

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

ODELIA AHUMIBE, *Applicant*

vs.

HERBALIFE LTD; HP HARTFORD; TRAVELERS, *Defendants*

**Adjudication Number: ADJ7381650
Los Angeles District Office**

**OPINION AND ORDERS
DISMISSING PETITIONS FOR RECONSIDERATION,
DENYING PETITIONS FOR REMOVAL AND
DENYING PETITIONS FOR DISQUALIFICATION**

Applicant Odelia Ahumibe, in pro per (applicant) filed a document entitled “Petition for Reconsideration + ADDENDUM + EXHIBITS 1H – 8H” date stamped received by the Marina Del Rey district office on August 24, 2020 and a second document entitled “Petition for Reconsideration + ADDENDUM + EXHIBITS 9H – 15H” ” date stamped received on August 31, 2020 (Petitions) in response to an Order Denying Change of Venue dated August 11, 2020, issued by the presiding workers’ compensation administrative law judge (WCJ). Applicant also appears to seek the disqualification of the WCJ handling the matter.¹

We received no answer from defendant. The WCJ issued two Reports and Recommendations on Petition for Disqualification and the presiding WCJ filed an additional Report and Recommendation (Reports) all recommending that we either dismiss applicant’s Petitions or deny them on the merits.

We have considered the allegations of the filings and the contents of the Reports of the WCJ with respect thereto. Applicant has submitted supplemental documents to the Appeals Board. These submissions do not seek permission from the Appeals Board for filing prior to its submission, nor do they attempt to set forth good cause for filing as required by WCAB Rule

¹ Applicant appears to have filed additional correspondence addressed to Chief Judge Paige Levy and Director Katie Hagan that do not appear to be Petitions for Removal or Reconsideration and we do not address those filings here.

10964 (Cal. Code Regs., tit. 8, former § 10848(b), now § 10964 (eff. Jan. 1, 2020).) Thus, we do not accept these pleadings and will not consider them in addressing applicant’s Petitions. Based on our review of the record, and based upon the WCJ’s and presiding WCJ’s analysis of the merits of the applicant’s arguments in the Reports, we will dismiss the Petitions to the extent they seek reconsideration and deny them as seeking removal. We also deny them to the extent that they seek disqualification of a WCJ.

A petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that “it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice” (*Shipley v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied the applicant’s petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board’s decision holding that the time to act on applicant’s petition was tolled during the period that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) In this case, the presiding WCJ issued the Order on August 11, 2020 and applicant filed the Petitions on August 24, 2020 and August 31, 2020. Thereafter, the Appeals Board failed to act on the two petitions within 60 days, through no fault of the parties. Therefore, considering that applicant filed a timely petition and that the Appeals Board’s failure to act on that petition was in error, we find that our time to act on applicant’s petition was tolled.

Nevertheless, a petition for reconsideration may properly be taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a “threshold” issue that is fundamental to the claim for benefits. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of

the workers' compensation proceedings, are not considered "final" orders. (*Id.* at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"]; *Rymer*, *supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer*, *supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the presiding WCJ's August 11, 2020 Order Denying Petition for Change of Venue is solely an intermediate procedural order. It does not determine any substantive right or liability and does not determine a threshold issue. Therefore, it is not a "final" decision. Accordingly, we will dismiss the Petitions to the extent they seek reconsideration, treat them as Petitions requesting removal, and deny removal for the reasons stated below.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); see also *Cortez*, *supra*; *Kleemann*, *supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) Here, based upon the WCJs' analysis of the merits of the petitioner's arguments in the WCJs' Reports, we will deny the Petitions as ones seeking removal.

We also deny them to the extent they seek disqualification of the WCJ. To the extent the Petitions contend 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, 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 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].)² 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

² 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].

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).)

In this case, the WCJ provides:

I believe that I bear no bias or enmity against Ms. Ahumibe, in whose favor I ruled on a number of issues when this matter previously came up for trial before me in 2011. I am merely trying to get her issue fairly heard and decided as expeditiously as is reasonably possible in light of the very many procedural challenges posed by the COVID-19 pandemic which has significantly affected the handling of her case ever since the [March 11, 2020] pretrial conference. (WCJ Report dated, September 21, 2020, pg. 20)

Therefore, the Petitions do 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 Petitions to the extent they seek to disqualify the WCJ.

Additionally, applicant attached several documents to its Petitions which appear to be documents already received in evidence, or that have already been made a part of the adjudication file in violation WCAB Rule 10945(c)(1). (Cal. Code Regs., tit. 8, former § 10842, now § 10945 (eff. Jan. 1, 2020).) Documents attached in violation of WCAB Rule 10945(c)(1) may be detached from the petition and discarded. (*Id.*)

Also, Labor Code section 5905 requires a petition for reconsideration be properly served upon all parties. (Lab. Code, § 5905.) According to the attached proofs of service, applicant failed to serve defendant with the Petitions and dismissal is also appropriate for failure to serve defendant.

Finally, we caution applicant against filing documents without reasonable justification. We note that applicant continues to utilize multiple filings to make repeated allegations of “fraud.” These repetitive filings may result in proceedings to have applicant declared a vexatious litigant pursuant to WCAB Rule 10430. (Cal. Code Regs., tit. 8, former § 10782, now § 10430 (eff. Jan. 1, 2020).) We caution applicant that upon petition by any party or lien claimant, or motion of a WCJ or the Appeals Board, and after notice and opportunity to be heard, applicant may be declared a vexatious litigant. (Cal. Code Regs., tit. 8, § 10430 (b)-(c).) The consequences of designation as a vexatious litigant include, but are not limited to, the inability to file any pleading without obtaining leave of the presiding workers’ compensation judge of the district office and the inability to file any petition for reconsideration or removal without first obtaining leave from the Appeals Board. (Cal. Code Regs., tit. 8, § 10430(d)-(e).)

For the foregoing reasons,

IT IS ORDERED that Applicant's Petitions for Reconsideration are **DISMISSED**.

IT IS FURTHER ORDERED that Applicant's Petitions for Removal are **DENIED**.

IT IS FURTHER ORDERED that Applicant's Petitions for Disqualification are **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 5, 2021

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

**DIMACULANGAN ASSOCIATES
ODELIA AHUMIBE
TESTAN LAW**

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