BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1080515**
SHIMMICK CONSTRUCTION COMPANY, INC.	**DENIAL OF PETITION FOR RECONSIDERATION**
Employer	

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Shimmick Construction Company, Inc. (Employer).

JURISDICTION

On January 20, 2017, pursuant to California Code of Regulations, title 8, section 375.2, Employer filed a Motion to Disqualify Administrative Law Judge. The motion sought the disqualification of Administrative Law Judge (ALJ) Jacqueline Jones on the basis of alleged bias.

On February 1, 2017, the Presiding ALJ, Ursula Clemons, denied Employer's motion to disqualify, finding "Appellant did not put forth good cause to disqualify or recuse Administrative Law Judge Jones from the instant proceeding."

Employer has filed the instant Petition for Reconsideration, which seeks reversal of the order denying its motion to disqualify. Within the petition Employer contends that the ALJ erred by not including the legal and factual basis for the order on the motion, erred by utilizing a good cause standard, and Employer contends the facts support the grant of its motion to disqualify.

ISSUE(S)

Should the Board grant this interlocutory Petition for Reconsideration?

Has Employer demonstrated that ALJ Jones is biased, requiring her disqualification?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION DECISION

The Board has independently reviewed and considered the entire record in this matter, including the arguments presented in the original motion and the Petition for Reconsideration.

The Board has taken no new evidence. The Board renders this decision based on its own independent review.

Should the Board grant this interlocutory Petition for Reconsideration?

Preliminarily, we observe that the Petition for Reconsideration is interlocutory in nature. "An interlocutory order is one issued by a tribunal before a final determination of the rights of the parties to the action has occurred. 'In determining whether a judgment is final or merely interlocutory, the rule is that if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the judgment is interlocutory only[.]'" (*Gardner Trucking, Inc.*, Cal/OSHA App. 12-0782, Denial of Petition for Reconsideration (Dec. 9, 2013), citing *Steen v. Fremont Cemetery Corp*. (1992) 9 Cal.App.4th 1221, 1228; see also *Fedex Ground*, Cal/OSHA App. 13-1220, Decision After Reconsideration (Sep. 17, 2014), writ denied, Orange County superior court, March 2016 .) The Order denying Employer's motion to disqualify was not a final determination of the parties' rights. Nor is this proceeding final, indeed, a hearing was set for March 2017, although it has been taken off calendar because of the instant petition for reconsideration.

"Board precedent holds that reconsideration will not be granted concerning interlocutory rulings, reasoning that they are not 'final' orders with the meaning of the Labor Code section 6614." (*Gardner Trucking, Inc.*, Cal/OSHA App. 12-0782, Denial of Petition for Reconsideration (Dec. 9, 2013), citing *Inglewood Parks & Recreation*, Cal/OSHA App. 08-4182, Denial of Petition for Reconsideration (Mar. 4, 2010); see also *Fedex Ground*, Cal/OSHA App. 13-1220, Decision After Reconsideration (Sep. 17, 2014).) Since the Order is not a final order, but rather resolves a non-dispositive motion, it is not ripe for reconsideration.

As the Board also pointed out in *Fedex Ground*, Cal/OSHA App. 13-1220, Decision After Reconsideration (Sep. 17, 2014), there are some exceptions allowing for interlocutory review of non-final rulings. If the ruling at issue threatens immediate and irreparable harm, review is appropriate. (*Ibid*.) In determining whether to grant interlocutory review, the Board may consider general principles followed by courts that allow for interlocutory review. (*Ibid*.)[1] While Employer contends that a refusal to disqualify a judge should fall within any of the exceptions permitting interlocutory review, Employer presents no legal authority in support of its position and fails to accurately cite to any record, thereby waiving the contention. A contention is waived by failure to cite to legal authority and to the record. (See, e.g., *Akins v. State of California* (1998) 61 Cal.App.4th 1, 50; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [court not required to consider points not supported by cited authority].) The grant of interlocutory review is extraordinary in nature and it is only exercised sparingly, and any request for such review must be supported by adequate citation to legal authority and to the record.

But even assuming interlocutory review is appropriate, we would still not grant Employer's petition.

[1] The Board's authority to consider interlocutory matters also stems from its authority under Labor Code section 6605, allowing it the discretion to remove to itself any proceeding.

Has Employer demonstrated that ALJ Jones is biased, requiring her disqualification?

Within Employer's Motion to Disqualify, Employer sought disqualification on the basis of Section 375.2, subdivision (b), which allows a party to object to the assignment of an ALJ on grounds set forth in Government Code section 11425.40, including "bias, prejudice, or interest in the proceeding." Employer asserted "it will not receive a fair and impartial decision based on the evidence…" (Motion to Disqualify, at p. 4.) Within its Petition for Reconsideration, for the first time, Employer additionally seeks disqualification on the basis of 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, which include, "The existence of a state of mind in the potential referee evincing enmity against or bias toward either party." (Petition for Reconsideration, at p. 2-3.) Employer argues that ALJ Jones has "previously expressed enmity against or bias toward this employer." [2] In sum, regardless of whether this matter is considered under the provisions of Section 375.2 or Labor Code section 6606, Employer alleges that ALJ Jones is biased against it such that it cannot receive a fair hearing.

In *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, the California Supreme Court formulated a two-part test to determine whether to disqualify a hearing officer based on bias. First, the moving party must set forth legally sufficient facts to demonstrate the bias of the judicial officer. (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792-793.) Second, we must determine whether any such bias is "sufficient to impair the judge's impartiality." (*Ibid*.)

Under the first prong of the test, we first look to Employer's factual averments. Employer contends ALJ Jones demonstrated bias by ruling against it in another matter, by crediting the Division's witnesses in that matter, by asking a question(s) of a witness during a hearing regarding the witness's memory, by failing to address all of its defenses, and by delaying issuance of her ruling(s). Preliminarily, we observe that these assertions are vaguely characterized and made without specific citation to the record. They are also often buried within footnotes. Employer's vague and conclusionary assertions are simply insufficient to meet its burden of proof to demonstrate bias. It has been repeatedly held that a party must allege concrete facts demonstrating bias. "Bias and prejudice are never implied and must be established by clear averments." (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792-793, *citing Shakin v. Board of Medical Examiners* (1967) 254 Cal.App.2d 102, 117; see also, *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483, *Gill v. Mercy Hosp.* (1988) 199 Cal.App.3d 889, 911; *BreakZone v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1236-1237; *Gai v. City of Selma* (1998) 68 Cal.App.4th 213.) "A judge should not be disqualified lightly or on frivolous allegations or mere conclusions." (*Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 400.) Here, Employer has simply not offered concrete facts demonstrating bias, but rather offers only conclusionary assertions. And it is not our function to comb through various referenced records looking for support for Employer's contentions. On this basis alone, Employer's petition must be rejected.

[2] We observe that Employer failed to cite Labor Code section 6606 in its Motion to Disqualify Administrative Law Judge. Thus, Employer failed to exhaust its administrative remedies as to this claim prior to filing its petition. But as discussed in the body of the decision, even if the claim had been raised it would fail.

Even if we were to consider Employer's sparse and vague assertions on the merits, we would still not find bias. Bias is not demonstrated simply because an ALJ ruled against a party in another matter. Indeed, if ruling against a party in one matter means a judicial officer is biased against that party forevermore, some parties would be unable to have their cases heard, for example prosecutors and enforcement agencies.

Bias is not demonstrated simply because a trier of fact credited one party's witnesses, and not those of the other party. (See *T & C General Contractors*, Cal/OSHA App. 91-1199 (May 20, 1994) ["The fact that the judge did not credit fully each of Employer's witnesses is not a basis for establishing bias."] The Supreme Court has acknowledged that "the total rejection of an opposed view cannot of itself impugn the integrity or the competence of the trier of fact." (*NLRB v. Pittsburgh S.S. Co.*, (1949) 337 US 656, 659-660.) Further, even assuming the ALJ made an error on questions of law, i.e. in failing to properly address an argument or defense, bias is still not demonstrated. (*Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 400; *Guardianship of Jacobson* (1947) 30 Cal.2d 312, 317; *McEwen v. Occidental Life Ins. Co*. (1916) 172 Cal. 6.)

We also decline to find than an ALJ is partisan or biased merely because she asked questions in a proceeding. It is has long been held that is the duty of a trial judge "to see that the evidence is fully developed…. and to assure that ambiguities and conflicts are resolved insofar as possible. [Citations omitted.]" (*People v. Carlucci* (1979) 23 Cal.3d 249, 255; *Conservatorship of Pamela J* (2005) 133 Cal.App.4th 807; see also Evid. Code § 775.) In that regard, "A trial judge may examine witnesses to elicit or clarify testimony. [Citations omitted.]" (*Ibid.)* The duty to fully develop the record applies equally to the Board's hearing officers. Labor Code section 6604, subdivision (b) allows hearing officers to "ascertain facts necessary to enable the appeals board to determine any proceeding…." Here, Employer presents no evidence within either its Petition for Reconsideration or the underlying motion sufficient to demonstrate biased or partisan conduct on the part of the ALJ in her questioning. [3]

Finally, the delay in the issuance of the decision also does not demonstrate bias. The Board has consistently held the time period stated in Labor Code section 6608 for issuing a decision is directory, not mandatory. (*Treasure Island Media, Inc.*, Cal/OSHA App. 10-1093 through 1095, Decision After Reconsideration (Aug. 13, 2015); *CA Prison Industry Authority*, Cal/OSHA App. 08-3426, Denial of Petition for Reconsideration (Nov. 08, 2013) citing *California Correctional Peace Officers' Assn. v. State Personnel Board* (1995) 10 Cal.4th 1133, 1145; *Irby Construction*, Cal/OSHA App. 03-2728, Decision After Reconsideration (Jun. 08, 2007).) And here there is no evidence or facts that would suggest that any delay existed for any purpose other than to ensure the ALJ had the time needed to render a considered decision.

Ultimately, we decline to find bias based on vague and unsubstantiated allegations against ALJ Jones. "A party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals." *(Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792; see also *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1237; *Gill v. Mercy Hosp.* (1988) 199 Cal.App.3d 889, *Gai v. City of Selma* (1998) 68 Cal.App.4th 213.)

[3] "It is [also] well settled in this state 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. [Citation omitted.]" (*Kreling v. Superior Court* (1944) 25 Cal.2d 305, 310-311; see also, *Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 400.)

For the reasons stated above, the petition for reconsideration is denied.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Art R. Carter, Chairman
Ed Lowry, Board Member
Judith S. Freyman, Board Member

FILED ON: 03/30/2017