

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

NICOLE SCHILDER, (DONALD MARSAU, DEC'D, *Applicant*

vs.

**STANDER REUBENS THOMAS KINSEY and VALLEY FORGE INSURANCE,
administered by CNA CLAIMS PLUS, *Defendants***

**Adjudication Number: ADJ15708296
Sacramento District Office**

**OPINION AND ORDER
DENYING PETITION
FOR DISQUALIFICATION**

Defendant seeks disqualification of all workers' compensation administrative law judges at the Sacramento and Stockton Appeals Board District Offices. Defendant also requests a change of venue to a district office other than the Sacramento and Stockton District Offices.

We have received a Report on Petition for Disqualification (Report) from the Presiding Sacramento workers' compensation administrative law Judge (WCJ), recommending that the Petition for Disqualification (Petition) be denied or dismissed.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will deny the Petition and return the matter to the WCJ for further proceedings as appropriate.

BACKGROUND

On January 25, 2022, an Application for Adjudication of Claim was filed on behalf of Donald Marsau (deceased) claiming that the repetitive and cumulative stress of his employment with defendant resulted in his death on December 4, 2021. Also, on January 25, 2022, an Application for Adjudication of Claim (Death Case) was filed on behalf dependents Nicole Schilder (spouse), Isabel Marsau (daughter), and Charles Marsau (son). Both applications were filed at the Sacramento District Office. On February 23, 2022, defendant filed its Petition for Disqualification and Request to Transfer Venue Based on Disqualification of Judges.

DISCUSSION

The statutes and regulations pertaining to WCJ disqualification include:

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 and the objection shall be heard and disposed of by the appeals board. Affidavits may be read, and witnesses examined as to the objections. (Lab. Code, § 5311.)

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. (Cal. Code Regs., tit. 8, § 10960.)

Pursuant to Code of Civil Procedure section 641, the grounds for disqualification are:

- (a) A want of any of the qualifications prescribed by statute to render a person competent as a juror, except a requirement of residence within a particular county in the state.
- (b) Consanguinity or affinity, within the third degree, to either party, or to an officer of a corporation which is a party, or to any judge of the court in which the appointment shall be made.
- (c) Standing in the relation of guardian and ward, conservator and conservatee, master and servant, employer and clerk, or principal and agent, to either party; or being a member of the family of either party; or a partner in business with either party; or security on any bond or obligation for either party.

(d) Having served as a juror or been a witness on any trial between the same parties.

(e) Interest on the part of the person in the event of the action, or in the main question involved in the action.

(f) Having formed or expressed an unqualified opinion or belief as to the merits of the action.

(g) The existence of a state of mind in the potential referee evincing enmity against or bias toward either party.

(Code Civ. Proc., § 641.)

(a) A judge is disqualified in a workers' compensation case if any of the following is true: ...

(11) The judge has actual bias against or in favor of an attorney for a party and the judge has a substantial doubt as to his or her capacity to be impartial. A judge is not disqualified as to other members or associates in a law firm, or as to the law firm itself, solely because of actual bias against or in favor of individual attorneys in or associated with the firm. Actual bias in favor of or against an attorney does not in itself create the appearance of bias as to a law firm of which the attorney is a member or associate. A doubt of a person aware of the facts that a judge could be impartial towards a law firm or other members or associates of a law firm, based only on knowledge of a judge's bias in favor of or against an individual attorney or attorneys, is not a doubt which is reasonably entertained. If the workers' compensation appeals board, on a petition for disqualification alleging bias against or in favor of an attorney, determines that a judge is disqualified because of the appearance of bias or because a person aware of the facts might reasonably entertain a doubt that the judge could be impartial, it shall not be presumed, as to a law firm of which the attorney is a member or associate, or as to other members or associates of the law firm: ...

(Cal. Code Regs., tit. 8, § 9721.12.)

By its Petition, defendant seeks to disqualify all of the WCJs at the Sacramento and Stockton District Offices. As quoted above, Labor Code section 5311 specifically states that a party may object “to a particular workers' compensation judge” being assigned to the case at issue. (Lab. Code, § 5311.) There is no statutory or case law that allows the disqualification of multiple WCJs by a party filing a single petition to

disqualify. The Appeals Board has previously held that parties may not seek “blanket” disqualifications, and that disqualifications must be sought on a case-by-case basis. (*Robbins v. Sharp Healthcare* (2006) 71 Cal.Comp.Cases 1291, 2006 Cal.Wrk.Comp. LEXIS 314 (Appeals Board significant panel).)¹

Further, although a petition for disqualification of a WCJ is to be determined by the Appeals Board, a petition for change of venue will initially be addressed by the Presiding WCJ at the district office where the petition is filed, and subsequently an aggrieved part may seek review by the Appeals Board. Thus the “Request to Transfer Venue” is not properly before us and will not be further addressed at this time.

It is important to note that we are not addressing the merits of the disqualification or removal sought by defendant. However, as discussed above, upon return of this matter to the trial level, if defendant seeks a change of venue from the Sacramento District Office, that issue would need to be submitted to the Sacramento Presiding WCJ.

Once the proper venue has been determined and the matter has been assigned to a WCJ, defendant may seek disqualification if appropriate. It is also important to note that a party’s “unilateral” and/or “subjective” perception of an appearance of bias does not constitute a factual or legal basis for disqualification of a WCJ. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1034 [119 Cal. Rptr. 2d 341] *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal. 3d 781 [171 Cal. Rptr. 590].)

Accordingly, we deny the Petition and return the matter to the WCJ for further proceedings as appropriate.

¹ Although panel decisions of the Appeals Board are not binding precedent and have no stare decisis effect, they are citable to the extent they point out the contemporaneous interpretation and application of the workers’ compensation laws by the Board. (*Griffith v. Workers’ Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145, 147, fn. 2]; *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 [Appeals Board en banc], citing *Gee v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Disqualification and Request to Transfer Venue Based on Disqualification of Judges, filed February 23, 2022, is **DENIED**; and the matter is **RETURNED** to the WCJ for further proceedings as appropriate.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 11, 2022

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

**NICOLE SCHILDER
DUDLEY R PHENIX
LAW OFFICES OF PKNW**

TLH/mc

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