

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

CHARLES FOSTER, *Applicant*

vs.

**L.H. WOODS & SONS, INC.;
GALLAGHER BASSETT, *Defendants***

**Adjudication Number: ADJ11310818
San Diego District Office**

**OPINION AND ORDER
DENYING PETITION FOR
DISQUALIFICATION**

We have considered the allegations of the Petition for 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 Disqualification.

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].)¹ 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 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.”].)

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).)

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, the petition will be denied.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 15, 2023

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

**CHARLES FOSTER, IN PRO PER
SIEGEL, MORENO & STETTLER, APC
MONTELEONE & MCCRORY, LLP**

AS/mc

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

Report and Recommendation On Petition For Disqualification

I. Nature of Petition

Applicant, In Pro Persona has filed an untimely, Petition for Disqualification.

II. Procedural Facts

Applicant was initially represented by Counsel. On February 17, 2021, the parties appeared for a mandatory settlement conference (MSC) before WCJ Michelle Utter. The parties were unable to reach resolution. As such, the parties prepared the Pre-Trial

Conference Statement, listed exhibits and witnesses and the matter was set for trial on April 5, 2021 before the undersigned.

On April 5, 2021, the parties appeared for Trial. The WCJ extensively discussed the matter with the parties and went through the Pre-Trial Conference Statement, Stipulations, Issues, Exhibits and witnesses. Due to time constraints, the matter was continued for one week to April 12, 2021.

On April 12, 2021, the WCJ again discussed the matter with the parties. Pursuant to discussion with the parties, settlement options were also discussed. The matter was continued to August 10, 2021 to allow applicant to discuss and go over settlement options with his counsel.

On August 10, 2021, the WCJ had another trial that took priority and the matter was continued to October 5, 2021.

On September 10, 2021, Applicant attorney filed a Petition to be relieved as Counsel.

On September 13, 2021 the WCJ issued a Notice of Intent to Relieved as Counsel. On October 5, 2021, the parties appeared for Trial. The Minutes of Hearing reflect Applicant was now representing himself and parties discussed settlement. The MOH also reflect Serious and Willful and Medicare Set Aside issues. The matter was continued to December 7, 2021. The WCJ also issued an Order Relieving counsel as attorney of record.

On October 18, 2021, applicant's prior counsel filed a \$100,000 lien for attorney fees.

On December 7, 2021, applicant appeared for trial in person. However, both defense counsel appeared via AT&T Life-Size. Per request of applicant, the matter was continued to allow him to obtain new counsel. The matter was continued to February 9, 2022.

On December 9, 2021, Applicant submitted a request for a continuance for more time to obtain counsel. The matter was continued to March 21, 2022.

On March 21, 2022, the parties personally appeared for Trial. The WCJ went through the Pre-Trial Conference Statement and the Exhibits. Based upon a review of the PTCS, the WCJ determined although applicant's prior counsel had prepared the PTCS, there were six (6) applicant exhibits that were missing and had not been served upon the Court nor defendants. Per the MOH, applicant was ordered to serve the Court and defense counsel with the missing exhibits.

In addition, the MOH reflect Applicant wished to add an Exhibit and identified three witnesses that were not previously listed on the Pre-Trial Conference Statement. Defendants objected to applicant's request to add a new Exhibit and three new witnesses. Per the MOH, the WCJ reserved decision on the applicant's request to add an additional exhibit and three new witnesses. The WCJ encouraged applicant to obtain counsel and the matter was continued to May 11, 2021. As all of the parties were present in person, they were provided with a hard copy of the Minutes of Hearing personally by the WCJ.

On April 19, 2022, applicant filed the instant Petition for Disqualification.

III.

The Petition is untimely

Pursuant to *Labor Code* § 5311, 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. This objection shall be heard and disposed of by the appeals board. It is further specified in Section 10960 of the California Code of Regulations (Title 8) that the petition for disqualification shall be filed not more than **ten days** after service of notice of hearing or after grounds for disqualification are known. Specifically, pursuant to Regulation section 10960,

“If the workers' compensation judge assigned to hear the matter and the grounds for disqualification are known, the petition for disqualification shall be file done more than ten days after service of notice of hearing or after grounds for disqualification are known.”

In this case, Applicant was personally present at the Trial on March 21, 2022. Thus, the Petition for Disqualification should have been filed no later than March 31, 2022 to be in compliance with the ten day filing requirement. (Cal. Code Regs., tit. 8, § 10960.) Instead, Petitioner filed the Petition on April 19, 2022 **twenty-nine (29) days later**. Thus, his Petition is untimely.

IV.

No Good Cause Exists to Disqualify this WCJ

Applicant cites U.S. Code section 455 for disqualification and asserts: (1) The WCJ doesn't care about his known disabilities, (2) she did not give him enough time to look for another attorney, (3) she spoke over his head to the defense attorneys, (4) gave defense counsel 'little signs' and (5) advised him to obtain an attorney.

First, as this is a Petition for Disqualification, the governing regulation would be Title 8 California Code of Regulation section 10452 which states a Petition for Disqualification *must be* supported by an affidavit stating in detail the facts establishing grounds for disqualification of the workers compensation judge. Respectfully, in this case, the Petitioner's claims are without merit and contain conclusory statements without any supporting facts.

Further, there is no evidence that the WCJ had a state of mind evincing enmity against or bias towards Applicant and his disabilities. This WCJ has not made any decisions regarding Petitioner's case, nor formed or expressed an unqualified opinion or belief as to the merits of an action.

Petitioner also claims to have observed the WCJ and defense counsel engage in "little signs." However, the WCJ disputes the allegations Petitioner alleges to have seen or heard set forth in the petition. In addition, the WCJ granted Applicant's request for a continuance and gave him time to obtain new counsel and did recommend that he attempt to do so.

Recommendation

Respectfully, this WCJ believes she has acted in a fair and impartial manner in this case and does not see an appearance of bias having been demonstrated toward Petitioner given the foregoing facts. In addition, the Petition for Disqualification is untimely.

Accordingly, and respectfully requests that the petition be denied.

Dated: April 26, 2022

WADE D .DICOSMO
WORKERS' COMPENSATION JUDGE

Filed and Served on all parties shown on the Official Address
Record. Date: 4/26/2022 By: Julissa Moreno