WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL PERRY, *Applicant*

vs.

**S2 HR SOLUTIONS 1 D, LLC,
professional employer organization for
BALANCE ENERGY, LLC, a Delaware limited liability company,
dba DUPURE; SECURITY NATIONAL INSURANCE COMPANY
administered by AMTRUST NORTH AMERICA, INC.;
COSTCO WHOLESALE CORPORATION,
permissibly self-insured, administered by
HELSMAN MANAGEMENT SERVICES, LLC, *Defendants***

**Adjudication Numbers: ADJ11075823 (MF); ADJ11130118; ADJ11703310
Van Nuys District Office**

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

We have considered the allegations of the Petitions[1] for Reconsideration, Removal and Disqualification[2] filed on July 27, 2022, 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, we will deny all of the petitions.

On August 18, 2022, applicant filed a supplemental pleading. We do not accept or consider that pleading. (Cal. Code Regs., tit. 8, § 10964.)

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*

[1] Applicant, who was declared a vexatious litigant in 2010 by a Superior Court, has filed six petitions. To the extent that any of the petitions overlap, we deny all of them by this order.

[2] Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

(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 WCJ's decision determined threshold issues and substantive rights and liabilities. Accordingly, we will deny the petitions to the extent that they seek reconsideration.

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, § 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, for the reasons stated in the WCJ's report, 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 petitions to the extent they seek removal.

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, § 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].)[3] 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

[3] 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].

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."

Here, the petitions for disqualification 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.

Accordingly, we deny applicant's petitions as petitions for reconsideration, removal and/or disqualification.

For the foregoing reasons,

IT IS ORDERED that the Petitions for Reconsideration, Petitions for Removal, and Petitions for Disqualification filed by applicant on July 27, 2022 are **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 13, 2022

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

MICHAEL PERRY, IN PRO PER
LAW OFFICE OF GEORGIA CONNOLLY
FISHER & PHILLIPS

AS/abs

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

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION

INTRODUCTION:

On July 15, 2022, the Applicant, in pro per, filed multiple documents, **being treated as a timely and verified petition for reconsideration**, dated July 14, 2022, claiming that the undersigned WCJ erred in his First Amended Joint Findings of Fact & Orders dated July 8, 2022. The Applicant contends that the undersigned WCJ should not have stricken Exhibits "85" to "97" and "99" to "100", denied his request to reinstate his petition for violation of Labor Code § 132a, and denied his petition for violation of Labor Code § 4553. The Applicant also requests, for a third time, that the undersigned WCJ be disqualified from hearing this case any further.

STATEMENT OF FACTS:

The Applicant, while employed on February 27, 2017 as a salesperson for Balance Energy, LLC, claimed to sustained industrial injury to his back, neck, shoulders and lower extremities from slipping and falling. He also filed two duplicative cumulative trauma claims during the period February 27, 2017 to July 14, 2017.

On November 21, 2018, the parties appeared before the undersigned WCJ for an expedited hearing. On that day, the undersigned WCJ issued his order approving compromise and release for $50,000.00 resolving the case-in-chief. The case was continued to a mandatory settlement conference on January 31, 2019 at 1:30 p.m. before the undersigned WCJ regarding the Applicant's outstanding petition for violation of Labor Code § 132a.

On January 31, 2019, the parties appeared and agreed to withdraw the petition for violation of Labor Code § 132a. In the minutes of hearing, the undersigned WCJ made the following minute reflection:

> "Applicant, as of April 26, 2018, has withdrawn his Labor Code § 132a claims as to employers S2 HR Solutions 1 D, LLC, Balance Energy, LLC, and Costco Wholesale, LLC, without prejudice. This withdrawal shall have no issue preclusion effect with respect to his pending federal civil lawsuit."

On September 6, 2019, the Applicant filed his verified complaint with the United States District Court for the Central District of California alleging various federal and state claims of discrimination seeking punitive and compensatory damages.

On November 5, 2019, Fisher & Phillips, LLP, attorneys for Balance Energy, LLC, filed its petition for dismissal of the Applicant's verified complaint alleging, among other contentions, that the Applicant's complaint was time-barred by the statute of limitations.

On April 9, 2020, United States District Judge John A. Kronstadt, issued his order dismissing the Applicant's complaint.

On April 23, 2021, the Ninth District Court of Appeals affirmed Judge Kronstadt's order dismissing the Applicant's complaint.

On November 15, 2021, the Applicant filed two petitions. The first petition, dated November 12, 2021, sought to set-aside the minute order dated January 31, 2019, essentially requesting to reinstate his petition for violation for Labor Code § 132a. The second petition, dated November 14, 2021,[1] contended that his employers violated his rights pursuant to Labor Code § 4553 and Cal. Code Regs., tit. 8, § 10525 resulting from serious and willful misconduct.

On November 16, 2021, the undersigned WCJ issued his order suspending action on both the above petitions.

On June 13, 2022, the parties submitted for adjudication the disputed issues of the Applicant's request to set-aside the minute order dismissing the Labor Code § 132a thereby reinstating it, adjudication of the Applicant's petition for violation of Labor Code § 4553 and Cal. Code Regs., tit. 8, § 10525, and the disputed issue of employment with Costco Wholesale Corporation.

On July 8, 2022, the undersigned WCJ issued his First Amended Joint Findings of Fact & Award dated July 8, 2022, denying the Applicant his requested relief.

Aggrieved by this decision, the Applicant filed his present petitions.

DISCUSSION:

ADMISSIBILITY OF APPLICANT'S EXHIBITS "85" TO "97" AND "99" TO "100"

Pursuant to Labor Code § 5502(d)(3):

> "If the claim is not resolved at the mandatory settlement conference, the parties shall file a pretrial conference statement noting the specific issues in dispute, each party's proposed permanent disability rating, and listing the exhibits, and disclosing witnesses. Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference."

Finally, pursuant to Cal. Code Regs., tit. 8, § 10622, disclosure and service of all medical reports in the possession and control of every party is essential to and required in the expeditious determination of controversies. A WCJ may decline to receive into evidence, either at or subsequent to a hearing, any report offered under the provisions of Labor Code § 5703 by a party who has failed to comply with the provisions of Cal. Code Regs., tit. 8, §§ 10600 and 10615. Those rules are intended to assure due process and give an opposing party an opportunity to inspect the documents and offer other evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. [Katzin vs. Workers' Comp. Appeals Bd. (1992) 57 Cal. Comp.

[1] The Applicant dismissed his prior petition for violation of Labor Code § 4553 dated September 27, 2017, in his compromise and release dated November 21, 2018.

Cases 230, 236; see Hirschi v. Workers' Comp. Appeals Bd. (1995) 60 Cal. Comp. Cases 773, 776 (writ denied) (an applicant's failure to serve a medical report contained in subpoenaed records violated the due process rights of the defendant and was properly stricken)]

In this case, given that the Applicant admitted that he did not serve the objected exhibits prior to the mandatory settlement conference, the Defendants were unfairly surprised and deprived of their due process right to properly inspect the exhibits and present rebuttal evidence. Under the circumstances, the undersigned WCJ had no choice but to strike Applicant's Exhibits "85" to "97" and "99" to "100". [See Frontline Medical Associates, Inc. v. Workers' Comp. Appeals Board (Lopez) (2015) 80 Cal. Comp. Cases 380, 382 (writ denied) (WCAB held that the lien claimant's documentary evidence disclosed at the lien conference but served afterwards properly resulted in them being stricken at the lien trial); see also Gaytan v. Payless Shoesource, Inc. (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 159, *6–7 (Appeals Board noteworthy panel decision) (WCAB held that the applicant's failure to serve medical reports disclosed to the defendant at the mandatory settlement conference regarding industrial causation properly resulted in them being stricken when introduced at trial)]

In response to the undersigned WCJ's decision-making, the Applicant responds that his exhibits comprised audio recordings encoded and stored on a flash drive that needed only to be filed at the time of trial pursuant to Cal. Code Regs., tit., 8, § 10677(a). However, that does not relieve him of his duty to serve them on his opposition and disclosing them for the first time at trial. [See Garden Grove Unified School District v. Workers' Comp. Appeals Bd. (Cervantes) (2004) 69 Cal. Comp. Cases 280, 284 (writ denied) (sub rosa video tape offered by the defendant was inadmissible because it did not provide the applicant with the videotape until five days prior to the mandatory settlement conference).]

The Applicant next contends that he may introduce such evidence for impeachment purposes. However, he was the only witness to testify at the trial and failed to demonstrate that he was unfairly surprised at trial. [See Ace American Insurance Company vs. Workers' Comp. Appeals Bd. (Sulek) (2012) 77 Cal. Comp. Cases 353, 358 (writ denied) (a defendant's undisclosed witness was barred from testifying due its failure to demonstrate that it was surprise by the applicant's trial testimony).]

Therefore, for those reasons, the undersigned WCJ did not err in striking the Applicant's undisclosed proffered evidence.

REQUEST TO REINSTATE LABOR CODE § 132A

A WCJ may set-aside an agreement if good cause is shown that it was entered into by way of fraud, mutual mistake of fact, duress, or undue influence. [Johnson v. Workers' Comp. Appeals Bd., *supra*, 35 Cal. Comp. Cases at p. 369] Negligent legal representation or the possibility of a greater recovery does not suffice as grounds constituting mutual mistake and are deemed to be unilateral mistakes. [See Smith v. Workers' Comp. Appeals Bd. (1985) 50 Cal. Comp. Cases 311, 319-322]

In addition, as an affirmative defense, an aggrieved party may rescind an agreement due to unilateral mistake of fact. The party seeking to rescind the agreement must prove that (1) the party

was mistaken as to a material fact, (2) the opposing party knew of the mistake and used it to his advantage, (3) the mistake was not caused by the neglect of a legal duty on the party making the mistake, and (4) that the party would not have entered into the agreement had it known of the mistake. Failure to make reasonable inquiry to ascertain or effort to understand the meaning and content of the agreement upon which one relies constitutes neglect of a legal duty such as will preclude recovery for unilateral mistake of fact. [Guzman v. Aerospace Service Controls (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 337, *6-7 (Appeals Board noteworthy panel decision); He v. Mandarin Chinese Food and Sushi (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 286, *6-7 (Appeals Board noteworthy panel decision); Duncan v. State of California, Dept. of Corrections (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 29, *5-6 (Appeals Board noteworthy panel decision); Comer v. Cal. State University Long Beach (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 609, *7 (Appeals Board noteworthy panel decision); Brook v. California Pizza Kitchen (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 548, *6-7 (Appeals Board noteworthy panel decision); Oxnard School District v. Workers' Comp. Appeals Bd. (Garcia) (2015) 81 Cal. Comp. Cases 69, 71-72 (writ denied)]

Finally, the WCAB is the exclusive forum for adjudication of allegations of discrimination in violation of Labor Code § 132a based on a work-related disability. [City of Moorpark v. The Superior Court of Ventura County (1998) 63 Cal. Comp. Cases 944, 946; Denny v. University City Studios, Inc. (1992) 57 Cal. Comp. Cases 750, 756] However, this does not preclude an aggrieved party from pursuing other legal remedies in civil courts such as a claim for violation of the Fair Employment and Housing Act. [City of Moorpark*, supra,* 63 Cal. Comp. Cases at pp. 955-956; Bagatti v. Dept. of Rehab./State of California (2002) Cal. Comp. Cases 528, 546]

In this case, on January 31, 2019, the Applicant withdrew his petition for violation of Labor Code § 132a under the mistaken notion that he could litigate that issue in his subsequent federal court lawsuit. [MOH/SOE, 06/13/2022, 18:13-15] However, he conceded in his pleadings that the WCAB had exclusive jurisdiction over that disputed issue, [Applicant's Exhibit "75" (p.7)] despite testifying to the contrary, [MOH/SOE, 06/13/2022, 19:15-17] and instead raised the claim in federal court within the context of his claim of violation of the Fair Employment and Housing Act. [Applicant's Exhibit "75" (p. 29)]

In addition, he further claimed that he waited until September 6, 2019, eight months after withdrawing his Labor Code § 132a claim, to initiate his federal lawsuit, thereby resulting in his various discrimination claims being dismissed as time-barred, because he believed that withdrawing the claim before the WCAB tolled the statute of limitations [MOH/SOE, 06/13/2022, 19:13-15] would be allowable within five years from the date of injury, [MOH/SOE, 06/13/2022, 20:10-12] and that he suffered from COVID-19. [MOH/SOE, 06/13/2022, 20:13-15] However, the undersigned WCJ did not accept any of those excuses as credible.

Ultimately, pursuant to his own testimony, he withdrew his discrimination claim before the WCAB believing he would obtain a more favorable result in federal court. [MOH/SOE, 06/13/2022, 19:16-19] When he waited too long to file his federal claims, resulting in their dismissal, he sought to undo his personal error of judgment. His attempt to blame his mistake on the Defendant's attorneys under the claim of fraud is not support by the facts but appears instead to be a manifestation of his own subjective perceptions of reality and his last ditch attempt to salvage his failed decision-

making. Therefore, due to his poor legal judgment and unjustifiable delay in filing his federal lawsuit leading to its dismissal as time-barred, his request to reinstate his petition for violation of Labor Code § 132a was denied.

Unfortunately, despite the verbosity of his pleadings, the Applicant does not provide any discussion beyond deprecating comments and conclusory remarks that constitutes any basis to disturb the undersigned WCJ's decision.

Therefore, for those reasons, the undersigned WCJ did not err in denying the Applicant his requested relief.

LABOR CODE § 4553

Pursuant to Labor Code § 5407:

> "The period within which may be commenced proceedings for the collection of compensation on the ground of serious and willful misconduct of the employer, under provisions of [§] 4553, is as follows: [t]welve months from the date of injury. This period shall not be extended by payment of compensation, agreement therefor, or the filing of application for compensation benefits under other provisions of this division."

In addition, pursuant to Labor Code § 4553:

> "The amount of compensation otherwise recoverable shall be increased one–half, together with costs and expenses not to exceed two hundred fifty dollars ($250), where the employee is injured by reason of the serious and willful misconduct of any of the following:
>
> (a) The employer, or his managing representative.
>
> (b) If the employer is a partnership, on the part of one of the partners or a managing representative or general superintendent thereof.
>
> (c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof."

An employer may be liable for serious and willful misconduct that causes a worker's injury where the employer (1) knew of the dangerous condition; (2) knew that the probable consequences of the continuance of that condition would involve serious injury to an employee; and (3) deliberately failed to take corrective action. [John Manville Sales Corp. v. Workers' Comp. Appeals Bd. (Horenberger) (1979) 44 Cal. Comp. Cases 878, 883] Mere negligence, even gross negligence, is not enough to sustain a finding of willful misconduct. [Mercer-Fraser Co. v. Industrial Acc. Com. (Soden) (1953) 18 Cal. Comp. Cases 3, 5] Instead, the conduct must be "of a quasi-criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences …" [Id. at p. 11]

However, not every failure to correct known defects in the workplace amounts to serious and willful misconduct. Were this the law, the distinction between negligence and willful misconduct

in workers' compensation law would largely disappear. [Horenberger, *supra*, 44 Cal. Comp. Cases at p. 884] In addition, the mere failure to perform a statutory duty, standing alone, does not constitute willful misconduct. [Bigge Crane & Rigging Co. v. Workers' Comp. Appeals Board (Hunt) (2010) 75 Cal. Comp. Cases 1089, 1101]

In this case, the Applicant's petition dated November 14, 2021, alleged that he was deceived and tricked into withdrawing his Labor Code § 132a claim leading to him filing a federal court case that was ultimately dismissed. To the extent that the statute of limitations would apply to his case, given the alleged ongoing behavior, it would not be time-barred.

However, regarding the substance of his petition, none of the Applicant's allegations lodged were apposite meriting relief that may be sought pursuant to Labor Code § 4553. Therefore, for that reason, and notwithstanding his reasoning in his various petitions attacking the decision, his petition for violation of Labor Code § 4553 was denied.

APPLICANT'S REQUEST FOR DISQUALIFICATION

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 [§] 641 of the Code of Civil Procedure and the objection shall be heard and disposed of by the appeals board. Affidavits may be read and witnesses examined as to the objections."

In addition, Code of Civil Procedure § 641 sets forth the following as grounds for objection:

> "(f) Having formed or expressed an unqualified opinion or belief as to the merits of the action.
>
> (g) The existence of a state of mind in the potential referee evincing enmity against or bias toward either party.

A statement charging bias or prejudice by a WCJ must set forth specific details on which the charge is predicated and must present specific evidence of bias or prejudice to support the disqualification of a judge and shall be filed no more than 10 days after having notice of the facts that might warrant disqualification. [Cal. Code of Regs., tit. 8, § 10452; Mackie v. Dyer (1957) 154 Cal. App. 2d 395, 399; Colindres v. Kor Realty Group/Sheraton Gateway Hotel (2008) 2008 Cal. Wrk. Comp. P.D. LEXIS 73, 8 (Appeals Board noteworthy panel decision)] While the reasonable appearance of bias may support disqualification, a party's unilateral and subjective perception of bias does not afford a basis for disqualification. [Haas v. County of San Bernardino (2002) 27 Cal. 4th 1017, 1034; see Peluso v. Calgary Flames (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 376, 13 (Appeals Board noteworthy panel decision) ("Bias and prejudice are never implied and must be established by clear averments.")] The standard to be used is that of a reasonable person. [Robbins v. Sharp Healthcare (2006) 71 Cal. Camp. Cases 1291, 1307 (Appeals Board significant panel decision)] Therefore, the expressions of opinion uttered by a WCJ, in what he conceives to be a discharge of his official duties or erroneous rulings against a litigant, even when numerous and continuous,

cannot be grounds for a charge of bias or prejudice, especially when they are subject to review. [Kreling v. Superior Court (1944) 25 Cal. 2d 305, 312; McEwen v. Occidental Life Ins. Co. (1916) 172 Cal. 6, 11; Perry v. S2 HR Solutions 1D, LLC (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 107, *3-5 (Appeals Board noteworthy panel decision).]

In this case, the Applicant has failed to articulate any facts to demonstrate that the undersigned WCJ harbors any bias against him. Instead, he uses highly invective language against the undersigned WCJ and threatens to engage in internet trolling on social media to address his unsubstantiated claims of unfair decision-making by the undersigned WCJ. Finally, he mistakenly believes that the undersigned WCJ's status with the State Bar of California disqualifies him from acting in the capacity as a workers' compensation administrative law judge. Ultimately, none of his claims constitutes any reasonable basis to disqualify the undersigned WCJ.

Therefore, for the reasons set forth above and as articulated twice previously by the undersigned WCJ in this case, the undersigned WCJ has no enmity or bias against the Applicant and that his requested relief should be denied.

RECOMMENDATION:

The undersigned WCJ respectfully recommends that the Applicant's various petitions dated July 14, 2022, be **DENIED**.

Date: July 27, 2022

David Pollak
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE