

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

DIANE CLAY, *Applicant*

vs.

COUNTY OF LOS ANGELES, Permissibly Self-Insured; TRISTAR, *Defendants*

**Adjudication Number: ADJ11166250
Pomona District Office**

**OPINION AND ORDER
DENYING PETITION FOR DISQUALIFICATION**

Applicant in pro per seeks disqualification of administrative law judge (WCJ) Sharon Bernal from this case.

Applicant argues that the WCJ expressed an unqualified opinion as to the merits of her claim or demonstrated enmity or bias against her by responding to her questions by pounding a gavel, failing to properly handle documents she submitted to the court, and verbally scolding her outside the courtroom.

We did not receive an Answer.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be dismissed or denied.

We have considered the allegations of the Petition and the contents of the Report. Based on our review of the record, and as discussed below, we will deny the Petition.

FACTUAL BACKGROUND

While employed as a typist-clerk by defendant during the period of October 16, 2017 through January 5, 2018, applicant allegedly sustained a cumulative trauma injury to left leg, left knee, left thigh, left foot and back.

On July 21, 2020, the Page Law firm filed a Notice of Dismissal of Attorney, dismissing applicant in pro per as applicant's attorney of record. (Notice of Dismissal of Attorney, July 21, 2020.)

Also on July 21, 2020, the Page Law firm filed a Substitution of Attorneys, substituting the Page Law firm for applicant in pro per as applicant's attorney of record. (Substitution of Attorneys, July 21, 2020.)

On September 21, 2020, Solimon Rodgers filed a Notice and Request for Allowance of Lien and an Original Bill, asserting a lien for legal services as to any claim of applicant's and referencing case numbers ADJ11756941 and ADJ12428226. (Notice and Request for Allowance of Lien, September 21, 2020; Original Bill, September 21, 2020.)

A review of the record reveals no dismissal, substitution, or order relieving Solimon Rodgers as applicant's attorney of record prior to the filing of its lien.

On June 21, 2021, applicant filed a Declaration of Readiness to Proceed (DOR), seeking "clarification regarding who is my attorney of record" on the following grounds:

Page Law submitted sub./dismissal documents earmarked for 3 unrelated cases to remove my original attorney of record – Solimon & Rodgers. This action was conducted in July of 2020 without my knowledge. (Declaration of Readiness to Proceed, June 21, 2021, pp. 1-2.)

On July 28, 2021, the matter proceeded to a status conference at which applicant and defendant appeared. (Minutes of Hearing, July 28, 2021.) The WCJ issued an order that the matter be taken off calendar (OTOC). (*Id.*)

On August 26, 2021, applicant sought reconsideration of the OTOC on the grounds that it was issued without addressing the merits of her contentions that Page Law had filed the substitution of attorneys without her authority and that Solimon Rodgers remained her attorney of record. (Petition for Reconsideration, August 26, 2021, pp. 1-5.)

On October 25, 2021, we dismissed applicant's petition to the extent that it sought reconsideration and granted removal, stating:

[T]he record contains no pleadings showing Solimon Rodgers's substitution or dismissal, and no order relieving it as applicant's attorney of record. (Report, p. 6.) Rather, the substitution and dismissal on file pertain solely to applicant in pro per and her purported subsequent attorney of record, Page Law. (Notice of Dismissal of Attorney, July 21, 2020; Substitution of Attorney, July 21, 2020.) In the absence of a pleadings record showing the substitution or dismissal of Solimon Rodgers as applicant's attorney of record, we are unable to discern the reasons or grounds for the OTOC.

...

[T]he WCJ issued the OTOC at a status conference, effectively setting aside applicant's contention that Solimon Rodgers remains her attorney of record without a hearing or otherwise establishing a record from which we may discern the reasons or grounds for his decision. (Minutes of Hearing, July 28, 2021.) However, given the absence of a pleadings record showing Solimon Rodgers's substitution, dismissal, or order to be relieved as applicant's attorney of record, we are persuaded that the WCJ should have issued a Notice of Intention (NIT) to Peter Solimon and Solimon Rodgers to produce evidence regarding the substitution of attorneys, or lack thereof, and for failure to appear at the status conference on behalf of applicant. Upon the issuance of a NIT, the parties, including lien claimant Solimon Rodgers, would be in a procedural position from which they could develop the record regarding whether or not Solimon Rodgers is applicant's attorney of record. (Opinion and Orders Dismissing Petition for Reconsideration; Granting Petition for Removal and Decision After Removal, October 25, 2021, pp. 6-7.)

On October 29, 2021, Solimon Rodgers filed a petition to be relieved as attorney of record for applicant on the grounds that it believed that the substitution and dismissal filed by Page Law operated to remove it as applicant's attorney of record and that it would be prejudiced in the event the WCJ found otherwise. (Petition to be Relieved as Attorney of Record for Applicant, October 29, 2021, pp. 1-6.)

On November 1, 2021, the WCJ ordered that Solimon Rodgers be relieved as applicant's attorney of record. (Order Relieving Solimon Rodgers, November 1, 2021.)

On November 30, 2021, applicant filed a petition for reconsideration of the order relieving Solimon Rodgers as attorney of record. (Petition for Reconsideration, November 20, 2021.)

On January 21, 2022, we rescinded the order relieving Solimon Rodgers as applicant's attorney of record and returned the matter to the trial level for development of the record as to whether or not Solimon Rodgers remains applicant's attorney of record and further proceedings as appropriate. (Opinion and Orders Dismissing Petition for Reconsideration; Granting Petition for Removal and Decision After Removal, January 21, 2022.)

On March 2, 2022, applicant submitted a pre-trial conference statement (PTCS), framing the issue for trial as whether Solimon Rodgers is her attorney of record, stating "I am requesting the assistance of the WCAB (court) to demonstrate my need to continue with their legal representation." (PTCS, March 2, 2022, p. 3.)

On September 22, 2022, applicant filed a request for change of venue, asserting that the request was supported by “Complexity of Case[,] Semi-Companion cases located in Los Angeles[,] Judicial Management of fairness[,] Travel Expenses on applicant as a burden.” (Petition for Change of Venue, September 22, 2022, p. 2.)

On December 8, 2022, presiding WCJ George Reny ordered that the petition for change of venue be granted and that the matter be transferred to the Los Angeles District Office. (Order Changing Venue, December 8, 2022.)

On December 21, 2022, presiding WCJ Reny rescinded the order granting the petition for change of venue and transferring the matter to the Los Angeles District office, scheduling the matter for hearing on January 17, 2023. (Order Rescinding Change of Venue, December 21, 2022.)

On January 17, 2023, applicant filed a PTCS which included a copy of a letter sent to presiding Judge Reny dated January 17, 2023, asserting that the petition for change of venue should be granted for, among other reasons, the “Court Conduct by Judge, Sharon Bernal” (Diane Clay PTCS, January 17, 2023, p. 8.)

In the Report, the WCJ states:

Applicant contends in the Petition to Disqualify . . . she had a question as to the person acting as the witness for the firm Solimon Rodgers and attorney of Page Law performing in two capacities. Applicant’s Petition to Disqualify also states attorney Paris Page was sitting next to applicant at the applicant’s side of the table. It is not clear to which hearing the applicant was referring as at all of the scheduled hearings at the Pomona WCAB before WCJ Bernal the appearances by prior applicant’s attorney Paris Page were all made by telephone.

Applicant appears to contend in the Petition to Disqualify . . . there was some collaboration between prior applicant’s attorney Paris Page and defense counsel and that when applicant had a question about that the response from the WCJ was to loudly bang the gavel. Applicant’s Petition to Disqualify contends the same response through several court proceedings, no specific details or references were provided with that contention.

Applicant contends in the Petition to Disqualify . . . there was an issue with submission of exhibits. No specific date is noted but the Petition contends the WCJ denied receipt of the exhibits. Thereafter when copies of the proposed exhibits were provided to all parties, including the applicant, she contends she had to rearrange the

documents and several were missing (those documents claimed to be missing were not identified in the Petition). The Petition states documents from the Law Office of Solimon Rodgers were previously uploaded.

Applicant claims to refer to a different petition, this one to change venue, for additional reasons for the requested disqualification. However, review of the form Petitions to Change Venue dated September 6, 2022 and December 3, 2022, shows those Petitions do not state any specific contentions or reference to specific events or how any such events were relevant to the pending Petition for Disqualification.

Applicant contends in the Petition to Disqualify . . . the WCJ can be verbally abusive, rude, unprofessional and disrespectful regarding the applicant. Applicant claimed to have been scolded at the time of the hearing on November 29, 2022 and that she reported that to the Presiding Workers' Compensation Judge.

...

The Petition is date stamped received at the WCAB Pomona on March 15, 2023, and that same date is scanned into filenet. Pursuant to WCAB Rule 10960 the Petition for Disqualification shall be filed not more than ten (10) days after service of notice of hearing or after grounds for disqualification are known.

...

The record shows that despite this case being set on the trial calendar on multiple dates the case has not yet gone forward to further develop the record as to the dispute over whether the Law Office of Solimon Rodgers is to remain in this case as attorney of record for the applicant. There are no transcripts or summaries of evidence or testimony of witnesses. It was not until the time of the hearing on February 22, 2023 that a Pre-Trial Conference Statement was fully completed and submitted by the parties. That Pre-Trial Conference Statement added that prior attorney Page Law appear for the next trial setting. Also the Pre-Trial Statement stated case returned for further proceedings consistent with the Opinion and Orders Dismissing Petition for Reconsideration; Granting Petition for Removal and Decision After Removal dated January 21, 2022. It was Ordered the matter be returned to the trial level for further proceedings consistent with that decision. It was Ordered to develop the record on the issue of the Petition by the Law Office of Solimon Rodgers to be relieved as applicant's attorney of record. It was Ordered notice and an opportunity to be heard be issued and for a record to be developed and decision to be made on that petition.

The Minutes of Hearing April 21, 2022 noted the agreement of the parties for an order to issue for a replacement panel and the case went off calendar for further discovery. Applicant was present.

The Minutes of Hearing June 21, 2022 noted the applicant called in to state she was ill and unable to appear and requested a continuance.

The Minutes of Hearing August 3, 2022 noted a joint request for continuance. Applicant was present.

The Minutes of Hearing October 4, 2022 noted the applicant was to review and return to defendant by October 11, 2022 an advocacy letter. Applicant was present.

The Minutes of Hearing November 29, 2022 noted insufficient time to finish and the case was continued at 3:40 p.m. to a trial date February 9, 2023.

...

The limited issue for trial . . . was whether the Law Office of Solimon Rodgers was to be dismissed as attorney of record for the applicant. The applicant was given time . . . to go through all her exhibits and complete the Pre-Trial Conference Statement. The hearing was scheduled to start at 8:30 that morning and was continued as noted at 3:40 p.m. after the applicant left the hearing without completing the Pre-Trial Conference Statement. The hearing had not yet been concluded by the WCJ when the applicant left the courtroom and did not return.

...

At the time of the scheduled trial November 29, 2022, this case was set on the petition by the Law Office of Solimon Rodgers to be dismissed as attorney of record for the applicant. The trial was set to comply with the directive to develop the record on that issue. The case could not go forward at that time due to the fact the applicant had not completed the Pre-Trial Conference Statement. The Pre-Trial Conference Statement had by that date been completed by the other party participating in that trial.

...

At no time was the WCJ rude or verbally abusive. The conduct of the applicant by not completing the Pre-Trial Conference Statement, despite having access on multiple occasions to the Information and Assistance Office for any questions as well as being given ample time by the WCJ, was continuing to cause further unnecessary delay.

In the course of that hearing November 29, 2022 it was necessary for the WCJ to use the gavel to gain and redirect the applicant's attention to the issues being addressed for the scheduled trial. This

applicant has other cases filed in another venue however the focus for the hearing was to be limited to the present case and a very specific limited issue. It was only after reminding the applicant multiple times the focus needed to remain on that limited issue that the WCJ used the gavel as a means to control the proceeding. The WCJ was not rude to the applicant at any time during that proceeding. The WCJ was not verbally abusive, rude or disrespectful toward the applicant. The WCJ is absolutely not biased as alleged by the applicant.
(Report, pp. 1-4.)

DISCUSSION

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.) 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 of 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 . . . [and] shall be filed not more than 10 days after service of notice of hearing or after grounds for disqualification are known." (Cal. Code Regs., Tit. 8, § 10960.)

In this case, the pleadings record shows that on January 17, 2023 applicant filed a PTCS asserting that venue should be changed based upon alleged "Court Conduct by Judge, Sharon Bernal," that the Petition avers that WCJ Bernal verbally scolded her on November 29, 2022, and that the Petition was filed on March 15, 2023. (Diane Clay PTCS, January 17, 2023, p. 8; Report, p. 1.) Based upon applicant's own pleadings, applicant knew of grounds to disqualify WCJ Bernal as early as November 29, 2022 and not later than January 17, 2023, but did not file the Petition until March 15, 2023. Hence we conclude that the Petition is untimely.

Accordingly, we will dismiss the Petition.

Having concluded that the Petition is untimely, we nevertheless address applicant's contention that the WCJ expressed an unqualified opinion as to the merits of her claim or demonstrated enmity or bias against her by responding to her questions by pounding a gavel,

failing to properly handle documents submitted to the court, and verbally scolding her outside the courtroom.

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, 316 P.2d 366, 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 [100 P. 2d 511, 5 Cal.Comp.Cases 61].) 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, 153 P.2d 734 ["It is [a judge's duty] to consider and pass upon the evidence produced 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, 155 P. 86; 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, 4 Cal. Rptr. 3d 519 ["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, 119 Cal. Rptr. 2d 341, 45 P.3d 280; *Robbins v. Sharp Healthcare* (2006) 71 Cal.Comp.Cases 1291, 1310-1311 (Significant Panel Decision).)

Here, applicant alleges that she questioned the WCJ regarding whether the person acting as a witness for Solimon Rodgers and attorney of Page Law was performing in dual capacities; whether it was proper for attorney Paris Page to sit at the same table as herself in the courtroom; whether there was improper collaboration between her previous attorney, Ms. Page, and defense counsel; and that the WCJ responded to these questions by pounding the gavel.

However, the Petition does not aver at what hearing or hearings any of this alleged conduct occurred—and the Report suggests that applicant could not have questioned the WCJ about Ms. Page's sitting at the same table because all of Ms. Page's appearances before the WCJ in this matter were telephonic. (Report, pp. 1-4.)

Moreover, although the record reveals that the WCJ used a gavel with respect to applicant at one hearing, the WCJ states that it was for the purpose of redirecting applicant's attention to issues then pending before the WCJ and occurred only after the WCJ had reminded applicant numerous times to focus on the pending matter. (Report, p. 4.) Accordingly, we are unable to discern grounds to disqualify WCJ Bernal for using the gavel in response to applicant's questions.

As to applicant's contention that the WCJ expressed an unqualified opinion as to the merits of her claim or demonstrated enmity or bias against her by failing to properly handle documents she submitted to the court, we agree with the reasoning of the WCJ, as stated in the Report, that the Petition does not aver when this alleged conduct occurred nor what specific documents were mishandled. (Report, p. 2.) Additionally, we are unable to discern how the alleged conduct expressed an unqualified opinion as to applicant's claim or demonstrated enmity

or bias against her. Accordingly, we are unable to discern support for applicant's contention that disqualification is warranted as a result of WCJ Bernal's alleged failure to properly handle documents she submitted.

As to applicant's contention that the WCJ expressed an unqualified opinion as to the merits of her claim or demonstrated enmity or bias against her by verbally scolding her outside the courtroom, the WCJ denies being rude or verbally abusive toward applicant and denies holding enmity towards or bias against her. (Report, p. 4.) Accordingly, we are unable to discern support for applicant's contention that disqualification is warranted as a result of WCJ Bernal's alleged scolding of applicant.

Accordingly, we conclude that had the Petition not been subject to dismissal as untimely, we would deny it on the merits.

Accordingly, we will dismiss the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Disqualification of WCJ Sharon Bernal is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER



KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 13, 2023

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

**DIANE CLAY
ROBINSON DILANDO
SOLIMON RODGERS**

SRO/cs

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