

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JOHN FITZPATRICK, *Applicant*

vs.

**GENERAL DYNAMICS INFORMATION TECHNOLOGY; INSURANCE COMPANY
STATE OF PENN, administered by BROADSPIRE BREA, *Defendants***

**Adjudication Number: ADJ13725703
San Diego District Office**

**OPINION AND ORDERS
DENYING PETITIONS FOR
REMOVAL AND
DENYING PETITION FOR
DISQUALIFICATION**

Applicant, in pro per, filed a Petition for Removal on October 4, 2021, Amended Petition for Removal on October 21, 2021, and a Petition for Disqualification on December 8, 2021. We have considered the allegations of the Petitions for Removal and the Petition for Disqualification and the contents of the Reports of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated below, we will deny removal. In addition, we will deny the Petition for Disqualification for the reasons stated by the WCJ in the December 10, 2021 Report, which we adopt and incorporate.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) Here, we are not persuaded that substantial

prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

For the foregoing reasons,

IT IS ORDERED that the Petitions for Removal are **DENIED**.

IT IS FURTHER ORDERED that the Petition for Disqualification is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 23, 2021

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**JOHN FITZPATRICK
MANNING & KASS, ELLROD, RAMIREZ, TRESTER LLP**

PAG/ara

I certify that I affixed the official seal of
the Workers' Compensation Appeals
Board to this original decision on this date.
CS

to the issuance of the Order, no Order would have issued. Nevertheless, that brings the parties to the current issues at hand now set for trial.

After the Opinion from the Board issued, this WCJ returned this matter to an MSC for further proceedings consistent with the Decision from the Board. The parties presented to the undersigned on July 20, 2021 where the matter was set for trial on September 29, 2021. During the July 20, 2021 hearing, both parties actively participated in the PTCS, however due to the pandemic, the matter took place telephonically. The parties submitted a fully-executed PTCS and submitted proposed exhibit pages. It is noted that after this hearing, applicant filed an “opposition to joint PTCS”. However, this was after the July hearing had taken place. This WCJ felt such issues were again addressed at the next trial date.

On September 29, 2021, the parties along with this WCJ discussed the pre-trial conference statement along with the Decision from Board delineating the issues to be heard, clarified Stipulations and Issues, reviewed the proposed exhibits including designating such proposed with their respective designations (Applicant 1, Applicant 2, Defendant A, Defendant B, etc.). The parties and this WCJ discussed the proper way to present audio files during the trial, explaining that the audios cannot be submitted on a CD or DVD or anything else that would go into the State’s computers. After extensive discussions, clarifications and designating the exhibits, this WCJ had to continue this matter as there was no time left to move forward and no Court Reporters available to hear the matter.¹ To help ensure expeditious movement on this matter, this WCJ picked a new date for the next trial setting with the parties and blocked her calendar from any other trial being set for the new date.

After the trial date of September 29, 2021, applicant filed a Petition for Removal and has now filed the current Petition for Disqualification.

III **DISCUSSION**

Pursuant to *Labor Code* § 5311, any party to the proceeding may object to the reference of the proceeding to a particular workers’ compensation judge upon any one or more of the grounds specified in Section 641 of the Code of Civil Procedure. This objection shall be heard and disposed of by the Appeals Board. It is further specified in Section 10960 of the California Code of Regulations (Title 8) that the petition for disqualification shall be filed not more than ten days after service of notice of hearing or after grounds for disqualification are known.

A. Timeliness of Petition

The Petition for Disqualification was filed on December 8, 2021. With respect to the alleged bias that Applicant contends took place in February, 2021, the petition is untimely. The petitioner should have filed this petition no later than March 12, 2021, if the date was February 28, 2021, in

¹ Please note SDO has only one physical reporter at this time, is heavily reliant on remote assistance, and cannot guarantee on any given day a reporter will be available. In an attempt to try to secure a reporter, this WCJ will spend time with the parties preparing the PTCS and ensuring all exhibits are marked and ready to go prior to calling a reporter, a practice that is followed by all WCJs.

accordance with Cal. Code Regs., tit. 8, §10960.² In addition, if petitioner alleges the bias occurred at the September 29, 2021 trial date, then this present petition should have been filed no later than October 14, 2021. Instead, the petition was not filed until December 8, 2021. As such, the filing of the Petition for Disqualification on December 8, 2021, was untimely and the petition should be denied accordingly.

B. Whether Good Cause Exists to Disqualify this WCJ

Petitioner filed the petition for disqualification pursuant to Cal. Code Regs., tit 8, §10940(a). This section states,

“Petitions for reconsideration, removal, or disqualification and answers shall be filed in EAMS or with the district office having venue in accordance with Labor Code section 5501.5 unless otherwise provided. Petitions for reconsideration of decisions after reconsideration of the Appeals Board shall be filed with the office of the Appeals Board. Petitions filed in EAMS pursuant to this rule must comply with rules 10205.10-10205.14.”

In addition, Cal. Code Regs., tit. 8, §10960 states,

Proceedings to disqualify a workers’ compensation judge under Labor Code section 5311 shall be initiated by the filing of a petition for disqualification supported by an affidavit or declaration under penalty of perjury stating in detail facts establishing one or more of the grounds for disqualification specified in section 641 of the Code of Civil Procedure. The petition to disqualify a workers’ compensation judge and any answer shall be verified upon oath in the manner required for verified pleadings in courts of record.

If the workers’ compensation judge assigned to hear the matter and the grounds for disqualification are known, the petition for disqualification shall be filed not more than 10 days after service of notice of hearing or after grounds for disqualification are known.

A petition for disqualification shall be referred to and determined by a panel of three commissioners of the Appeals Board in the same manner as a petition for reconsideration.

The petition before the Court fails to comply with the above regulations. First, the Petition for Disqualification, again, is not timely filed. In addition, it does not have attached an affidavit or declaration under penalty of perjury stating in detail facts establishing one or more of the grounds for disqualification specified in section 641 of the Code of Civil Procedure.

However, this WCJ will attempt to address issues raised in petitioner’s petition. One such issue is the petitioner alleges an ex parte communication between defense counsel and this WCJ

² No specific date in February is alleged, therefore the March 10, 2021 is giving petitioner the benefit of the doubt to the latest date possible.

“particularly in February, 2021 prior to dismissing his case.” (Petition, page 3, line 12) Without knowing what communication(s) petitioner is referencing, a review of the file indicates no such communications exists between this WCJ and defendant independently of petitioner. If the petitioner means the Petition for Dismissal, it will be noted that the Petition for Dismissal dated January 4, 2021 is accompanied by a proof of service indicating the same address petitioner uses on his Objection to the Petition to Dismissal filed with this Court on January 19, 2021. In addition, the proof of service attached to the Objection to dismissal also lists this same address. However, this interaction does not constitute ex parte communication. Rather, the Petition for Dismissal was filed with the Court which generated a task to this WCJ which she acted upon.

If the petitioner means the Notice of Intent to dismiss, it again appears from the proof of service provided to this Court with the request for final order again serving the address indicating in applicant’s objection. However, it should be addressed that the physical address being served is not the same address as the official address record, which is a PO Box for the applicant. Again, the Order for Dismissal and whether or not applicant’s claim should be dismissed is the subject for the upcoming trial. Either way, the filing and serving of these documents do not constitute ex parte communication as alleged by petitioner.

If there is another allegation of such ex parte communications, this WCJ would like petitioner to comply and indicate with specificity, what, if any, ex parte communications took place so they may be properly addressed.

Furthermore, as to petitioner’s contention that the issues he wishes to have heard at trial are not being heard are unfounded. A review of the EAMS documents shows that on December 7, 2020, applicant filed a unilateral PTCS. (EAMS DOC ID number 73633081) Petitioner alleges this WCJ did not use this PTCS to set the matter for trial. However, this document could not be used. Under stipulations, petitioner indicates that he sustained injury on August 28, 2018, a fact that defendant will not stipulate to. Further review of this document on the issues page shows that petitioner acknowledges defendant takes the position that they are not legally responsible for the injuries sustained during a surgical consultation. If one looks at the Minutes of Hearing supplemental page from the trial date of September 29, 2021, this issue is listed to be heard at the upcoming trial, specifically, whether or not there is an industrial injury on 8/28/2018. This WCJ does not understand the allegation that petitioner’s issues are being deferred.

Finally, Labor Code § 123.6(a) mandates that workers’ compensation administrative law judges adhere to the Code of Judicial Ethics adopted by the Supreme Court pursuant to subdivision (m) of Section 18 of Article IV of the California Constitution for the conduct of judges. Canon 2 of the Code of Judicial Ethics states that “a judge shall avoid impropriety and the appearance of impropriety in all of the Judges’ activities”. This “appearance of impropriety” test is an objective one which employs a reasonable person standard, i.e., “would a reasonable person with knowledge of the facts entertain doubts concerning the WCJ’s impartiality”. [See *Robbins v. Sharp Healthcare*, (2006) 71 Cal. Comp. Cases 1291, 1303 (significant panel decision).]

In the matter at hand, this WCJ has demonstrated neither bias, nor the appearance of bias, toward petitioner whatsoever and his claims to the contrary are without merit.

Respectfully, this WCJ believes she has acted in a fair and impartial manner in this case and sees neither actual bias, nor an appearance of bias having been demonstrated toward Petitioner in this matter. Accordingly, this WCJ respectfully requests that the petition be denied.

IV
RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the Petition for Disqualification be denied.

Respectfully submitted,

DATE: December 10, 2021

Alicia D. Hawthorne
WORKERS' COMPENSATION JUDGE