

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

**JOHN NAVROTH II, *Applicant***

**vs.**

**MERVYN'S STORES;  
ACE AMERICAN INSURANCE COMPANY,  
administered by CONSTITUTION STATE SERVICES, *Defendants***

**Adjudication Number: ADJ8209954  
Santa Ana District Office**

**OPINION AND ORDER  
DISMISSING PETITION FOR  
RECONSIDERATION  
AND DENYING PETITION  
FOR REMOVAL**

Applicant seeks reconsideration<sup>1</sup> of the September 7, 2023 Opinion and Order Denying Petition for Disqualification (O&O), wherein we determined that applicant's petition did not establish the facts necessary to support disqualification of the workers' compensation administrative law judge (WCJ) pursuant to Labor Code section 5311, Workers' Compensation Appeals Board (WCAB) Rule 10960, and Code of Civil Procedure section 641(f) and (g).

Applicant contends that the WCAB has an affirmative duty to conduct additional evidentiary hearings necessary to ascertain the truth of the facts as alleged in applicant's petition, that court personnel did not accurately report the events as they transpired at the December 29, 2022 hearing and applicant's petition was timely and complied with applicable statutes.

We have not received an answer from any party. Because applicant seeks reconsideration of a decision of the Appeals Board, the WCJ has not prepared a Report and Recommendation on Petition for Reconsideration.

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<sup>1</sup> Commissioner Dodd, who was previously a member of this panel, is not currently available. Another panelist has been assigned in her place.

We have considered the Petition for Reconsideration, and we have reviewed the record in this matter. Based on our review of the record, and for the reasons stated below, we will dismiss the petition to the extent it seeks reconsideration and deny it to the extent it seeks removal.

## **BACKGROUND**

On May 2, 2023, applicant filed a Petition for Judicial Disqualification, alleging the WCJ presiding over his December 29, 2022 trial demonstrated the appearance of bias against applicant, and that the WCJ was physically impaired such that he could not appropriately conduct the hearing. (Petition for Judicial Disqualification, May 2, 2023, at p. 7:3.)

On September 7, 2023, we denied the Petition for Judicial Disqualification. Our O&O observed that applicant's petition did not comply with WCAB Rule 10960 which requires the attachment of 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. (O&O, p. 3; Cal. Code Regs., tit. 8, § 10960.) We also noted that the petition was not filed within 10 days of the date when the grounds for disqualification were known, which in this matter was the WCJ's alleged conduct during the December 29, 2022 trial proceedings. (*Ibid.*)

However, and notwithstanding these procedural deficiencies, we nevertheless addressed the merits of applicant's petition for disqualification. Our O&O noted that "[e]xpressions of opinion uttered by a judge, in what he conceives to be a discharge of his official duties, are not evidence of bias or prejudice [citations]." (*Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 399, 316 P.2d 366; *Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312, 153 P.2d 734.) We further observed that, "[a] party's unilateral and subjective perception of bias does not afford a basis for disqualification." (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1034, 119 Cal. Rptr. 2d 341, 45 P.3d 280.) We reviewed applicant's specific contentions with respect to the WCJ's conduct at the December 29, 2022 trial setting, and following a discussion of the legal standard necessary to support judicial disqualification, concluded that the factual assertions contained in applicant's Petition were not borne out in the evidentiary record. (O&O, p. 4.)

By petition dated September 15, 2023, applicant seeks reconsideration of our O&O, averring that it was error for the WCAB to rely on the December 29, 2022 Minutes of Hearing. Applicant contends that court personnel prepared an incomplete and factually incorrect record of the trial proceedings, and that the Appeals Board obstructed the due process rights of applicant by

not interviewing the three percipient witnesses to the December 29, 2022 trial proceedings. (Petition for Reconsideration, at p. 4:15.)

## DISCUSSION

A petition for reconsideration may properly be taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a “threshold” issue that is fundamental to the claim for benefits. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Id.* at p. 1075 [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”]; *Rymer, supra*, at p. 1180 [“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, our September 7, 2023 O&O solely resolves an intermediate procedural or evidentiary issue or issues. The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a “final” decision and the petition will be dismissed to the extent it seeks reconsideration.

Insofar as the petition seeks removal, we observe that allegations of bias and prejudice of a judge must set forth *specifically* the *facts* on which the charge is predicated; a statement containing nothing but conclusions and setting forth no facts constituting a ground of disqualification will not support judicial disqualification. (*Mackie v. Dyer, supra*, 154 Cal.App.2d 395, 399.) Here, the Petition for Reconsideration offers no independent evidence to support the allegation of bias or the appearance of bias on the part of the WCJ.

Nor are we persuaded that the WCAB, as an appellate court of limited jurisdiction, has an independent obligation to conduct supplemental hearings for the purpose of adducing the

testimony of percipient witnesses, because a party who carries the burden of proof must submit evidence that is adequate to meet that burden. When the evidence is insufficient to meet that party's affirmative burden, the Appeals Board will not direct the augmentation of the record where the record is otherwise sufficient to support a final determination. (*San Bernardino Community Hospital v. Workers' Compensation Appeals Board (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *McClune v. Workers' Compensation Appeals Board* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Compensation Appeals Board* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see also *Davis v. Pacific Bell* (2020) 85 Cal.Comp.Cases 612 [2020 Cal. Wrk. Comp. LEXIS 44] (writ denied).)

Here, the Petition for Reconsideration asserts malfeasance on the part of the WCJ and court personnel without citation to supporting evidence. While we emphasize that we take allegations of bias and the appearance of bias by WCJs seriously, it remains the burden of the party alleging bias to come forward with the evidence necessary to support those allegations. (Lab. Code, §§ 3202.5, 5705.) Because applicant's Petition for Reconsideration does not cite to evidence in support of his allegations of bias or the appearance of bias, we are not persuaded that our O&O was decided in error. (Lab. Code, § 5903.)

We will deny applicant's petition, accordingly.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DISMISSED** and the Petition for Removal is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ JOSEPH V. CAPURRO, COMMISSIONER

**I CONCUR,**

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**November 13, 2023**

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

**JOHN NAVROTH II  
PEARLMAN, BROWN & WAX**

**SAR/abs**

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