

**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
DENYING PETITION FOR
DISQUALIFICATION**

We have considered the allegations of the Petition for Disqualification filed on May 2, 2023, 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 discussed below, we will deny the Petition for Disqualification.

On May 24, 2023, applicant filed a "Response to Judge Jeremy Clift's 05/15/23 Response to Applicant's Petition for Judicial Disqualification." However, applicant did not file a petition setting forth good cause to approve the filing of a supplemental pleading, or attach the proposed pleading as required under WCAB Rule 10964(b). Consequently, we neither accept nor review the May 24, 2023 supplemental pleading.

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 Code of Civil Procedure 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)).

It is settled law that a WCJ is not subject to disqualification under Code of Civil Procedure 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].)¹ Additionally, even if the WCJ expresses an unqualified opinion on the merits, the WCJ is not subject to disqualification under Code of Civil Procedure 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 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 Code of Civil Procedure section 641(g) (*Kreling, supra*, 25 Cal.2d at pp. 310-311; accord: *Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 400 [316 P. 2d 366] (*Mackie*)) 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 Code of Civil Procedure 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.”].)

¹ 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].

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) (*Robbins*).

In addition, WCAB Rule 10960 provides:

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.)

We note that applicant's Petition does not attach 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, as required under our Rules. (Cal. Code Regs., tit. 8, § 10960.) We further observe that the Petition was not filed within 10 days of December 29, 2022, the date of the alleged conduct warranting disqualification. (*Ibid.*)

Notwithstanding the failure to comply with our Rules with respect to the content and timeliness of the Petition, we acknowledge that the Petition sets forth detailed facts alleged to be supportive of disqualification of the WCJ. (Cal. Code Regs., tit. 8, § 10960; see also *Mackie v. Dyer* (1957) 154 Cal.App.2d 395.) In addition, the Petition is filed under penalty of perjury. Accordingly, and notwithstanding the procedural irregularities with respect to the filing of the Petition, we have considered the Petition on the merits.

Applicant avers the WCJ's concern for the health of a family member compromised his "cognitive and memory processes," and that the WCJ exhibited manifestations of increased anxiety

in his courtroom demeanor and behavior. (Petition, at 7:9.) However, as we wrote in *Robbins, supra*:

A judge's disagreement with an attorney's legal arguments, and even erroneous rulings by a judge, ordinarily are not sufficient to establish bias or prejudice against the attorney. (E.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1112 [129 P.3d 321, 40 Cal. Rptr. 3d 118]; *People v. Samuels* (2005) 36 Cal.4th 96, 115 [113 P.3d 1125, 30 Cal. Rptr. 3d 105]; *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 795 [623 P.2d 151, 171 Cal. Rptr. 590]; *McEwen v. Occidental Life Insurance Co.* (1916) 172 Cal. 6, 11 [155 P. 86].) Similarly, a judge's disagreement with an attorney's interpretation of the evidence or assessment of the credibility of witnesses generally does not establish bias. (*Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312 [153 P.2d 734]; *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219–1220 [4 Cal. Rptr. 3d 519].) Further, a judge's mere frustration or irritation with an attorney does not suggest bias or prejudice. (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 303 [4 Cal. Rptr. 3d 883]; *Scott v. Family Ministries* (1976) 65 Cal.App.3d 492, 502 & 509 [135 Cal. Rptr. 430]; see also, *Offutt v. United States* (1954) 348 U.S. 11, 17 [75 S.Ct. 11, 99 L.Ed. 11] (“a modicum of quick temper . . . must be allowed even judges”).) Even a judge's critical remarks to an attorney usually do not establish bias. (*People v. Brown* (1993) 6 Cal.4th 322, 336 [862 P.2d 710, 24 Cal. Rptr. 2d 710].)

(*Robbins, supra*, at pp. 1310-1311.)

Applicant further contends that the WCJ's trial directions and demeanor demonstrate the *appearance* of bias, if not actual bias against the applicant. (Petition, at 8:7.) However, the factual assertions contained in applicant's Petition are not borne out with specificity in the Minutes of Hearing, and are not confirmed by a transcript of the proceedings or any other independent evidence.

Based on the above, and following our review of the entire record occasioned by applicant's Petition, we discern no evidence of bias or the appearance of bias in the WCJ's conduct in this matter. Accordingly, 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, the petition will be denied.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 7, 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*