC and Nationwide Insurance),	:	
	:	
Respondents	:	

O R D E R

NOW, September 19, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby affirmed.

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RENÉE COHN JUBELIRER, Judge