

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

**JESUS GONZALEZ CRUZ, *Applicant***

**vs.**

**L&S FRAMING; AMERICAN ZURICH INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13593933  
Sacramento District Office**

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

We have considered the allegations of applicant's Petition for Removal and Disqualification, the supplemental pleading filed by applicant<sup>1</sup> 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 discussed below, we will deny the Petition for Removal and Disqualification.

In his Report, the WCJ noted that applicant's Petition was unverified. (Report, September 23, 2022, p. 1.) WCAB Rule 10510 requires that all petitions "shall be verified under penalty of perjury in the manner required for verified pleadings in courts of record." (Cal. Code Regs., tit. 8, § 10510(d).) However, a petitioner may cure the defect of filing a petition without a verification by subsequently filing the verification. (See *Torres v. Contra Costa Schools Ins. Group* (2014) 79 Cal.Comp.Cases 1181 (Significant Panel Decision); *Lucena v. Diablo Auto Body* (2000) 65 Cal.Comp.Cases 1425 (Significant Panel Decision).) Applicant filed a supplemental pleading on October 26, 2022, which contained the requisite verification and reiterated his contentions. Applicant has thus cured the defect with his original Petition.

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

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<sup>1</sup> We accept applicant's supplemental pleading for filing per WCAB Rule 10964. (Cal. Code Regs., tit. 8, § 10964.)

substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); 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, § 10955(a).) Here, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner. Accordingly, we will deny the petition to the extent it seeks removal.

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. I.A.C. (Thomas)* (1940) 38 Cal.App.2d 75, 79-80 [5 Cal.Comp.Cases 61].)<sup>2</sup> Additionally, even if the WCJ expresses an

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<sup>2</sup> Overruled on other grounds in *Lumbermen’s Mut. Cas. Co. v. I.A.C. (Cacozza)* (1946) 29 Cal.2d 492, 499 [11 Cal.Comp.Cases 289].

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).)

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.” Applicant’s Petition was filed on September 13, 2022, which was more than 10 days from the August 29, 2022 hearing.

To the extent that applicant takes issue with the WCJ's Notice of Intent to Impose Sanctions and Costs, it is premature to address whether sanctions were warranted until the WCJ actually issued the order for sanctions. Applicant's attorney must separately challenge the WCJ's September 21, 2022 Order to Impose Sanctions and Costs if he wishes to do so.

The WCJ took judicial notice of the State Bar proceedings against applicant's attorney, which include allegations that he backdated and forged a client's signature.<sup>3</sup> The State Bar proceedings do not involve misconduct in this pending workers' compensation claim and to date, no specific findings of misconduct have been made by the State Bar. We are not prepared to cast a pall on every filing applicant's attorney has submitted based on those separate proceedings and to the extent the WCJ indicates that it may, this is inapt even if it does not arise to a showing of bias.

Applicant's attorney is reminded that parties and their representatives are expected to act with respect toward the judges. (See e.g., Cal. Code Regs., tit. 8, § 10421(b)(9); see also Bus. & Prof. Code, § 6068(b).) Likewise, WCJs are subject to the Code of Judicial Ethics, which requires judges "be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." (Cal. Code Jud. Ethics, canon 3B(4); Lab. Code, § 123.6(a).)

Here, 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.

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<sup>3</sup> Judicial notice of State Bar proceedings may be taken pursuant to Evidence Code section 452. (Evid. Code, § 452(d).)

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Removal and Disqualification is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

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



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

**December 8, 2022**

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

**COLANTONI COLLINS MARIN PHILLIPS & TULK  
JESUS GONZALEZ CRUZ  
LAW OFFICES OF FERNANDO VARGAS**

***AI/pc***

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