WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SCOTT FOSTER, *Applicant*

vs.

BITECH, INC. dba PERFORMANCE HOLDINGS, PENNSYLVANIA MANUFACTURERS ASSOCIATION INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ13379668
Van Nuys District Office

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

Applicant, in pro per, filed a Petition for Removal on August 29, 2022. We will dismiss the Petition for Removal because applicant is not aggrieved by any non-final order and will treat the petition as a 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, and for the reasons stated below, we will deny the Petition for Disqualification.

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].)[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.*

[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].

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).)

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.

The WCJ may consider applicant's former attorney's request for sanctions and attorney fees in the first instance.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 21, 2023

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

SCOTT FOSTER
LAW FIRM OF ROWEN GURVEY & WIN
COLLANTONI, COLLINS, MARREN, PHILLIPS & TULK

PAG/abs

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 PETITION FOR REMOVAL/DISQUALIFICATION OF WCJ

I
INTRODUCTION

1. Minutes of Hearing	08/17/2022
2. Identity of Petitioner	Applicant
3. Verification	Yes
4. Timeliness	Petition is timely
5. Petition for Removal Filed	08/26/2021

Petitioner Scott Foster, applicant in pro per, seeks an "Order of Removal and/or Reassignment based upon the Minutes of Hearing and preliminary findings of WCJ Graff". The undersigned is treating this petition as a combined petition for removal and for disqualification pursuant to 8 C.C.R. 10960.

II
FACTS

This matter concerns a fee dispute between applicant in pro per and his prior counsel, Alan Gurvey, of the law office of Rowen, Gurvey and Win. Mr. Gurvey's office filed a notice of representation dated December 8, 2020 (EAMS doc ID # 34776907). Although at some point, Mr. Foster clearly elected to terminate his representation by Mr. Gurvey's office, neither party filed any documentation of substitution or dismissal of attorney. Instead, the next document filed in EAMS is a September 23, 2021 letter by Mr. Gurvey's office (EAMS doc ID #38353522) which purports to be a cover letter supporting his lien claim. This letter reflects that the representation was severed on or about September 17, 2021 and also addresses some of the alleged circumstances of the termination of that representation.

On or about March 3, 2022, defense counsel e-filed a signed Compromise and Release Agreement (EAMS doc ID #40375245) in the gross amount of $465,000. The same reserved 15% of the gross, in the amount of $69,750.00, to be withheld as a potential attorney's fee pending either a court order or a signed agreement between the applicant and his former attorney. This agreement was approved by Order of WCJ Pollak on March 4, 2022 (EAMS doc ID #75247041).

The parties did not reach an agreement as to division of fees. Accordingly, on March 31, 2022, Mr. Gurvey filed a Declaration of Readiness to proceed to Mandatory Settlement Conference (EAMS doc ID #40797126) regarding the attorney fee issue. The matter was set for trial before the undersigned to be held on August 17, 2022.

On the day before the trial, at approximately 4:36 p.m., the undersigned was informed by the Information and Assistance unit that the applicant had contacted the office requesting a continuance of his trial due to a very recent surgery. The undersigned instructed the Information

and Assistance unit to inform the applicant that he could call in on the undersigned's teleconference line at the time of trial to request the continuance.

On the day of trial, Mr. Gurvey and defense counsel Mr. Robert Tulk appeared in-person at VNO. As instructed, Mr. Foster appeared by phone on the teleconference line. The undersigned called the hearing to order, took appearances, and then stated that he understood that the applicant intended to ask for the trial to be continued. The undersigned then invited Mr. Foster to make his request for the continuance and the set forth the basis therefor. Mr. Foster stated that he just had a hip replacement surgery and was taking pain medication, and that as a result, he did not feel prepared to proceed to trial.

The undersigned then inquired of Mr. Gurvey if he was amenable to applicant's request for the continuance. Mr. Gurvey responded that this put him in a very difficult position, as his office had negotiated a proposed resolution of the claim in August of 2021 for the exact same dollar amount that the applicant had ultimately agreed to in the approved C&R, and that the granting the continuance would cause a further delay in the adjudication of the division of the attorney fee, to which he claimed entitlement. Mr. Gurvey expressed his general frustration with the situation, and at one point, applicant attempted to interrupt Mr. Gurvey, ostensibly to offer argument in opposition to what Mr. Gurvey was stating. The undersigned admonished applicant to allow Mr. Gurvey to finish without interruption. Mr. Gurvey concluded by deferring to the undersigned's judgement as to whether to grant applicant's requested continuance. The undersigned similarly inquired of defense counsel as to whether defendant wished to be heard as to the request for the continuance, and defendant similarly deferred to the Court regarding the decision to grant or deny the continuance.

The undersigned was mindful of Mr. Foster's statement that he did not feel prepared to address the merits of the case, and therefore, the undersigned informed Mr. Foster that he did not need to respond, and the continuance would be granted. The undersigned added however that he wished for Mr. Foster to be aware of the law regarding quantum meruit and when an attorney is entitled to a fee. The undersigned explained to Mr. Foster that quantum meruit allows an attorney to collect the reasonable value of services rendered, regardless of whether the applicant is represented at the time of actual settlement of his case.

The undersigned explained that based on what Mr. Gurvey had represented to the Court, the allegation was that Mr. Gurvey had negotiated a settlement for $465,000, that applicant had agreed to that settlement, and that subsequent to that, the applicant had severed the representation and entered into a Compromise and Release agreement in pro per for the same gross dollar amount. The undersigned specifically stated that he was not deciding the issue, but that *if that were true*, Mr. Gurvey would *likely* be entitled to a fee, which *could be* as much as 15% of the gross value of the settlement. The undersigned encouraged Mr. Foster to speak with Mr. Gurvey to see if it could be possible to reach a resolution of Mr. Gurvey's claim for fees without the need for formal adjudication of the issue. Mr. Foster said "ok", and the undersigned adjourned the hearing, with the continuance granted.

III
DISCUSSION
A.

Applicant's Petition for Removal Should be Denied, as the Undersigned Granted Applicant's Requested Relief

Petitions for removal are governed by 8 C.C.R. §10955. This section provides:

> §10955
>
> (a) At any time within 20 days after the service of the order or decision, or of the occurrence of the action in issue, any party may petition for removal based upon one or more of the following grounds:
> (1) The order, decision or action will result in significant prejudice.
>
> (2) The order, decision or action will result in irreparable harm.
>
> The petitioner must also demonstrate that reconsideration will not be an adequate remedy after the issuance of a final order, decision or award. Failure to file the petition to remove timely shall constitute valid ground for dismissing the petition for removal.

Here, as set forth in the 8/17/2022 Minute Order, the Petitioner specifically sought a continuance of the trial setting, which was granted. Petitioner is neither prejudiced by nor irreparably harmed by the undersigned's decision to grant his requested relief; petitioner is not aggrieved. Petitioner has similarly failed to demonstrate that reconsideration will not be an adequate remedy after the issuance of a final order, decision, or award; the Court granted the remedy that Petitioner specifically requested.

As to petitioner's allegation that the undersigned's "advisory opinion will result in significant prejudice or irreparable harm…," the undersigned did not render an "advisory opinion". The undersigned did not make any findings of fact or conclusions of law. The undersigned did not receive or express an opinion regarding any evidence to be offered at trial. The undersigned specifically informed the parties that he was not deciding the case at that moment. The undersigned did not express an opinion as to validity of either party's position on the merits.

To the extent that applicant inferred that the undersigned's explanation regarding quantum meruit and encouragement of further settlement discussions constitutes a "preliminary decision" or prejudgment of the outcome of the case, applicant is in error. The undersigned has not and did not decide the outcome of the case at the time of the hearing, and he specifically made a point of expressing this to the applicant. Other than the granting of the continuance itself, the undersigned has made no decision from which to take an appeal. Accordingly, the undersigned recommends that the "Petition for Removal" be denied.

B.

Applicant's Alternative Petition for Disqualification of the WCJ Should be Denied, as the WCJ has not Prejudged the Outcome of the Case

Although applicant did not explicitly invoke Regulation 8 C.C.R. 10960, it appears to the undersigned that rather than "removal", applicant is actually seeking disqualification of the WCJ and re-assignment to a different judge. In considering applicant's request, the undersigned must note that material portions of applicant's allegations regarding the events of the hearing are not accurate, and certain "quoted" or paraphrased statements that applicant has attributed to the undersigned either were not said or have been grossly mischaracterized.

The undersigned did not invite a discussion of the merits of the parties' positions. Mr. Gurvey did not "set forth his case and his position regarding the attorney fee dispute", and he certainly did not

do so for 15 minutes. Mr. Gurvey spoke as to the propriety of granting the continuance, and in doing so, he referred to the procedural history of the claim. The discussion regarding the propriety of a continuance organically led to the invocation of a key element of Mr. Gurvey's position that a decision regarding a potential attorney fee had already been delayed for nearly one year. As Mr. Foster had alleged that he was unable to proceed to trial given his medical condition, the undersigned did not require or pressure Mr. Foster to respond in any way to Mr. Gurvey's allegation. In stopping Mr. Foster's interruption, the undersigned did not state that he "wanted [] Mr. Gurvey to get his position in on the attorney fees."

The undersigned did not "brow beat" the petitioner. The undersigned did not address the petitioner for 20 minutes. The undersigned did not state that Mr. Gurvey was entitled to the fees, that "costs associated with litigating cases like yours are not inexpensive", or that "Mr. Gurvey had it for a long time and deserves to get paid." The undersigned did not say "there's a lot of work for years and years for no money until it ends he sees a contract for $465,000. (sic)" The undersigned did not say that there was "no reason Mr. Gurvey should not get a fee on that", that Mr. Gurvey was "entitled to something along the lines of $465,000 for the work he has done", or that Mr. Gurvey is "entitled to the 15% fee."

The undersigned simply informed Mr. Foster that *if it were true* that while represented, he had agreed to enter into a Compromise and Release Agreement for a gross dollar amount identical to the dollar amount of the Agreement that was ultimately approved after he was no longer represented, his former attorney would *likely* be entitled to *a fee*, possibly for as much as 15% of the gross value of his settlement. Having so stated, the undersigned encouraged the applicant to engage in further settlement discussions with his former attorney. The undersigned was hopeful that having explained the concept of quantum meruit to the applicant, the applicant would have a better understanding of the law governing his former attorney's claim to an attorney fee.

The undersigned has not prejudged the outcome of the case and did not so state. The undersigned has not reviewed the parties' evidence or heard from any witnesses. The undersigned has not formed or expressed an unqualified opinion or belief as to the merits of the action, nor has he demonstrated enmity towards Mr. Foster or bias in favor of Mr. Gurvey1. The undersigned knows nothing of the alleged history of the claim prior to Mr. Gurvey's involvement as set forth in Mr. Foster's petition, nor has he been provided any information regarding any alleged "lies" by Mr. Gurvey's firm regarding the "terms and conditions of the settlement". *The undersigned has not heard or decided the case*; such information would certainly be relevant to the consideration of a potential fee interest on the part of Mr. Gurvey's firm. The undersigned is prepared to consider any such evidence to be proffered by the applicant at trial.

Applicant's recollection of the events of the hearing is not accurate. Applicant has not demonstrated grounds for disqualification of the undersigned. Accordingly, applicant's alternative petition for disqualification/reassignment should be denied.

IV
RECOMMENDATION

It is respectfully recommended the applicant's petition for removal or alternative disqualification of the WCJ be denied.

DATE: September 2, 2022

Adam D. Graff
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE