

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

DEE DEVILLE, *Applicant*

vs.

THE BOEING COMPANY; AIG CLAIMS SERVICES, *Defendants*

**Adjudication Number: ADJ1939621, ADJ2269333
Los Angeles District Office**

**OPINION AND ORDER
DENYING PETITION FOR
REMOVAL AND
DISQUALIFICATION**

We have considered the allegations of the Petition for Removal and Disqualification and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny the Petition for Removal and Disqualification.¹

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, § 10955(a); 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, § 10955(a).) Here, for the reasons stated in the WCJ's report, 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

¹ Deputy Commissioner Garcia, who was on the panel that issued a prior decision in this matter is unavailable to participate. Another panelist has been assigned in her place.

to a final decision adverse to petitioner. Accordingly, we will deny the petition to the extent it seeks removal.

To the extent the petition contends that the WCJ should be disqualified, Labor Code section 5311 provides that a party may seek to disqualify a WCJ upon any one or more of the grounds specified in Code of Civil Procedure section 641. (Lab. Code, § 5311; see also Code Civ. Proc., § 641.) Among the grounds for disqualification under section 641 are that the WCJ has “formed or expressed an unqualified opinion or belief as to the merits of the action” (Code Civ. Proc., § 641(f)) or that the WCJ has demonstrated “[t]he existence of a state of mind ... evincing enmity against or bias toward either party” (Code Civ. Proc., § 641(g)).

Under WCAB Rule 10960, proceedings to disqualify a WCJ “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” (Cal. Code Regs., tit. 8, § 10960, italics added.) It has long been recognized that “[t]he allegations in a statement charging bias and prejudice of a judge must set forth specifically the facts on which the charge is predicated,” that “[a] statement *containing nothing but conclusions and setting forth no facts* constituting a ground for disqualification may be ignored,” and that “[w]here no *facts* are set forth in the statement *there is no issue of fact to be determined.*” (*Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 399, italics added.)

Furthermore, even if detailed and verified allegations of fact have been made, it is settled law that a WCJ is not subject to disqualification under section 641(f) if, prior to rendering a decision, the WCJ expresses an opinion regarding a legal or factual issue but the petitioner fails to show that this 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. (*Taylor v. Industrial Acc. Com. (Thomas)* (1940) 38 Cal.App.2d 75, 79-80 [5 Cal.Comp.Cases 61].)² Additionally, even if the WCJ expresses an unqualified opinion on the merits, the WCJ is not subject to disqualification under section 641(f) if that opinion is “based upon the evidence then before [the WCJ] and upon the [WCJ’s] conception of the law as applied to such evidence.” (*Id.*; cf. *Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312 [“It is [a judge’s] duty to consider and pass upon the evidence produced

² Overruled on other grounds in *Lumbermen’s Mut. Cas. Co. v. Industrial Acc. Com. (Cacozza)* (1946) 29 Cal.2d 492, 499 [11 Cal.Comp.Cases 289].

before him, and when the evidence is in conflict, to resolve that conflict in favor of the party whose evidence outweighs that of the opposing party.”].)

Also, it is “well settled ... that the expressions 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” under section 641(g) (*Kreling, supra*, 25 Cal.2d at pp. 310-311; accord: *Mackie, supra*, 154 Cal.App.2d at p. 400) and that “[e]rroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias or prejudice, especially when they are subject to review” (*McEwen v. Occidental Life Ins. Co.* (1916) 172 Cal. 6, 11; accord: *Mackie, supra*, 154 Cal.App.2d at p. 400.) Similarly, “when the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies” the judge under section 641(g). (*Kreling, supra*, 25 Cal.2d at p. 312; see also *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219 [“When making a ruling, a judge interprets the evidence, weighs credibility, and makes findings. In doing so, the judge necessarily makes and expresses determinations in favor of and against parties. How could it be otherwise? We will not hold that every statement a judge makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias.”].)

Under no circumstances may a party’s unilateral and subjective perception of bias afford a basis for disqualification. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1034; *Robbins v. Sharp Healthcare* (2006) 71 Cal.Comp.Cases 1291, 1310-1311 (Significant Panel Decision).)

Finally, WCAB Rule 10960 provides that when the WCJ and “the grounds for disqualification” are known, a petition for disqualification “shall be filed not more than 10 days after service of notice of hearing or after grounds for disqualification are known.”

Here, as discussed in the WCJ’s report, the petition for disqualification does not set forth facts, declared under penalty of perjury, that are sufficient to establish disqualification pursuant to Labor Code section 5311, WCAB Rule 10960, and Code of Civil Procedure section 641(f) and/or (g). Accordingly, we will deny the petition to the extent it seeks to disqualify the WCJ.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 11, 2024

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

**DEE DEVILLE
SILVER FENSTEN LAW**

AS/aw

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

REPORT AND RECOMMENDATION
ON APPLICANT'S PETITION FOR REMOVAL & DISQUALIFICATION

I

INTRODUCTION

Applicant filed a timely and verified Petition for Removal and/or Disqualification, dated March 16, 2023, as to both of her cases, contending that this WCJ should have been provided her the opportunity to present evidence and testimony on the issue of Applicant's Petition for Transfer of Venue to the Asbestos Unit at the Long Beach District Office. Applicant contends, essentially, that this WCJ's Minute Order noting that her request is denied at this time denies her due process as to the issue.

Defendant filed a Response.

II

FACTS

Dee Deville ("Applicant") filed applications for a specific injury of January 3, 2001 and a cumulative trauma injury from September 27, 1987 through February 15, 2001, both involving multiple body parts, arising out of and in the course of employment with the Boeing Company. Her cases went to trial starting on December 9, 2004 before Judge Richard Shapiro. He issued a decision in April 2005, finding Applicant's thyroid cancer and restrictive airways disease are industrial. He deferred a ruling on the other claimed body parts and all other issues raised at trial pending further development of the record.

The cases have been on calendar multiple times since 2005. Additionally, on September 21, 2011 Applicant's prior counsel Law Offices of John Mendoza filed a Petition for Change of Venue seeking to have the matter transferred to the Long Beach District Office. Such Petition was Denied by then Presiding Judge Jorja Frank on October 24, 2011 on the basis that there had been 10 prior MSCs and trials in Los Angeles on the case and good cause has not been shown.

At a Mandatory Settlement Conference on November 13, 2017, Judge Shapiro set the matter for trial before Judge Douglas Watkins as Judge Shapiro was retiring at the end of the year. Applicant, who was represented for the initial trial, was now representing herself *pro per*. The initial trial with Judge Watkins was scheduled for January 22, 2018. Applicant did not appear on that date so the trial was continued. It has been continued several times since then.

Trial commenced with Judge Watkins on January 28, 2019. The Stipulations and Issues were read into the record and the trial was continued at that point. It was continued again on April 3, 2019 because the Judge was unavailable and was continued twice at Defendant's request because the handling attorney was having surgery. The matter had remained on the Trial calendar

before Judge Watkins through to his retirement. In the last Minutes of Hearing before Judge Watkins, on June 16, 2021, Judge Watkins noted that a reevaluation with required by Dr. Hasday to obtain a current report and address the alleged neck and shoulder injuries and a clarification is required from Dr. Jurkowitz to clarify his findings as to work restrictions and apportionment.

The matter was then before Presiding Judge Rassp on September 15, 2021 for Status Conference. However, Applicant, *in pro per* at that point, did not appear and advised Information & Assistance that she was not interested in any further medical evaluations and was ready to proceed to Trial based upon the current record.

The Status Conference was continued to a Mandatory Settlement Conference before Judge Lori (Oesterreich) Holmes on November 15, 2021. The matter was then placed back on the Trial calendar. The matter remained on Judge (Oesterreich) Holmes' Trial calendar from April 5, 2022 through to the end of her tenure at the Los Angeles District Office in September, 2022. Upon her departure, the matter was transferred to Judge Andrew Malagon for Trial on October 25, 2022 but due to recusal, the matter was transferred to the undersigned for Trial on December 19, 2022.

Subsequent to the October 25, 2022 Trial date, Applicant filed a Petition for Change of Venue dated November 7, 2022, received by the WCAB on November 14, 2022 seeking to have the matter heard at the Long Beach District Office alleging asbestos exposure. Defendant filed an Objection to same. Presiding Judge Rassp deferred the issue noting that "Applicant selected the Los Angeles venue when the Application was filed. This case was already tried by WCJ Douglas Watkins and had to be reassigned to a new trial judge due to Judge Watkins' retirement. Current trial judge may submit case as appropriate and change of venue is deferred unless and until there is a finding of any asbestos related illness AOE/COE by current trial judge" as well as "[n]oncompliance with requirements of Labor Code §5501.5 and §5501.6 "

Presiding Judge Rassp advised the undersigned that he has delegated the venue issue to me to address at the continued Trial date.

The December 19, 2022 hearing was continued at the request of Defense Counsel based upon a medical emergency.

The matter was then on calendar for Trial before the undersigned on February 22, 2023. I had lengthy discussions, lasting more than 2.5 hours, with the parties regarding the Applicant's request for venue change to Long Beach and the asbestos unit. As the Applicant was able to produce no medical evidence diagnosing her with any asbestos diseases (asbestosis, mesothelioma), coupled with the fact that the factors that would be applicable for adjudication within the Long Beach Asbestos Unit are not applicable (liability between employers is not in issue in this matter as the applicant had only one employer with which she is alleging industrial injury – Boeing), the undersigned noted on the Minutes of Hearing that "APPLICANT'S PETITION FOR TRANSFER OF CASE TO ASBESTOS UNIT IS DENIED AT THIS TIME AS NO EVIDENCE APPLICANT HAS BEEN DIAGNOSED WITH ASBESTOS AS PER DISCUSSIONS WITH PARTIES AND OVER APPLICANT'S OBJECTION."

Moreover, this matter is in the middle of Trial as Stips & Issues had been read into the record previously with Judge Watkins and the undersigned continued the matter so that the exhibits can be reviewed with the parties and offered into evidence. Further, this matter was previously before Judge Shapiro in Los Angeles and AOE/COE was found and other issues and parts of body deferred.

III

DISCUSSION

Reconsideration or Removal

Is Applicant's Petition a Petition for Reconsideration or a Petition for Removal? Removal is an extraordinary remedy that may be requested to challenge interim and non-final orders issued by a workers' compensation judge. *Cortez v. Workers' Compensation Appeals Board* (2006) 136 Cal. App. 4th 596, 600, fn 5; *Kleeman v. Workers' Compensation Appeals Board* (2005) 127 Cal. App. 4th 274, 281, fn 2. The petitioning party must demonstrate that substantial prejudice or irreparable harm will result if removal is not granted (8 CCR 10955(a)) and that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues.

A Petition for Reconsideration on the other hand is the appropriate mechanism to challenge a final order, decision, or award. Labor Code Section 5900. An order that resolves or disposes of the substantive rights and liabilities of those involved in a case is a final order. See *Maranian v. Workers' Compensation Appeals Board* (2000) 81 Cal. App. 4th 1068; *Safeway Stores, Inc. v. Workers' Compensation Appeals Board (Pointer)* (1980) 104 Cal. App. 3d 528.

The instant Petition involves the Applicant's objection to the Denial of transfer of venue to the Long Beach District Office Asbestos Unit asserting her due process rights are being violated. This Petition was first brought almost 4 years after the matter proceeded and Stips & Issues were read into the record in January, 2019.

Not only has the applicant presented no evidence of a relevant diagnosis would qualify a possible transfer to the Asbestos Unit, she does not otherwise qualify to be heard in such Unit as the Applicant is alleging injury as a result of one employment and not multiple employments with varying exposures. The denial, at this time, of transfer of case to the Asbestos Unit is not a final order and therefore, removal is the proper mechanism to challenge this Court's Minute Order denying transfer.

Applicant's Contention – The WCAB should hear the Applicant's case or in the alternative the undersigned should be disqualified

Applicant seeks to have various issues addressed by the Appeals Board as set forth in her March 17, 2023 Petition for Removal. However, in this third Petition for Disqualification filed by the Applicant in this matter, Applicant has once again failed to support her Petition with an affidavit or declaration under penalty of perjury stating in detail facts establishing grounds for disqualification in violation of 8 Cal. Code Reg. §10452. The grounds stated in the attached declaration are general allegations spanning the entirety of her case litigation for the last 20+ years,

most of the complaints predate the undersigned's involvement in the matter starting in November/December, 2022.

IV

RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the Applicant's Petition for Removal be denied.

Dated: 4/3/2023

HON. ELISHA LANDMAN
Workers' Compensation
Administrative Law Judge

Service by mail on all parties listed on the
Official Address Record on 4/4/2023.
By: Mary Sena