WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARIA GUADALUPE HERRERA ARELLANO, ***Applicant***

vs.

AUBERGE RESORTS, ***Defendants***

Adjudication Number: ADJ11025217
San Francisco District Office

OPINION AND ORDER DENYING PETITIONS FOR DISQUALIFICATION

Applicant's attorney filed a Petition for Disqualification on October 11, 2022 and a second Petition for Disqualification on November 1, 2022. We have considered the allegations of the Petitions for Disqualification and the contents of the Reports 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 Reports, both of which we adopt and incorporate, and for the reasons stated below, 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].)[1] 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."].)

[1] 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).)

Here, as discussed in the WCJ's Reports, 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). In reviewing the two Petitions for Disqualification, we saw no evidence of bias on the part of the WCJ. Moreover, we caution applicant's attorney that continuing to file meritless petitions may be a basis for sanctions. Accordingly, the petitions will be denied.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 13, 2023

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

MARIA GUADALUPE HERRERA ARELLANO
KENNETH D MARTINSON
MULLEN FILIPPI

PAG/oo

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 Petition for Disqualification

INTRODUCTION

In what is beginning to resemble an ill-advised litigation tactic[1], the attorney representing applicant in this case has filed a petition for disqualification in connection with the pending trial before the undersigned. The petition is verified, but lacks proper proof of service; consequently, as an ex parte filing, copies of it are being served herewith on all parties in accordance with Board Rule[2] 10410(b) [Cal. Code Regs., tit. 8, § 10410, subd. (b)].[3]

Substantively, applicant accuses me of bias and prejudging in connection with an order to show cause as to why her attorney should not be sanctioned under Labor Code section 5813 for his apparent non-compliance with a Board Rule 10629 service designation.

FACTS

1. Procedural background.

The underlying claim arises from an admitted 2016 injury to multiple body parts, with several additional conditions in dispute. The initial application was filed in September 2017. Roughly three years later, at a trial set on the case-in-chief, the case was ordered off calendar with instructions regarding development of the record (8/19/20 Minutes of Hearing at EAMS Document ID No. 73146793). The matter was subsequently re-activated several times, until it was again set for trial during a September 1, 2022, mandatory settlement conference (Pre-Trial Conference Statement at EAMS Document ID No. 75893122). The trial was scheduled for October 3, 2022.

2. Events leading up to and during the October 3 hearing.

On September 20, 2022, applicant's counsel filed a verified joint petition to hold the October 3 trial remotely, citing health concerns. The following day, I issued the following order: "In light of parties' joint request, 10/3/22 trial will proceed remotely. All parties are to check in via email sent to egogerman@dir.ca.gov no later than 8:30 a.m. and await further instructions. Applicant's attorney's attention is directed to Board Rule 10625(b) and (c)." The final sentence

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[1] See, e.g., WCAB Cases No. ADJ10410059, ADJ12669513, ADJ10371478, and ADJ10266933.

[2] All further citations to "Board Rules" hereinafter are to Title 8 of the California Code of Regulations, sections 10300, et seq.

[3] In this and other cases, Mr. Martinson has been repeatedly instructed and admonished regarding the requirements of Board Rule 10625(c) with respect to valid proof of service. This is evident from the contents of the EAMS file herein, as well as each of the cases referenced in fn.1. Mr. Martinson has also been admonished in at least one prior instance (ADJ10410059) for his apparent failure to comply with Board Rule 10629.

was included because the petition lacked valid proof of service within the meaning of Board Rule 10625. Mr. Martinson was designated to serve the order in accordance with Board Rule 10629. The document was sent to him via email by district office staff (see Order at EAMS Document ID No. 75950260 and copy of email at EAMS Document ID No. 75989335). Applicant's counsel re-filed the same petition on September 26 and twice more on October 1, identifying it as either "petition to quash subpoena" or "request for continuance" in EAMS.

On the morning of October 3, defense counsel appeared at the district office in person, while Mr. Martinson did not. Mr. Thorndal, the defense attorney, indicated that he had not been served with the September 21 order converting the hearing to remote; nor had he otherwise been informed of the order's issuance. Upon checking Filenet, I learned that Mr. Martinson had not filed proof of service of the September 21 order. Given our inability to conduct hybrid proceedings, Mr. Thorndal offered to rush back to his office and appear in the virtual courtroom. At 8:58 a.m., I sent the following email to both parties (found at EAMS Document ID No. 75990316):

> Mr. Martinson, on September 21, 2022, you were designated, pursuant to Reg. 10629, to serve all parties with the order granting the parties' joint petition to hold today's hearing remotely. I was not able to locate proof of such service in EAMS (there are, however, three more copies of the same joint petition, filed on September 26 and October 3, and identified as either "request for continuance" or "petition to quash subpoena." Reg, 10629 requires the party designated to serve to file proof of service within 10 days of the designation.
>
> NOTICE IS HEREBY GIVEN that, absent written objection showing good cause filed within 10 days hereof, monetary sanctions of up to $500 will be imposed on Mr. Martinson pursuant to Labor Code section 5813 for his apparent failure to (1) serve the September 21 order or (2) otherwise notify other parties of the order's issuance, which caused defense counsel to needlessly travel to the district office this morning and delayed today's proceedings.
>
> Instructions on appearing in the virtual courtroom will be provided to the parties once Mr. Thorndal lets us know that he is ready.

Upon receiving word from defense counsel, I instructed the parties to appear in the virtual courtroom at 9:40 a.m. Mr. Martinson did not appear until 9:59. For the reasons discussed in the October 3 minutes of hearing (EAMS Document ID No. 75989708), we were ultimately unable to proceed with the trial on that day and the matter was continued. The above-quoted notice of intention was reproduced verbatim in the minutes, service of which was delegated to Mr. Thorndal pursuant to Board Rule 10629.

3. Petitioner's contentions.

In her petition, applicant asserts that I created the appearance of bias during the October 3 trial, by issuing a notice of intention to impose sanctions without mentioning the word "sanctions" in the course of the hearing and by deciding, without considering any evidence, that Mr. Martinson is subject to Labor Code section 5813 sanctions.

DISCUSSION

1. No decision has been made regarding sanctions.

Contrary to petitioner's characterizations, at no point during or after the October 3 hearing did I make any findings, enter any orders, or otherwise announce any decision regarding the applicability of Labor Code section 5813 to the conduct in question (failing to comply with a service delegation). The notice of intention set forth in the email and the minutes of hearing was just that: an opportunity for Mr. Martinson to explain his actions, only failing which would an actual sanctions order issue. In fact, within the petition for disqualification, Mr. Martinson declares that he did not receive either the October 21 email from my assistant or the one I sent on the morning of October 3, with the notice of intention. Based on this sworn representation by an officer of the court, I will not impose sanctions in connection with the service delegation, though it is noteworthy that Mr. Martinson did, in fact, expect the October 3 trial to proceed remotely. Mr. Martinson has also been put on notice that email communications with him will no longer be accepted or acted on, given that neither of the messages in question resulted in a "failed delivery" response. In any event, the notice of intention appears to have served its purpose. It is also evidence that there was no "fixed" opinion expressed with respect to sanctions, only an intention that was subject to further evidence and argument. This is not bias within the meaning of section 641 of the Code of Civil Procedure. See Taylor v. Industrial Acci. Com. (1940) 38 Cal.App.2d 75, 80 (disapproved on other grounds in Lumbermen's Mut. Casualty Co. v. Industrial Acci. Com. (Cacozza) (1946) 29 Cal.2d 492, 499).

Coincidentally, Mr. Martinson's email troubles would also appear to account for his surprise at learning that sanctions were being considered—while it is true that Labor Code section 5813 issues were not discussed in the virtual courtroom while I attempted to get the case ready for trial on October 3, the email containing the notice was sent prior to any of those discussions and Mr. Martinson was carbon copied on my email delegating service of the minutes of hearing to defense counsel (see EAMS Document ID No. 75990321).

2. The notice of intention to impose sanctions was justified and is not evidence of bias.

Based on the history set forth above, it appeared on the morning of the October 3 hearing that applicant's counsel relied on the September 21 remote hearing order and did not come to the district office in person, yet he did not comply with the Board Rule 10629 service designation or otherwise inform defense counsel that the trial would be held remotely. At that point, it was appropriate to consider sanctions against Mr. Martinson, as service delegations serve a vital purpose and the rule unequivocally requires the designee to (a) serve the document in question and (b) file proof of such service. Not only did defendants incur unnecessary costs when their attorney traveled to the hearing, but the district office's ability to administer its calendar efficiently was impaired. The technical requirements of Board Rules 10625 and 10629 (among others) are meant to allow the Appeals Board to conduct its business while relying on parties' good-faith adherence to the rules of practice. Thus, adherence to them is necessary and expected, particularly with respect to licensed members of the bar and certified specialists such as Mr. Martinson.

As noted above, once he was given the opportunity to explain himself, Mr. Martinson declared that he did not actually receive the September 21 order with the service designation and, as a result, his non-compliance with the rule is excusable. Nevertheless, the fact that Labor Code section 5813 sanctions were considered on the morning of the hearing is in no way indicative of an impermissible bias or prejudice on my part toward any party.

RECOMMENDATION

For the foregoing reasons, I recommend that applicant's Petition for Disqualification, filed herein on October 11, 2022, be denied.

DATED: October 24, 2022

Eugene Gogerman
Workers' Compensation Judge

Report and Recommendation on Petition for Disqualification

INTRODUCTION

In response to my previous report and recommendation on petition for disqualification, applicant has filed a "Petition for Disqualification Second," again seeking to have the pending trial in this case reassigned to another department. While I continue to stand by my original report with respect to the substance of applicant's earlier petition for disqualification, I am submitting this supplemental report to address the specific contention raised in the more recent petition.

DISCUSSION

Petitioner argues that, by bringing to the attention of the Appeals Board a number of other cases in which her attorney sought to disqualify various trial judges, I improperly investigated those cases and made findings without allowing her and her counsel to rebut the evidence. This contention has no merit for several reasons. First, as the current acting presiding judge at the San Francisco District Office, I am charged with managing and overseeing the trial calendars and proceedings and have knowledge of pending petitions for removal, reconsideration, or disqualification. Thus, by the time of the original petition in this case, I was privy to the several other recent petitions for disqualification, which are extremely uncommon, and did not marshal evidence as alleged.

As to the due process argument, contrary to petitioner's contention, I did not make any findings on the basis of the other petitions. Rather, they are cited in my earlier report to demonstrate that (1) Mr. Martinson has alleged bias on the part of at least three of the five judges currently working in this district office; (2) in each instance, the allegation of bias stemmed from actions taken by the judge in response to a perceived failure to appear, failure to timely file a pleading, failure to effect valid service, or some combination thereof, on the part of Mr. Martinson; and (3) in at least one case (ADJ10410059, which is pending in my department), applicant's counsel attempted to conduct discovery into the case-in-chief after filing the petition for disqualification, despite the fact that all discovery had been closed and a continued trial date was pending.

RECOMMENDATION

For the foregoing reasons, I recommend that applicant's Petition for Disqualification, filed herein on November 1, 2022, be denied.

DATED: November 16, 2022

Eugene Gogerman
Workers' Compensation Judge