

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

**LORENA FLORES ALVAREZ, *Applicant***

**vs.**

**VALLEY FINE FOODS;  
TRAVELERS INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ10410059  
San Francisco District Office**

**OPINION AND ORDER  
DENYING PETITIONS FOR  
DISQUALIFICATION**

We have considered the allegations of the Petitions 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, we will deny the Petitions for Disqualification.

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].)<sup>1</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.”].)

---

<sup>1</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].

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, 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, the petition will be denied.

For the foregoing reasons,

**IT IS ORDERED** that the Petitions for Disqualification are **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

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

I CONCUR,

**/s/ MARGUERITE SWEENEY, COMMISSIONER**



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

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

**October 10, 2022**

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

**LORENA FLORES ALVAREZ  
KENNETH D. MARTINSON, ESQ.  
LAUGHLIN, FALBO, LEVY & MORESI**

**AS/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 AMENDED PETITION FOR DISQUALIFICATION**

**INTRODUCTION**

As discussed in my July 25, 2022, Report and Recommendation, applicant previously filed an unsigned and unverified petition for disqualification (EAMS Document ID No. 42369711). On July 26, 2022, applicant filed an amended petition, now bearing her attorney's signature both in the body of the pleading and below the attached verification.

The amended petition, like the original, does not appear to have been served on all parties, since the accompanying proof of service is non-compliant with Board Rule 10625(c) [Cal. Code Regs., tit. 8, § 10625, subd. (c)]. Thus, the new filing is herewith being served on all parties on the official address record, as required by Board Rule 10410(b).

**DISCUSSION**

Inasmuch as the Amended Petition for Disqualification is substantively identical to the previously filed version, its merits are discussed in my July 25, 2022, Report and Recommendation.

**RECOMMENDATION**

For the foregoing reasons, I recommend that applicant's Amended Petition for Disqualification, filed herein on July 26, 2022, be denied.

DATED: July 26, 2022

**Eugene Gogerman**  
WORKERS' COMPENSATION JUDGE

# REPORT AND RECOMMENDATION ON PETITION FOR DISQUALIFICATION

## INTRODUCTION

Applicant has filed an unsigned, unverified petition for disqualification in connection with the pending trial in this case before the undersigned.<sup>1</sup> Applicant contends that, in light of my recent order to show cause as to why monetary sanctions should not be imposed on her counsel, I am biased against her.

## FACTS

### *1. Procedural background prior to initial trial setting.*

The industrial claim underlying this litigation is for an admitted 2014 injury to the neck, right upper extremity, and right shoulder (see stipulations in pre-trial conference statement (PTCS) filed January 31, 2022, EAMS Document ID. No. 75126752). The only application for adjudication in the case was filed in May 2016; it does not allege injury to any body parts, but does allege that the industrial injury resulted in impairment in applicant's spine, arms, legs, lungs, and relating to headaches (EAMS Document ID No. 60163441). The case remains under the Board's original jurisdiction. On December 9, 2021, defendants filed a Declaration of Readiness to Proceed (EAMS Document ID No. 39327811) on issues of permanent disability and entitlement to further medical care, referencing alleged reporting by an Agreed Medical Evaluator. Applicant objected, averring, in part, that the upcoming Mandatory Settlement Conference (MSC) was set "without any jurisdiction over the case in chief" (objection filed 12/20/21, EAMS Document ID No. 39453330). The parties appeared before the Honorable Farai Alves on January 24, 2022, but were unable to jointly complete a pre-trial conference statement; the MSC was continued to January 31. On that day, the case was ordered to trial. According to the PTCS, applicant's counsel was ordered to file an amended exhibit disclosure no later than 20 days before trial, as the disclosure included in the PTCS was deemed non-compliant with Board Rule 10759(c). No such amended disclosure was filed.

### *2. Trial continuance requests and orders.*

Pursuant to Judge Alves's order, trial was initially set for May 10, 2022. On May 2, applicant filed a document identified in EAMS as a "request for continuance" (Document ID No. 41301448), though, in fact, it was a request to hold the proceedings remotely. The request was granted. When the parties appeared on May 10, the trial was continued for two reasons: (1) the case trailed an unrelated matter with trial priority; and (2) applicant's counsel raised doubts as to his client's mental competence, without producing any supporting medical documentation (see 5/10/22 Minutes of Hearing at EAMS Document ID No. 75489880). The new trial date was July 26, 2022.

---

<sup>1</sup> The petition appears to have been filed *ex parte*, in that it is accompanied by a purported proof of service that does not comply with Board Rule 10625(c) [Cal. Code Regs., tit. 8, § 10625, subd. (c)], does not identify the petition as the document being served, and does not list all parties on the official address record. As such, in accordance with Board Rule 10410(b), copies of the petition are being served on all parties herewith.

On June 3, 2022, applicant filed the following unverified document (EAMS Document ID No. 41732571; text reproduced verbatim, without correction): “REQUEST FOR CONTINUANCE FOR GOOD CAUSE [¶] Honorable Gogerman: [¶] Please grant continuance. Defendants have not replied to Kenneth Martinson’s requests to continue. [¶] GOOD CAUSE, Kenneth Martinson has a trial in ADJ10466905 which has been continued more times than this.” No proof of service was filed. On the same day, the request was “denied without prejudice for lack of proof of service on all parties.” Applicant’s attorney was designated to serve the order pursuant to Board Rule 10629 (6/3/22 order at EAMS Document ID No. 75573556). No proof of service of the order is on file.

The same request for continuance was refiled on June 6 (EAMS Document ID No. 41750119) and again on July 15 (EAMS Document ID No. 42272025). Following this third submission, again made without proof of service or verification, I issued the following order on July 20 (EAMS Document ID No. 42272025; capitalization as in original): “Request denied AGAIN for lack of service on all parties. Applicant's counsel SHALL, no later than 10 days from service hereof, show good cause as to why monetary sanctions should not be imposed for (1) failure to comply with Reg. 10629 in connection with 6/3/22 order denying continuance; (2) twice refiled previously denied request without correcting defect; and (3) addressing court in disrespectful manner (see, e.g., 2 California Trial Handbook § 17:08).”

On July 22, applicant filed an amended request for continuance of the July 26 trial (EAMS Document ID No. 42363520), this time with a proof of service of the request on “laughlin by fax, on June 2 and July 22, 2022.” It was also accompanied by a hard copy of an apparent email exchange between applicant’s attorney and counsel for the carrier, with the latter acknowledging applicant’s request for continuance. On the same day, the trial was continued to September 20. As part of the order (EAMS Document ID No. 75743658), Mr. Martinson’s attention was “directed to Board Rules 10410(a) and 10625, as well as 7/20/22 OSC.” He was again designated to serve pursuant to Rule 10629 and we are still within the compliance period for filing proof of service.

### 3. *Petitioner’s contentions.*

In her petition, applicant alleges that I exhibited “apparent bias” against her when, prior to trial, I ordered her attorney to show cause as to why monetary sanctions should not be imposed. She contends that the proper procedure was to “raise[] the issues that concerned the trial judge to a conversation on the day of Trial.” On this basis, she seeks to have the case reassigned to another department for trial.

## DISCUSSION

### 1. *Applicant’s attorney’s conduct warranted the order to show cause regarding sanctions.*

As discussed in the foregoing section, applicant’s attorney appears to have repeatedly violated Appeals Board Rules 10410(a) and 10629. The former rule requires each document filed with the Board to be accompanied by proof of its service on all parties. The lack of such proof was brought to Mr. Martinson’s attention when his initial request was denied without prejudice, and yet he proceeded to file the exact same document twice more. When he did eventually attach a

purported proof of service to the amended request for continuance, it was non-compliant with Board Rule 10625. As to Rule 10629, as the party designated to serve the June 3 order denying continuance, Mr. Martinson was required to file proof of such service within 10 days of the delegation, yet he never did so.

Moreover, applicant's attorney has violated a direct order from the MSC judge. As noted above, Mr. Martinson was ordered, within the PTCS, to find an amended evidence disclosure compliant with Board Rule 10759 no later than 20 days before the May 10 trial setting. No such filing is evident.

In addition to such apparent violations of orders and regulations, counsel's requests bear an impertinent tone because they are unverified, are written in incomplete sentences, and are addressed to "Honorable Gogerman," which is not an appropriate salutation.

2. *Sanctions have not actually been imposed.*

It must also be noted that the July 20 order to show cause is an opportunity for applicant's counsel to account for his actions and would be followed by a formal notice of intention and order before any sanctions are actually imposed. This is consistent with the recent history of this case: Mr. Martinson's attention was directed to the specific requirements at issue in the orders issued on January 31, June 3, July 20, and July 22, giving him multiple opportunities to comply or remedy earlier defects. The order to show cause was issued as a last resort after he refused to avail himself of those opportunities and yet he still had sufficient time to respond to the order to show cause in advance of the trial to avoid having the question of potential sanctions delay adjudication of his client's rights. Petitioner has not demonstrated bias that would render the undersigned incapable of serving as the trial judge in her case.

**RECOMMENDATION**

For the foregoing reasons, I recommend that applicant's Petition for Disqualification, filed herein on July 22, 2022, be denied.

DATED: July 25, 2022

**Eugene Gogerman**  
Workers' Compensation Judge  
Worker's Compensation Appeals Board