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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TIMOTHY LEON ATKINS, Plaintiff and Appellant, v. VICTIM COMPENSATION & GOVERNMENT CLAIMS BOARD, Defendant and Respondent.	B240295 (Los Angeles County Super. Ct. No.BS127140)

APPEAL from a judgment of the Los Angeles County Superior Court, Gregory H. Lewis, Judge. Reversed and remanded with directions.

Justin Brooks, Jan Stiglitz and Alexander Simpson for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, and Kenneth N. Sokoler, Deputy Attorneys General, for Defendant and Respondent.

The jury found Timothy Leon Atkins guilty as charged with murder and robbery. He was sentenced to prison for an indeterminate term of 25 years to life, plus a determinate term of 7 years. The Los Angeles County Superior Court subsequently granted Atkins's habeas corpus petition and vacated his conviction. Atkins, who had served 23 years of his sentence, filed a claim based on his assertion of innocence for $713,100 before the California Victim Compensation and Government Claims Board (the "Board"). The Board denied his claim. The Superior Court denied Atkins's mandate petition challenging the Board's decision (Code Civ. Proc., §1094.5).

On appeal, Atkins contends the proper burden of proof for establishing his innocence is preponderance of the evidence, which the Board mischaracterized as "a heavy burden." He challenges as invalid the regulation requiring "substantial independent corroborating evidence that claimant is innocent of the crime charged." (Cal. Code Regs., tit. 2, § 641, subd. (a).) He further contends he met this burden by producing substantial corroborating evidence and that the Board failed to give collateral estoppel effect to the innocence-related findings of the habeas corpus judge.

We invited the parties to submit supplemental briefing on whether the Board's failure to set forth its factual and legal bases for the denial of Atkins's claim in its Amended Notice of Decision mandates reversal of the judgment and remand to the Board either to hold a new hearing and afterward issue written factual and legal bases for its decision or to vacate its Amended Notice of Decision and issue a written decision with its factual and legal bases for denying Atkins's claim. The parties have submitted responses.

We reverse the judgment and remand the matter to the superior court with directions to vacate its judgment denying Atkins's petition for writ of mandate, enter a judgment granting Atkins's mandate petition, directing the Board to hold a new hearing followed by written findings as required by law.

BACKGROUND

1. Trial Proceedings

On January 1, 1985, about 1:00 a.m., two men robbed Maria Gonzales and Vicente Gonzales, her husband, at gunpoint, and one of the robbers shot Vicente in the chest, killing him. In a pretrial photographic lineup, Maria identified Ricky Evans as the shooter. In a separate photographic lineup, at the preliminary hearing, and at trial, Maria identified Atkins as the robber who took her necklace.

The preliminary hearing testimony of Denise Powell was admitted at trial. She testified on the morning after the murder, Atkins and Evans joined her and Tommy Yates in their car. Atkins asked if Yates heard about a Mexican being killed the night before. Akins said "'we offed him[,]'" i.e., killed him.

In his signed statement, Marvin Moore stated: On January 1, 1985, about 5:00 a.m., Atkins and Evans ran toward him. Evans, who had dried blood on his right hand and forearm, stated "'we just blasted a mother fucker.'" At trial, Moore recanted.

Atkins relied on mistaken identity and alibi defenses. Yates testified Atkins did not admit he had killed anyone. Kelly Lane Simpson testified on January 2, 1985, Denise Powell told her that while at a party she heard Buster Young and Gus Doonan brag about killing someone near 4th Street and Brooks. Larry Pitre testified Moore told him he got of jail by making a deal in the Atkins's case but he lied to the police in that two others had actually committed the murder. Julie Davis, who was dating Lew Dewberry, Atkins's uncle, testified just after midnight on January 1, 1985, Davis and Atkins walked to the 4th and Brooks crime scene, because they had heard there was a murder. Laura Boney, Atkins's grandmother, testified she believed Atkins returned home between 12:30 and 1:00 a.m. on January 1, 1985. Officer Debbie Dresser testified she believed the murder suspect description matched a robbery suspect, Sylvester Gus Henderson.

2. Habeas Corpus Hearing and Decision

At the habeas corpus hearing, Atkins presented evidence to show his conviction was the product of false testimony improperly procured by the prosecution. In granting the petition, Judge Michael A. Tynan, the judge who presided over Atkins's trial, vacated his conviction due to Powell's false testimony and set a date for a new trial.[1]

3. Administrative Proceedings and Board Decisions

Following the claims hearing, the hearing officer issued his "Proposed Decision" in which he found Atkins failed to prove his innocence. (AR 2764-2782)

a. Claims Evidentiary Hearing

The hearing officer considered the habeas corpus proceedings and the trial evidence. He also considered the following evidence based on Detective Roger Niles's notes from various police interviews.

Atkins stated on the night of the murder, he was with Evans most of time except between 12:30 and 2:00 a.m. when he left to sell a stolen car stereo. Atkins was in the laundry room at 410 Indiana Avenue[2] to sell the stereo when he saw three males running down the alley behind the building. Cecil Bowens was the one carrying a shotgun and Rickey Powell,[3] who held a handgun, advised Atkins to go home, because "'we just did a move.'" Evans, who was the third, was carrying a wallet. Atkins went home.

Evans told police he went to a New Year's Eve party on 7th and Broadway at about 10:30 pm and stayed until 5:00 a.m. on New Year's Day. Atkins was at the party. Evans laughed when asked if he had committed the murder.

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[1] The People declined to retry Atkins, and Atkins was released from prison on February 9, 2007.

[2] This location was about a tenth of a mile away from the crime scene.

[3] Any relationship he had with Denise Powell was unknown.

"Inmate A" told police on February 13, 1985, the date of Atkins's preliminary hearing, Atkins and he were waiting to be transported to court. Atkins told him on New Year's Eve he and Evans robbed a Mexican man and woman on Brooks Avenue. They stole the woman's necklace and shot the man.[4]

At the claims hearing, Atkins presented mistaken identity and alibi evidence. Dr. Mitchell Eisen, an identification expert, testified regarding factors affecting identification reliability and explained how certain factors could lead to a low level of reliability. He admitted he never interviewed Maria, nor did he view the police six-packs of photographs shown to her when she identified Atkins and Evans as the perpetrators.

Atkins testified on the night of December 31, 1984, he was in the basement hallway at 410 Indiana Avenue waiting for a friend to sell a car stereo Atkins had stolen. Atkins saw two fellow gang members, Cecil Bowens and Rickey Powell, and a third individual whom he did not know. All three were running through the alley behind the building. Powell told Akins to leave because "'they had just done a move." Later, Atkins saw Davis outside the alley and heard sirens around the corner. He and Davis then walked about a block away to a location which was roped off. He observed a person who appeared to be deceased hanging out of the car. Atkins later left for 5th and Broadway where he met Evans. When Yates and Denise Powell, pulled up in a vehicle, Atkins and Evans got in the back seat. There was no conversation about the commission of a murder.

In his declaration, Judge David Wesley, who previously had been Atkins's defense lawyer, stated he believed Atkins was innocent of the charged crimes.

[4] Dewberry told police that either on December 31, 1984, or January 1, 1985, he saw Atkins with a necklace. In his declaration, Dewberry stated on New Year's Eve, he never saw Atkins with a necklace.

b. Proposed Decision of Hearing Officer

The hearing officer found Atkins failed to prove his innocence by a preponderance of the evidence. He pointed out no evidence was presented that Maria no longer believed Atkins was the perpetrator. Maria never recanted her identification of Atkins. He did not find Maria's identification to be unreliable "due to the physical discrepancy between the description she gave and Atkins'[s] actual physical description."

The hearing officer found credible Denise Powell's testimony at the habeas corpus hearing at which she recanted her preliminary hearing testimony that Atkins said "'we offed him[.]" He concluded this "only shows that Atkins did not *admit* to committing the murder, it is not proof that Atkins is innocent." The hearing officer gave the testimony and declarations of Moore, Inmate A, Pietre, Davis, Boney, and Dewberry "very little weight, if any, due to their unreliability[.]" He found the declaration of Judge Wesley, as Atkins's former defense attorney, to have "little probative value." The hearing officer determined Evans's statement to police was not credible, because "there [was] no credible evidence that Atkins and Evans were together at a party the entire evening."

Although finding Atkins's testimony that he was only a block away committing a different crime "appears to be credible," the hearing officer concluded this uncorroborated testimony was insufficient to meet Atkins's "heavy burden of proof in order to prevail in these proceedings." He added "Atkins provided no substantial evidence that the murder was committed by any other individual such as Bowens, [Rickey] Powell, Henderson, Young or Burns [sic]."

The hearing officer concluded the decision of the habeas corpus court did not provide proof of innocence, because that "court did not base its ruling on an alibi witness who could place Atkins in the basement[;] it did not state that another suspect committed the crime[;] nor did it declare Atkins to be factually innocent. [Also, t]he case was returned to the trial court for retrial."

c. The Board's Initial Decision

On March 18, 2010, a hearing was held before the Board on Atkins's claim. The record does not include a certified reporter's transcript of the hearing. The Board later issued its "Notice of Decision," which stated the Board adopted "the attached Proposed Decision of the [h]earing [o]fficer as its Decision[.]"

d. The Board's Amended Decision

In a letter, the Attorney General requested the Board amend its decision to correct certain discrepancies between the hearing officer's credibility determinations and the Board's determinations and proposed certain modifications. In its "Amended Notice of Decision," the Board stated on March 18, 2010, the Board "adopted the Hearing Officer's decision to deny" Atkins's claim.

4. Mandamus Hearing and Decision

Atkins filed a mandamus petition to compel the Board to grant his claim for compensation. The Attorney General filed opposition, and Atkins filed a reply. Following a hearing, the superior court denied the petition.

DISCUSSION

1. Statutory Compensation for Persons Erroneously Convicted

a. Relevant Provisions of Claims Statute

"Penal Code[5] section 4900 provides that a person erroneously convicted and imprisoned for a felony may present a claim to the Board . . . for injuries sustained thereby. . . . A procedure for filing and establishing the claim is set out. (§ 4901 to § 4906.)" (*Diola v. State Board of Control* (1982) 135 Cal.App.3d 580, 584, fn. omitted (*Diola*).)

[5] All further statutory references are to the Penal Code unless otherwise noted.

At the hearing on the claim, "[t]he claimant must prove the facts set forth in the statement constituting the claim, including the fact that the crime with which he or she was charged was either not committed at all, or, if committed, was not committed by him or her, the fact that he or she did not, by any act or omission on his or her part, intentionally contribute to the bringing about of his or her arrest or conviction for the crime with which he or she was charged, and the pecuniary injury sustained by him or her through his or her erroneous conviction and imprisonment." (§ 4903.) "To prevail claimant must carry the burden of proof of innocence by a preponderance of the evidence. [Citation.]" (*Diola*, *supra*, at p. 588, fn. 7.)

b. No Fundamental Vested Right

An "application for monetary compensation pursuant to section 4900 is neither fundamental nor vested. Although it could be said the right to *claim* compensation under section 4900 is vested, the right to *obtain* compensation does not vest until a claimant persuades the Board on the merits of the application, and the Board reports 'the facts of the case and its conclusions to the next Legislature . . . with a recommendation that an appropriation be made . . . for the purpose of indemnifying the claimant for the pecuniary injury.' (§ 4904.) Accordingly, . . . the presentation of a 'claim . . . to the . . . Board for the pecuniary injury sustained . . . through [ ] erroneous conviction and imprisonment' does not implicate a fundamental vested right. (§ 4900.)" (*Tennison v. California Victim Compensation and Government Claims Bd.* (2007) 152 Cal.App.4th 1164, 1182.) In the absence of a fundamental vested right, the appellate court reviews the findings of the Board, not those of the superior court. (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1058.)

2. The Requirement of Written Findings

In an administrative mandamus proceeding, the agency abuses its discretion "if . . . the order or decision is not supported by the findings[.]" (Code Civ. Proc., 1094.5, subd. (b).) It is incumbent on the agency to issue its decision "in writing" and to "include a

statement of the factual and legal basis for the decision." (Gov. Code, §11425.50, subd. (a); see also Gov. Code §11425.10, subd. (a)(6).)

"All hearing decisions and proposed decisions shall: (1) be written; and (2) contain a statement of the factual and legal bases for the decision." (Cal. Code Regs., tit. 2, § 619.1, subd. (b).) The Board may adopt in whole the [h]earing [o]fficer's decision, but if the Board does not adopt in whole that decision, "(1) the [B]oard shall make a statement of decision that includes: (A) the decision made about the application; and (b) the reasons for the decision; and (2) the [B]oard staff shall prepare a written decision consistent with the [B]oard's statement of decision." (Cal. Code Regs., tit. 2, § 619.2, subds. (c) & (d).)

In *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 (*Topanga*), our Supreme Court explained the function of this findings requirement is "to bridge the analytic gap between the raw evidence and ultimate decision" and to point out the "analytic route the administrative agency traveled from evidence to action." (*Id*. at p. 515.) Under Code of Civil Procedure section 1094.5, it is incumbent on the Board to render findings that are sufficient "both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the [agency's] action." (*Id*. at p. 514.) This findings requirement also "serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions." (*Id.* at p. 516.)

An agency's decision is infirm if the reviewing court cannot discern the analytic route the agency traveled from the evidence to its decision. (*West Chandler Boulevard Neighborhood Assn v. City of Los Angeles* (2011) 198 Cal.App.4th 1506, 1521-1522; cf. *Great Oaks Water Co. v. Santa Clara Valley Water Dis*. (2009) 170 Cal.App.4th 956, 971 [findings "sufficient if a court has 'no trouble under the circumstances discerning "the analytic route the administrative agency traveled from evidence to action["] . . .'"].)

Both parties acknowledge the Board was required to support its decision with written findings containing the factual and legal bases for its decision and the Board's Amended Notice of Decision is deficient in this regard.

3. The Board's Amended Notice of Decision is Fatally Flawed for Lack of Findings

On March 18, 2010, the Board held a hearing on Atkins's claim for compensation. In its written Notice of Decision dated March 22, 2010, the Board stated it "adopted the attached Proposed Decision of the [h]earing [o]fficer as its Decision in the above-referenced matter." By letter dated April 19, 2010, the Attorney General requested the Board amend its decision to include four suggested modifications in light of inconsistencies between the Proposed Decision and what the Board found during its hearing. On April 28, 2010, the Board issued its Amended Notice of Decision in which the Board stated: "On March 18, 2010, the Board adopted the Hearing Officer's decision to deny the above-referenced claim."

We conclude the Board's failure to set forth its factual findings and legal conclusions in its Amended Notice of Decision is a fatal flaw.[6] The Board's written Amended Notice of Decision does not set forth any findings whatsoever and, at best, is ambiguous as to whether the Board adopted any or some of the factual findings and legal conclusions in the Proposed Decision in adopting the Hearing Officer's "decision."

The Attorney General contends the Board's oral findings during the hearing are adequate, because "'[i]t is proper to look for findings in oral remarks made at a public

[6] Atkins's attack on the Board's findings is sufficient to preserve his challenge to the absence of written findings. (Cf. *Webster v. Board of Dental Examiners of California* (1941) 17 Cal.2d 534, 543 [estoppel to claim failure to make proper findings where point not developed in briefs and no cases cited to sustain claim]; see also, *Association for Protection of Environmental Values in Ukiah v. City of Ukiah* (1991) 2 Cal.App.4th 720, 737 [failure to make adequate findings on separate approval of site permit claim waived by failure to raise it in trial court]; *Kifle-Thompson v. Board of Chiropractic Examiners* (2012) 208 Cal.App.4th 518, 530-531 [rejected claim findings inadequate for lack of "specificity of facts and analysis"].)

hearing at which both parties were present, which was recorded and of which a written transcript could be made.' (*Lin*[*d*]*borg-Dahl Investors, Inc. v. City of Garden Grove* (1986) 179 Cal.App.3d 956, 963, fn. 9; accord, *Harris v. City of Costa Mesa* (1994) 25 Cal.App.4th 963, 970-971; [see also,] *City of Carmel-By-The-Sea v.* [*Board*] *of Supervisors* (1977) 71 Cal.App.3d 84, 91; but see *Pacifica Corp. v. City of Camarillo* (1983) 149 Cal.App.3d 168, 179 [*Pacifica*].)" We disagree.

For several reasons, it would not be proper to rely on the Board's oral findings as a substitute for the requisite written findings of the factual and legal bases for the Board's amended decision. Initially, the record does not contain a certified reporter's transcript of the hearing before the Board.[7] Moreover, the uncertified partial transcript prepared by a person or persons unknown on behalf of the Attorney General does not reflect a cogent, cohesive decision by the Board. (See *Pacifica*, *supra*, 149 Cal.App.3d 168, 179 [remarks, "although reflective of the views of individual councilmen, . . . not the equivalent of *Topanga* findings"].)

Even if we were to consider the uncertified transcript, there would still be ambiguity regarding the findings made by the Board. First, the transcript demonstrates the Board also considered and "upheld" a staff recommendation in reaching its conclusion. But, the staff's recommendation report is not part of the appellate record.

Second, the Attorney General requested the Board modify its Notice of Decision, because of inconsistencies between findings in the Proposed Decision and the oral findings made by the Board at its hearing. Rather than address these inconsistencies, the Board allowed them to remain and simply issued an Amended Notice of Decision adopting the hearing officer's "decision to deny the claim[-]." It is not clear whether the

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[7] No reporter's transcript of the March 18, 2010 Board hearing is part of the record. Then Attorney General Jerry Brown stated he "has prepared a transcript of the Board members' comments and the ruling. It is attached to [his] letter [dated April 19, 2010, requesting the Board amend its Notice of Decision]. It does not include the arguments that the attorneys made before the Board members began speaking." This partial "transcript," unlike a reporter's transcript, was not certified by anyone as a full, true, and correct statement of the testimony and proceedings in the Board's hearing.

Board resolved any of the asserted inconsistencies and, if so, which one(s) the Board resolved in favor, or against, the findings of the hearing officer in the Proposed decision.[8]

4. Reversal and Remand for New Hearing and Written Findings Mandated

The Attorney General contends any remand should be limited to directing the Board to issue a written decision containing the required findings on the existing record. Atkins contends the Board should be directed to hold a new hearing at which additional evidence be allowed and then to issue a written decision with the required findings. We find neither solution to be satisfactory.

In view of the ambiguous and confusing circumstances under which the Board issued its original and amended decisions, the appropriate disposition is to reverse the judgment and direct the superior court to vacate that judgment and enter a new judgment granting the petition and directing the Board to conduct a new hearing at which the Board, in the exercise of its discretion, *may* allow new evidence to be presented, and afterward must issue a written decision setting forth its factual and legal bases therefor.[9] (See, e.g., *Lucas v. Board of Education of the Fort Bragg Unified School Dist.* (1975) 13 Cal.3d 674, 681-683 [failure to make findings of fact and determine issues presented mandates reversal and a new hearing "promptly followed by findings of fact, determination of issues, and a new decision"]; cf. *Alba v. Los Angeles Unified School Dist*. (1983) 140 Cal.App.3d 997, 1007-1008 [remand for findings "would serve no

[8] We note the Board did not adopt or address any of the Attorney General's four detailed proposed modifications.

[9] This disposition will enable the parties and the Board to clarify the record concerning what evidence the Board will be relying upon in reaching its decision and the factual and legal bases therefore. In this regard, we note during Atkins's mandate petition hearing, the superior court denied Atkins's request to augment the record with the reporter's transcript of the hearing on his habeas corpus petition, because it appeared the transcript had not been considered by the Board. The record is not clear whether the Board in fact considered the reporter's transcript of the four-day habeas corpus hearing but the transcript of each day's hearing is included in the administrative record before the hearing officer and is part of the record on appeal.

useful purpose and would obviously result in the same disposition by the Board as previously rendered"].)

DISPOSITION

The judgment is reversed and the matter is remanded to the superior court with directions to: (1) vacate its judgment denying Atkins's mandamus petition; and (2) enter a judgment granting the petition and directing the Board to (a) vacate its Amended Notice of Decision, (b) hold a new hearing, and (c) render a written decision setting forth its factual and legal bases therefor. Each party shall bear their costs on appeal.

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KUMAR, J.*

We concur:

MOSK, Acting P.J.

KRIEGLER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.