

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

**MICHAEL HOLMES, *Applicant***

**vs.**

**BEHAVIOR FRONTIERS; REDWOOD FIRE AND CASUALTY INS. CO., administered  
by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ10871012  
Long Beach District Office**

**OPINION AND ORDER  
DISMISSING PETITION FOR  
DISQUALIFICATION**

Applicant, in pro per, has filed a document entitled "A Motion to Recuse" which was verified and dated on April 14, 2021 and filed on April 19, 2021. We will treat this filing as a Petition for Disqualification of the workers' compensation administrative law judge (WCJ). The grounds for disqualification alleged in the Petition for Disqualification are as follows: (1) that the WCJ denied applicant's "petition for additional witnesses;" (2) that the WCJ failed to rule on six petitions filed by applicant, (3) that the WCJ's behavior has discriminated against applicant due to race, and (4) that, on March 23, 2021, the WCJ "hung up" the teleconference court call while applicant was still speaking, creating a hostile environment.

We have considered the allegations of the Petition for Disqualification and the contents of the WCJ's report with respect thereto. Based on our review of the record and for the reasons stated below, we will dismiss the Petition for Disqualification as untimely pursuant to Workers' Compensation Appeals Board (WCAB) Rule 10960.

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." In this case, the first two alleged grounds listed above (the WCJ's denial of applicant's "petition for additional witnesses" and the failure to rule on six additional petitions) occurred during the January 19, 2021 hearing, the minutes of which were served on applicant by the WCAB on February 1, 2021. The third and

fourth alleged grounds (that the WCJ “hung up” on applicant and that the WCJ’s alleged behavior has discriminated against applicant due to race) were known to applicant no later than the hearing on March 23, 2021.<sup>1</sup> Based on the authority cited above, at the latest, applicant had until Tuesday, February 16, 2021 to seek disqualifications as to the first two alleged grounds and until Wednesday, April 7, 2021 to seek disqualification as to the third and fourth alleged grounds. Therefore, the Petition for Disqualification dated and verified on April 14, 2021 is untimely.<sup>2</sup>

If we were not dismissing the Petition for Reconsideration as untimely, we would deny it on the merits for the reasons stated by the WCJ in the Report, which we would adopt and incorporate, to the extent it addresses the merits of applicant’s petition.

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, former § 10452, now § 10960 (eff. Jan. 1, 2020), 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

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<sup>1</sup> Applicant had knowledge that the WCJ “hung up” the teleconference court call at the time this incident allegedly occurred. Applicant does not allege any grounds for disqualification from any act or information contained in the actual March 23, 2021 Minutes of Hearing which were served by defendant on April 7, 2021.

<sup>2</sup> Given the closure of the Long Beach District Office to walk-in filings due to the Covid-19 pandemic, we find applicant’s Petition for Disqualification untimely even if using the date of April 14, 2021, the date the petition was signed and verified.

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].)<sup>3</sup> 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.”].)

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).)

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<sup>3</sup> 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].

Here, the petition for disqualification does not set forth facts 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).

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**/s/ DEIDRA E. LOWE, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**JUNE 18, 2021**

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

**MICHAEL HOLMES  
CIPOLLA, CALABA & WOLLMAN**

**PAG/pc**

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**

**INTRODUCTION**

1. Applicant's Occupation: Behavior instructor  
Date of Injury: August 2, 2016  
Parts of Body Injured: Low back  
Pending action: Labor Code § 132a claim  
Date of Next Trial: May 25, 2021
2. Identity of Petitioner: Applicant, *in pro per*, filed the petition.  
Verification: The petition was properly verified.  
Timeliness: The timeliness of the petition is unclear.
3. Petitioner's Contentions: That this Workers' Compensation Judge is biased against Applicant and should be disqualified as the trial judge in this matter.

**II**

**FACTS**

The underlying case-in-chief in this matter resolved via Stipulations with Request for Award and Award on September 12, 2019, and this matter was subsequently set for a Mandatory Settlement Conference (hereinafter "MSC") on Applicant's Labor Code § 132a claim against Defendant Behavior Frontiers on January 9, 2020. At the MSC, the parties prepared a Pre-Trial Conference Statement (hereinafter "PTCS") and set the matter for trial in front of this Workers' Compensation Judge (hereinafter "WCJ").

On July 7, 2020, the parties appeared before this WCJ for trial (via teleconference, due to the pandemic). A significant amount of time was expended with the parties that day going over the proposed exhibits. With respect to two of Applicant's exhibits (which had been listed as full documents on the PTCS), this WCJ asked Applicant to provide copies of the full exhibits, rather than just one page for each that provided no context for the offering. This WCJ also asked the parties to talk to each other privately to see if the Labor Code § 132a claim could be settled. Applicant and defense counsel then spoke privately, off the teleconference line, and subsequently informed this WCJ that they could not reach a settlement. The matter was continued so that the exhibits

could be readied for trial and because the trial could not be properly done via teleconference (with the option for a video trial not yet having been created by the State). [See Minutes of Hearing, dated July 7, 2020, EAMS Doc ID 72954351.]

On July 22, 2020, Applicant filed a Petition to Amend the PTCS to include additional witnesses. [See Petition, Subject: Witnesses, filed July 22, 2020, EAMS Doc ID 74147318.] Defendant subsequently objected to the petition and additional briefing was obtained from the parties on this issue.

On January 19, 2021, this matter proceeded to trial on the Labor Code § 132a claim. The stipulations and issues were read into the record and the exhibits were entered into evidence. Applicant provided testimony and the matter was continued to another date. Applicant's Petition to Amend the PTCS to include additional witnesses not listed at the MSC was also denied pursuant to Labor Code § 5502(d)(3), as the additional witnesses, along with all of the evidence used at trial, were known to Applicant at the time of the January 9, 2020 MSC. [See Minutes of Hearing and Summary of Evidence, dated January 19, 2021, p. 2, Ins. 22.5-24, EAMS Doc ID 73787381.]

On February 17, 2021, Applicant filed a Petition for Reconsideration of the denial of his Petition to Amend the PTCS. In the Petition for Reconsideration, Applicant argued, among other things, that additional witnesses were needed because this WCJ had asked Applicant to amend some of his exhibits to include the full documents. [See Petition for Reconsideration, filed February 17, 2021, p. 2, paragraph 3, EAMS Doc ID 73855084.] Needing additional clarification from Applicant on this issue, this WCJ issued an Order Rescinding Minute Order and Setting Further Proceedings on March 2, 2021. [See Order Rescinding Minute Order and Setting Further Proceedings, dated March 2, 2021, EAMS Doc ID 73902270.]

On March 23, 2021, the parties appeared at the next trial setting in this matter via teleconference. At that time, Applicant informed the Court and defense counsel that he had filed a Federal Complaint against this WCJ, along with new petitions in his Labor Code § 132a case. Neither the Federal Complaint, nor the additional petitions had been received by this WCJ as of that time. This WCJ informed the parties that the Long Beach Workers' Compensation Appeals Board (hereinafter "WCAB") had recently moved to a new location in February and provided the new address to the parties, since this could have been why no additional petitions had been received by the Court. This WCJ also discussed the Petition for Reconsideration with the parties, noting on the Minutes of Hearing that Applicant would be allowed to call additional witnesses at trial (not listed on the Pre-Trial Conference Statement) if he provided a written correlation between the additional witnesses and the two complete exhibits that this WCJ had asked Applicant to include at trial. The matter was then continued. [See Minutes of Hearing, dated March 23, 2021, EAMS Doc ID 74031066.]

After providing the parties with the March 23, 2021 disposition, Applicant continually asked this WCJ for advice with respect to the service of his Federal Complaint against this WCJ and the written correlation this WCJ had requested concerning the issue of the additional trial witnesses. This WCJ repeatedly stated that she could not give Applicant legal advice. Despite this, Applicant continued to ask the same questions without end, leaving this WCJ no choice but to say that the disposition for the day had been rendered and that the hearing was over. This WCJ wished the parties a good day and disconnected the call.

This WCJ subsequently received the additional petitions referenced above, which had been filed by Applicant in February, but were mistakenly misfiled by the Court's staff and not uploaded to FileNet in Applicant's case until March 29, 2021. [See Petitions, filed February 17, 2021, EAMS Doc ID 73921813.] The three new petitions, which concern additional exhibits, a request to amend the Summary of Evidence and a request to treat the parties equally, will be addressed at the next trial setting on May 25, 2021.

Applicant has also filed three Federal Complaints against this WCJ: the first on March 8, 2021, the second on March 29, 2021 and the third on April 8, 2021. Each complaint seeks injunctive relief based on alleged violations of Applicant's Civil Rights. In the most recent Federal Complaint, Applicant has raised an allegation of racial discrimination against this WCJ, along with the creation of a hostile environment.

On April 19, 2021, Applicant filed a Petition for Disqualification of this WCJ, which he titled "Petition: A motion to Recuse". In the petition, Applicant alleges that by terminating the March 23, 2021 teleconference, this WCJ discriminated against Applicant based on his race. Applicant also claims that he cannot have a fair and impartial trial with this WCJ, whom he believes is prejudiced against him. [See Petition: A Motion to Recuse, filed April 19, 2021, EAMS Doc ID 74099465.]

### **III** **DISCUSSION**

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.

#### **A. Timeliness of Petition**



The Petition for Disqualification was filed on April 19, 2021. The basis for the petition is the allegation that this WCJ is biased against Applicant. The petition identifies numerous occasions wherein Applicant believes this WCJ has demonstrated bias, the latest of which allegedly occurred at the last trial setting on March 23, 2021. Since the petition was filed 27 days after the hearing, it appears to be late on its face. However, there are other issues to consider, which render the timeliness of the petition unclear.

First, although the incident of alleged racial discrimination took place on March 23, 2021, the Minutes of Hearing were not served upon Applicant by defense counsel until April 7, 2021 (by mail). [See Proof of Service, dated April 7, 2021, EAMS Doc ID 36218814.] If we go by the date of the service of the Minutes of Hearing, allowing five days for service by mail, the Petition for Disqualification would be timely.

Second, there has been some confusion with service due to the recent relocation of the Long Beach WCAB. The Long Beach WCAB is closed to walk-in filings due to the pandemic, and Applicant has been mailing in his various petitions, including the Petition for Disqualification (which was mailed in on April 14, 2021). It is therefore unclear whether the relocation confusion created a delay in the filing of the Petition for Disqualification, which would be understandable.

Lastly, Applicant's third Federal Complaint was filed on April 8, 2021, and appears to contain the same allegations of racial discrimination that have been raised in the Petition for Disqualification. The petition also cites to the filing of the Federal Complaint(s) as one of the bases for seeking the disqualification of this WCJ. Accordingly, if we go by the date of the filing of the latest Federal Complaint as the date of the knowledge of the grounds for disqualification, then the Petition for Disqualification (mailed in on April 14, 2021) would be timely.

Taking into consideration the foregoing issues, the timeliness of the Petition for Disqualification remains unclear and in the interest of fairness, this WCJ respectfully believes that the petition should be considered by the Appeals Board.

## **B. Whether Good Cause Exists to Disqualify this WCJ**

Pursuant to Section 641 of the California Code of Civil Procedure<sup>1</sup>, a party may object to the appointment of any person as a referee on one or more of seven grounds, including (in pertinent part, per subsection (g)) "the existence of a state of mind in the potential referee evincing enmity against or bias toward either

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<sup>1</sup> Although Applicant's Petition for Disqualification relies on Section 170.1 of the Code of Civil Procedure, which is similar to Section 641 in that both allow disqualification for bias, it is Section 641 that controls the disqualification of a Workers' Compensation Judge and only Section 641 will be addressed herein.

party”. Such is the basis of Applicant’s Petition for Disqualification. Specifically, Applicant has alleged bias by this WCJ based on the following: 1. That this WCJ has discriminated against him based on his race, 2. That Applicant fears retaliation by this WCJ and cannot have a fair and impartial trial, 3. That Applicant has filed three lawsuits against this WCJ, which are still pending in Federal Court; 4. That this WCJ has given legal advice to Applicant improperly, and 5. That this WCJ has failed to rule on all of Applicant’s outstanding petitions. These allegations will be addressed herein.

Labor Code § 123.6(a) mandates that workers’ compensation administrative law judges adhere to the Code of Judicial Ethics adopted by the Supreme Court pursuant to subdivision (m) of Section 18 of Article IV of the California Constitution for the conduct of judges. Canon 2 of the Code of Judicial Ethics states that “a judge shall avoid impropriety and the appearance of impropriety in all of the Judges’ activities”. This “appearance of impropriety” test is an objective one which employs a reasonable person standard, i.e., “would a reasonable person with knowledge of the facts entertain doubts concerning the WCJ’s impartiality”. [*See Robbins v. Sharp Healthcare*, (2006) 71 Cal. Comp. Cases 1291, 1303 (significant panel decision).]

In the matter at hand, this WCJ can unequivocally state that she is not biased against Applicant and, as such, has not recused herself in this matter. At no time has this WCJ ever given Applicant legal advice, and this WCJ respectfully disputes Applicant’s allegations to the contrary. The petitions filed recently by Applicant are set to be addressed at the next trial setting, along with the petitions concerning the additional witnesses, and have not been ruled on to date for due process reasons.

Additionally, this WCJ wholeheartedly denies Applicant’s allegations of racial discrimination and has at all times acted in accordance with the Code of Judicial Ethics. However, the inquiry cannot end there. The objective test must be applied as to whether a person aware of the facts herein might reasonably entertain a doubt that this WCJ would be able to act with impartiality. *Id.* at 1307.

Here, Applicant has raised serious allegations against this WCJ, which question both this WCJ’s principles and ethical conduct. Applicant has accused this WCJ of racial discrimination, partiality and potential future retaliation without providing any evidence whatsoever to support these claims. Applicant’s filings, including three complaints against this WCJ in Federal Court, contain language which impugns the integrity and character of this WCJ. With these unsupported claims, Applicant is raising allegations that a reasonable person would find offensive. Accordingly, a reasonable person might also doubt that this WCJ would be able to act with impartiality in future proceedings in this manner.

In light of the foregoing and because the power to disqualify this WCJ rests solely in the hands of the Appeals Board, this WCJ respectfully defers to the best judgment of the Appeals Board on this issue.

**IV**  
**RECOMMENDATION**

For the reasons stated above, this WCJ respectfully defers to the authority of the Appeals Board to decide whether Applicant's Petition for Disqualification should be granted.

DATE: May 4, 2021

Diana L. Marsteiner

WORKERS' COMPENSATION JUDGE