

**BEFORE THE  
STATE OF CALIFORNIA  
OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD**

In the Matter of the Appeal of:

**CALIFORNIA DEPARTMENT OF FORESTRY AND  
FIRE PROTECTION dba CAL/FIRE  
1300 U Street  
Sacramento, CA 95818**

**Employer**

Inspection No.  
**1360156**

**DECISION AFTER  
RECONSIDERATION AND  
ORDER OF REMAND**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

**JURISDICTION**

California Department of Forestry and Fire Protection (Cal Fire or Employer) is a department of the State of California that provides firefighting and related services.

On May 8, 2019, the Division of Occupational Safety and Health (Division) issued two citations to Employer. In Citation 1, Item 1, the Division alleged a Repeat-Serious, Accident-Related violation of section 3410, subdivision (c)<sup>1</sup> [failure to ensure firefighters engaged in wildland firefighting were protected against burns to the arms and neck]. In Citation 2, Item 1, the Division alleged a Serious, Accident-Related violation of section 3410, subdivision (e) [failure to ensure that firefighters were wearing protective gloves while exposed to a hazardous environment that may cause injury to the hands or wrist].

Employer timely appealed both citations. During a pre-hearing scheduling conference before Presiding ALJ Kevin Reedy, a dispute arose between Employer and the Division regarding the appropriate administrative law judge (ALJ) to hear Employer’s appeal. The matter was initially to be assigned to ALJ Kerry Lewis. Counsel for the Division objected to that assignment, on the grounds that ALJ Lewis had presided over a settlement conference in a related appeal (which the Division initially suggested was the “same” case). As part of its objection, the Division requested that the case be reassigned specifically to Presiding ALJ Reedy, or ALJ Jennie Culjat. Following the Division’s objection, as described in greater detail below, Presiding ALJ Reedy assigned the matter to ALJ Jennie Culjat (the Assignment Order).

On August 24, 2022, Employer filed an interlocutory petition for reconsideration (Petition), objecting to the Assignment Order on the grounds that the Division had not established the “bias, prejudice, or interest” necessary for disqualification under Government Code, section 11425.40.

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<sup>1</sup> Unless otherwise noted, all section references are to California Code of Regulations, title 8.

The Board took Employer's Petition under submission. Thereafter, Employer and the Division submitted supplemental briefs, as directed by the Board. The matter is now ripe for decision. In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

The Board will deny Employer's Petition. Presiding ALJ Reedy was within his authority and discretion when he issued the Assignment Order, regardless of the merits of the Division's objection. However, as explained further below, the Division's objection was without merit, and neither party is entitled to request assignment to a specific ALJ. Accordingly, the Board will direct the Presiding ALJ to reassign this matter to another ALJ whom neither party has specifically requested.

### ISSUES

Employer's Petition presents the Board with one primary issue:

1. Should the Assignment Order be affirmed or vacated?

However, to resolve this issue, the Board must also address two sub-issues raised in Employer's Petition:

- a. Was Presiding ALJ Reedy's assignment of the matter in excess of the Board's authority?
- b. Was the Reassignment Order procured by fraud or misrepresentations by the Division?

### PROCEDURAL AND FACTUAL HISTORY

Employer's Petition directly concerns Inspection No. 1360156, referred to herein as "the Primary Appeal." However, Inspection No. 1360169 ("the Related Appeal"), which proceeded on a separate track, is also relevant to this Petition, necessitating a brief summary of their respective procedural histories. For the sake of clarity, the Related Appeal is summarized first.

#### **Inspection No. 1360169 (Related Appeal):**

On May 8, 2019, the Division cited Employer for an alleged Repeat-Serious violation of section 3410, subdivision (c) [failure to ensure firefighters engaged in wildland firefighting were protected against burns to the arms and neck].

The Related Appeal was assigned to ALJ Christopher Jessup. Prior to any hearing dates, however, Employer and the Division appeared for a settlement conference before ALJ Kerry Lewis. At that October 30, 2020 settlement conference, as Employer notes, counsel for Employer and the Division presented arguments regarding the applicability of section 3410, subdivision (c). However, ALJ Lewis was never assigned the Related Appeal for any other purpose, and did not rule on any issues presented by the parties, at the settlement conference or otherwise.

The matter did not resolve at the settlement conference, and proceeded before ALJ Jessup. On March 30, 2022, following two days of hearing testimony, ALJ Jessup issued a Decision dismissing the citations in the Related Appeal.

**Inspection No. 1360156 (Primary Appeal):**

On May 8, 2019 the Division issued Employer two citations under Inspection No. 1360156. In Citation 1, Item 1 of the Primary Appeal, the Division alleged a Repeat-Serious, Accident-Related violation of section 3410, subdivision (c) [failure to ensure firefighters engaged in wildland firefighting were protected against burns to the arms and neck]. In Citation 2, Item 1, the Division alleged a Serious, Accident-Related violation of section 3410, subdivision (e) [failure to ensure that firefighters were wearing protective gloves while exposed to a hazardous environment that may cause injury to the hands or wrist]. While the Division issued this citation the same day, and under the same safety order, as the citations in the Related Appeal, the citations, accident and injury at issue in the Primary Appeal occurred several days earlier. The parties appear to agree that both citations involve the same threshold legal issue: the applicability of section 3410, subdivision (c), which requires Employer to provide thermal protection of the ears and neck to fire fighters.<sup>2</sup>

The parties appeared for two settlement conferences in the Primary Appeal. The first settlement conference was held before ALJ Jessup, on January 12, 2021. The other was before Presiding ALJ Reedy on March 28, 2022. The Primary Appeal was not resolved at either settlement conference.

On July 25, 2022, the parties appeared for a status conference before Presiding ALJ Reedy, where they discussed assigning the matter to ALJ Lewis. The parties considered potential hearing dates and reviewed their respective calendars, with the expectation that the matter was being assigned to ALJ Lewis. During that conference, neither party raised any objection or concern regarding that assignment. The only step remaining was for Presiding ALJ Reedy to formally assign the matter to ALJ Lewis.

However, shortly after the status conference and before any ALJ assignment formally occurred, counsel for the Division (Cynthia Perez) emailed counsel for Employer (David Wiseman) and Presiding ALJ Reedy to raise an issue about the assignment to ALJ Lewis. According to Employer, the following email exchange resulted:

**Division Counsel (11:45 a.m.):** Judge Reedy, I just realized that ALJ Lewis was a settlement Judge on this case. I think this has to be set with ALJ Culjat or yourself. Thank you.

**ALJ Reedy (11:47 a.m.):** I'll look into it. Thanks for the heads up.

**Division Counsel (11:49 a.m.):** Thank you but just so it is clear the Division opposes this matter set with ALJ Lewis because she has heard the substance of the case and discussed with both parties the substantive issue and provided her opinion.

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<sup>2</sup> In 2021, in response to AB 2146, the California Occupational Safety and Health Standards Board made several revisions to the regulations pertaining to fire fighters' personal protective equipment. The requirement to provide thermal protection of the ears and neck to fire fighters has been relocated from section 3410, subdivision (c), to new section 3410.1, subdivision (c).

**ALJ Reedy (11:50 a.m.):** Noted. I understand and agree.

**ALJ Reedy (11:57 a.m.):** I can't find a date where Judge Lewis conducted a Settlement Conference in this matter. As far as I can tell, Judge Jessup conducted the Settlement Conference.

**Division Counsel (12:04 p.m.):** There were two cases and the issue is the shroud and I recall that Judge Lewis had a settlement conference if not this case then the other one which just concluded and had the same issue. Both Mr. Wiseman and myself know ALJ Lewis' decision on the issue of the deployment of the shroud. If she is not removed there is no necessity for a hearing, we have her decision. Please find a date with either you or ALJ Culjat.

**ALJ Reedy (12:18 p.m.):** Good afternoon Mr. Wiseman and Ms. Perez: May we re-convene at 3:30 to re-select dates? Thank you.

**Division Counsel (12:19 p.m.):** Yes I am available. Thank you.

**Employer Counsel (12:37 p.m.):** . . . Judge Lewis was not the Settlement judge on this matter and is clear and able to hear the case. Judge Lewis knows nothing about the facts of this case. She simply was a settlement judge where the same violation was alleged and completely different facts, meaning the issue occurred at a different time during the same fire, with different people involved, and different circumstances, different terrain, and none of the individuals involved in the other case, knew anything about the individuals involved in this case etc. Only thing that was similar was the same regulation was cited, and it occurred on the same fire. Judge Jessop [sic] heard this issue from Ms. Perez on the other case because he was our settlement judge in this case. Judge Jessop [sic] determined that Judges are able to be a hearing judge on a case where they heard the same regulation on another settlement.

I would object to Judge Lewis being pulled from this matter because Ms. Perez wishes to have another judge. There is no legal reason why Judge Lewis cannot hear this case.

**Employer Counsel (12:41 p.m.):** One follow up, from the discussions on the chain, I was furiously trying to catch up because I was involved in another matter, and it looks as if Judge Reedy agreed to remove Judge Lewis already, is that accurate? It would have been preferred if we (CAL FIRE) could be heard on this issue before Judge Lewis is removed as our judge.

**ALJ Reedy (12:57 p.m.):** I had not finalized anything yet. No notices have been issued. We will meet at 3:30 to discuss.

The parties appeared for that continued status conference, and maintained their respective positions regarding the assignment to ALJ Lewis. After that status conference, Presiding ALJ Reedy advised the parties he would be reassigning the matter to ALJ Jennie Culjat. On July 28, 2022, the Board issued a Notice of Video Hearing for December 7 and 8, 2022, reassigning the matter to ALJ Culjat. (As noted above, this is referred to as "the Assignment Order.")

Employer timely petitioned the Board for reconsideration of the Assignment Order.

On November 3, 2022, the Board issued an order requesting further briefing from the parties “regarding whether this matter should be assigned to ALJ Kerry Lewis, as initially indicated, or retain its subsequent assignment to ALJ Culjat.” Employer and the Division submitted their supplemental briefs on December 5, 2022. Being fully briefed, the matter is now ripe for a decision.

## DISCUSSION

In its Petition (and supplemental briefing), Employer argues that reconsideration should be granted for two reasons. First, Employer argues that ALJ Reedy lacked authority under section 375.2 and Government Code, section 11425.40, to issue the Assignment Order. Second, Employer argues that the Assignment Order was procured by fraud, because the Division falsely represented that ALJ Lewis had issued a “Decision” in the same case. Employer’s arguments, and the Division’s responses, are examined below.

### **a) Was the Assignment Order Issued In Excess of ALJ Reedy’s Authority?**

Employer alleges that the Assignment Order was issued without, or in excess of, the Board’s authority. (Petition, p. 12 [citing § 390.1]; Employer’s Supplemental Brief (Employer Brief), pp. 7-8.) Employer argues that “the law for the objecting to, and the removal of an ALJ from a matter” falls under section 375.2, subdivision (b), and Government Code, section 11425.40. (*Ibid.*)

Section 375.2, subdivision (b), provides,

A party wishing to object to the assignment of any proceeding to a particular Administrative Law Judge upon any one or more of the grounds specified in Government Code Section 11425.40 shall, at least 5 working days prior to the scheduled hearing, file with the Appeals Board or Administrative Law Judge a motion to disqualify the assigned Administrative Law Judge together with supporting affidavit or declaration. The hearing shall not begin until the Appeals Board has ruled on the motion.

In turn, Government Code section 11425.40, subdivision (a), provides that grounds for disqualification are limited to “bias, prejudice, or interest in the proceeding.” Further, and relevant to this Petition, “[i]t is not alone or in itself grounds for disqualification, without further evidence . . . that the presiding officer . . . has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding.” (Gov. Code, § 11425.40, subd. (b)(2).)

In its Petition, Employer argued that the Division had not established the “bias, prejudice, or interest” necessary, under Government Code, section 11425.40, subdivision (a), to support its objection to ALJ Lewis. (Petition, p. 12-13.) In its supplemental brief, Employer emphasizes that the Division’s objection to ALJ Lewis was based entirely on the fact that ALJ Lewis presided over a settlement conference in the Related Appeal, and that the Related Appeal involved the “same

issue,” i.e., the same safety order at issue in this matter. (Employer Brief, pp. 7-8.) However, Employer asserts, to the extent ALJ Lewis “expressed a view on, a legal [] issue presented in the proceeding,” that is not disqualifying, as the Division has not presented “further evidence of bias, prejudice, or interest.” (*Id.*, p. 8 [quoting Gov. Code, § 11425.40, subd. (b).])

Employer’s analysis of Government Code, section 11425.40 is generally correct, insofar as the Division’s objection to ALJ Lewis falls outside the scope of that provision. At most, ALJ Lewis “expressed a view on, a legal . . . issue.” Indeed, the Division’s stated reason for seeking to disqualify ALJ Lewis is that she already “indicated her decision on the substantive [legal] issue” underlying the parties’ dispute. (Division’s Supplemental Brief (DOSH Brief), p. 4.) Thus, the Division has failed to show that disqualification is required, since Government Code, section 11425.40, subdivision (b)(2), does not require disqualification merely because an ALJ has expressed a view on a legal issue. Therefore, the standard for removing or disqualifying an ALJ under Section 375.2, subdivision (b), has not been met.<sup>3</sup>

However, there are several problems with Employer’s argument, as the Division notes.

First, it is not clear that the matter was ever “assigned” to ALJ Lewis. As the Division notes, the *only* Notice of Hearing in this matter, issued on July 28, 2022, assigned the matter to ALJ Culjat. (DOSH Brief, p. 2.) According to Employer, during the morning session of the July 25, 2022 status conference, the parties coordinated hearing dates on the understanding that the matter would be assigned to ALJ Lewis. Employer notes that “[Presiding ALJ] Kevin Reedy [sic] assigned ALJ Kerry Lewis to oversee the remaining Pre-Hearing Conference and Hearing.” (Employer’s Brief, p. 2.) However, nothing in the record suggests that the matter was ever formally assigned to ALJ Lewis. In other words, the “assignment” to ALJ Lewis was never formalized and was withdrawn approximately one hour after the parties’ informal discussion with ALJ Reedy, who issued the Assignment Order, assigning the matter to ALJ Culjat, later that day.

The Division argues that this fact is dispositive. Specifically, the Division argues, it had no burden to object to ALJ Lewis pursuant to section 375.2, subdivision (b), until it received a Notice of Hearing that assigned the appeal to ALJ Lewis. (DOSH Brief, p. 3.) Since the Division was not “objecting” pursuant to section 375.2, subdivision (b), it was not required to establish “bias, prejudice, or interest” under Government Code section 11425.40.

Employer does not address that objection straightforwardly. Instead, Employer argues: (i) if hearing dates are discussed with the assumption that a particular ALJ will hear the matter, the matter has been effectively “assigned” to that ALJ; and (ii) any *reassignment* of a case, following a party’s objection, must be treated as a finding of *disqualification* of an ALJ, under Government Code section 11425.40. (Employer Brief, p. 2 [“Allowing the disqualification of an ALJ outside of the boundary of the law, erodes the integrity of the administrative process.”].)

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<sup>3</sup> The Division did not “file with the Appeals Board or Administrative Law Judge a motion to disqualify the assigned Administrative Law Judge together with supporting affidavit or declaration.” (Section 375.2, subd. (b).) While this issue was not raised by Employer, the Division’s failure to do so reinforces the view that the Division failed to meet the standard disqualifying ALJ Lewis under section 375.2, subdivision (b).

However, even assuming this matter was “assigned” to ALJ Lewis before being “reassigned” to ALJ Culjat, the Board’s authority to reassign cases is not limited to disqualification under Government Code section 11425.40.

First, section 375.2, subdivision (b), merely states the procedure for a party objecting to an ALJ under Government Code section 11425.40. However, it does not state that an objection under Government Code section 11425.40 is the *exclusive* basis for a party to object to an ALJ. To the contrary, under Labor Code section 6606, parties may object to an ALJ assignment “upon any one or more of the grounds specified in Section 641 of the Code of Civil Procedure,” and the Board must hear and dispose of such objections. (Lab. Code, § 6606.) In turn, Code of Civil Procedure section 641 authorizes parties to object to an ALJ assignment on seven different bases. (Code. Civ. Proc., § 641, subd. (a)-(g).) The Board may grant an objection on any of those bases, including a finding that the ALJ has “formed or expressed an unqualified opinion or belief as to the merits of the action,” without finding an ALJ to be disqualified under Government Code section 11425.40. (To be clear, and as explained below, the Board is not suggesting that any ALJ “formed or expressed an unqualified opinion or belief as to the merits of the action” in this matter, nor that any party has asserted an objection under Labor Code section 6606.)

Second, Employer overlooks section 375.1, subdivision (c), which grants the Board authority to transfer a case to another ALJ as long as “no oral testimony has been received.” Significantly, section 375.1, subdivision (c), contains no other limitation for such a transfer. Neither the parties nor the Board need to demonstrate good cause for the transfer. In fact, transferring a case assignment does not even require a party’s objection to the initial assignment.

Here, there has been no oral testimony received. In these circumstances, the Board retains authority to transfer the matter to another ALJ. While the Board must consider and evaluate objections to ALJ assignments, the Board may exercise this authority, even when no objection or motion to disqualify has been made. In fact, while neither of the parties make this argument, it appears that Presiding ALJ Reedy issued the Assignment Order pursuant to his authority under section 375.1, subdivision (c), and not as a ruling on a motion or objection under section 375.2, subdivision (b).

In summary, section 375.2, subdivision (b), applies only to a motion or objection seeking to disqualify an ALJ, and does not apply to the decision to assign this matter to ALJ Culjat. Further, the Board’s authority to transfer or reassign a matter is not limited to disqualification under section 375.2, subdivision (b). In other words, even assuming the matter was “reassigned” to ALJ Culjat, Presiding ALJ Reedy was within his authority to issue the Assignment Order.

**b) Was the Assignment Order procured by fraud, i.e., by the Division’s**

Employer argues that the Division falsely reported that ALJ Lewis had issued a “Decision” in the Primary Appeal, presided over a settlement conference in the Primary Appeal, and knew the facts of the Primary Appeal. In fact, ALJ Lewis had only presided over a settlement conference in the Related Appeal. (Petition, p. 14.) Employer claims that Presiding ALJ Reedy’s Assignment Order was therefore based on misinformation. (Employer Brief, pp. 8-9.)

The Division argues that ALJ Lewis “indicated her decision on the substantive issue of ‘provide’ in the application of 3410(c) to wildland fire fighting and that decision was not in the Division’s favor.” (DOSH Brief, p. 4.) Since ALJ Lewis already indicated her view, “[i]f the Division had not been upfront about the conflict issue, ALJ Lewis would be required to recuse herself and a new judge would be sought.” (*Ibid.*) Thus, the Division argues, while its statements to Presiding ALJ Reedy were imprecise (e.g., “ALJ Lewis was a settlement Judge on this case”), any misstatements did not change the fact that reassignment was necessary.

On this issue, Employer presents a sympathetic case. From the initial email exchanges, it appears the Division did conflate the procedural histories and substance of the Primary Appeal and the Related Appeal.<sup>4</sup> Further, the Division’s counsel inaccurately stated that ALJ Lewis had already issued a “decision” in the Primary Appeal, and misleadingly described the Primary Appeal as “identical” to the Related Appeal, neither of which were true. The Division even acknowledges this to some extent in its brief. (DOSH Brief, p. 4 [conceding that the Primary Appeal and Related Appeal “are different factually”].) Moreover, Presiding ALJ Reedy appeared to grant the Division’s request almost immediately, ostensibly in reliance on the Division’s representations. When the Division wrote that the matter must be reassigned because ALJ Lewis “has heard the substance of the case and discussed with both parties the substantive issue and provided her opinion,” Presiding ALJ Reedy replied “Noted. I understand and agree” within one minute, before Employer even had an opportunity to respond. Presiding ALJ Reedy held a further pre-hearing conference to discuss the matter, which provided Employer with an opportunity to object and articulate its position regarding the ALJ assignment. However, it is understandable that Employer would believe that the decision (i.e., the assignment of ALJ Culjat) was already made.

Nevertheless, the Assignment Order is not reflected in any written decision. Thus, there is no indication that the Division’s confusing or misleading statements were *actually* confusing or misleading to Presiding ALJ Reedy. Employer had an opportunity to, and in fact did, correct the Division’s misstatements, and the result did not change. On these limited facts, the Board infers that Presiding ALJ Reedy was sufficiently aware of the details of the situation, such that the Assignment Order was not procured by fraud or based on misinformation.

Ultimately, as indicated above, the Board has broad discretion to assign (or reassign) a matter to an ALJ, as long as testimony has not yet been taken. (§ 375.1, subd. (c).) Neither the Board nor Presiding ALJ Reedy are required to provide a reason for an ALJ assignment. Thus, because Presiding ALJ Reedy acted within his authority under section 375.1, subdivision (c), the Board declines to reverse or vacate the Assignment Order and assign ALJ Lewis, as Employer requests.

However, the Board also declines to affirm the Assignment Order. While the Assignment Order was within Presiding ALJ Reedy’s discretion, it followed three misleading statements from the Division: (1) “ALJ Lewis was a settlement Judge on this case,” (2) ALJ Lewis “has heard the substance of the case and discussed with both parties the substantive issue and provided her

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<sup>4</sup> The Division conflated the two matters elsewhere. For example, when Employer filed a motion for summary judgment in the Related Appeal, the Division filed its opposition in the Primary Appeal.



opinion,” and (3) the case must be heard by either Presiding ALJ Reedy or ALJ Culjat. These three statements are misleading, at best, and should not result in the Division obtaining its preferred ALJ assignment.

The first statement is plainly inaccurate; ALJ Lewis never presided over any settlement conference, or any other aspect, of this case.

The second statement is misleading, since ALJ Lewis had heard and discussed the substance of the Related Case, not the Primary Case. When addressing that Related Case, she (allegedly) expressed an informal opinion in a settlement conference, not a considered ruling in an adjudication of the matter. Such facts do not support, much less require, disqualification of ALJ Lewis under section 375.2, subdivision (b). In fact, even if the Division had raised an objection under Labor Code section 6606, which allows a party to object to a hearing officer on grounds set forth in Code of Civil Procedure section 641, that still would not support disqualifying or removing ALJ Lewis in this matter. An administrative judge “is not subject to disqualification under section 641(f) if, prior to rendering a decision, the [ALJ] expresses an opinion regarding a legal or factual issue” unless the petitioner shows that the opinion “is a fixed one that could not be changed upon the production of evidence and the presentation of arguments at or after further hearing.” (*Campos v. Prodesse Prop. Group*, 2023 Cal. Wrk. Comp. P.D. LEXIS 50, \*2 [citing *Taylor v. Industrial Acc. Com.* (1940) 38 Cal.App.2d 75, 79-80].) There is no indication that the Division made any such showing here.

The Division’s third statement—that the case “has to be” assigned to one of two particular ALJs, merely because ALJ Lewis allegedly expressed an opinion during a settlement conference—is not only inaccurate, but improper. Neither the Division nor an appealing employer is entitled to the ALJ of their preference, even if they believe they have received an unfavorable ALJ assignment. It is the purview of the Board to assign matters for hearing, not the parties. (Lab. Code, § 6605 [“The appeals board may appoint one or more hearing officers in any proceeding, as it may deem necessary or advisable, and may defer, remove to itself, or transfer to a hearing officer the proceedings on any appeal.”].) It is improper for any party to attempt to influence the selection of a particular ALJ, especially through inaccurate or misleading statements.

Moreover, the Board’s ALJs, including ALJ Lewis, are capable of impartial adjudication, even when they have presided over a settlement conference with similar legal issues, and even when they have expressed an opinion on one or more of those issues. Each of the Board’s ALJs has taken an oath that they “will faithfully and fairly hear and determine matters and issues” and “make just findings.” (§ 350, subd. (a).) There is zero indication in this record that ALJ Lewis was incapable of fairly and impartially adjudicating the Primary Appeal.

In addition, the Board’s ALJs, including ALJ Lewis, are bound by various canons of the Administrative Adjudication Code of Ethics, as defined in Government Code section 11475. (§ 350.3.) Among those is canon 3B(12), which authorizes ALJs to “participate in settlement conferences or in other efforts to resolve matters in dispute, including matters pending before the judge.” (Cal. Code Jud. Ethics, canon 3B(12).) ALJ Lewis’s presiding over a settlement conference is therefore explicitly authorized, and would not have supported her disqualification. The fact that

she presided over a settlement conference in the *Related* Appeal provides no basis for the Division to demand a reassignment

In summary, the Board has broad discretion to assign and reassign cases to particular ALJs. (§ 375.1, subds. (a)-(c).) If a party dislikes the ALJ assignment, they must either: (i) move to disqualify the ALJ under section 375.2, subdivision (b), on the grounds specified in Government Code section 11425.40; or (ii) object to the ALJ assignment, under Labor Code section 6606, on one or more of the grounds specified in Code of Civil Procedure, section 641. Parties to an appeal are not entitled to object to an ALJ assignment, nor seek to disqualify the assigned ALJ, merely because they find that assignment unfavorable, or to obtain a preferred ALJ assignment.

Accordingly, the Board denies Employer's Petition. The Board affirms that Presiding ALJ Reedy acted within his authority, under section 375.1, subdivision (c), in issuing the Assignment Order. However, the Board also recognizes the Assignment Order, in effect, grants the Division its explicit preference for setting the matter with ALJ Culjat. As noted above, the Division had no basis (under section 375.2, subdivision (b), or Labor Code section 6606) to object to or seek disqualification of ALJ Lewis, and its factual misrepresentations to Presiding ALJ Reedy (including the claim that this matter "has to be set" with him or ALJ Culjat) were improper, and should not result in the Division achieving its preferred ALJ. Consequently, the Board exercises its authority, under section 375.1, subdivision (c), and directs the Presiding ALJ to reassign the matter to another ALJ for whom neither party has explicitly stated a preference.

## DECISION

Employer's Petition is denied. The matter is remanded to Hearing Operations, where the Presiding ALJ shall reassign this matter to an ALJ other than ALJ Lewis, ALJ Jessup, or ALJ Culjat.

### OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair  
/s/ Judith S. Freyman, Board Member  
/s/ Marvin Kropke, Board Member

FILED ON: 08/02/2023

