

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

TYRA MONTGOMERY, *Applicant*

vs.

**LOS ANGELES UNIFIED SCHOOL DISTRICT;
permissibly self-insured and administered by SEDGWICK GLENDALE, *Defendants***

**Adjudication Number: ADJ11152345
Long Beach District Office**

**OPINION AND ORDER
DENYING PETITION FOR DISQUALIFICATION
AND GRANTING PETITION FOR REMOVAL AND
DECISION AFTER REMOVAL**

Defendant seeks removal in response to the May 31, 2022 Order wherein the workers' compensation administrative law judge (WCJ) continued the trial and ordered the claims adjuster to appear at trial. Defendant also seeks disqualification of the WCJ.

Defendant contends that the trial should proceed on the issues outlined and that the WCJ did not provide an adequate basis to order the adjuster to appear. Defendant further contends that the WCJ must be disqualified because the WCJ has pre-judged the claim thereby violating defendant's due process rights.

We have not received an answer from applicant. The WCJ prepared a Report and Recommendation on Petitions for Removal and Disqualification (Report), recommending that the Petitions be denied.

We have considered the allegations of the Petitions for Removal and Disqualification and the contents of the Report of the WCJ with respect thereto. Based on our review of the records, we will grant the Petition for Removal and rescind the order that the claims adjuster appear and deny the Petition for Disqualification.

FACTS

Applicant claimed industrial injury to her back, shoulders, neck, other body system, nervous system/psych, hips, and lower extremities while working as a special education assistant on December 4, 2017.

We adopt the WCJ's factual summary of uncontested facts as follows:

The PQME (ortho) deferred the psyche complaints to appropriate specialist in three of his reports dated 11/2/18, 12/28/18 and 6/14/19.

On 12/5/18, applicant's attorney filed a DOR on the issue of discovery and the matter was taken off calendar per joint request of the parties for further discovery (PQME). (Minutes of Hearing dated 2/4/19).

On 8/22/19, applicant's attorney filed another DOR on settlement and/or discovery. The matter once again was taken off calendar for further discovery (PQME supplemental report). (Minutes of Hearing dated 9/23/19).

* * *

On 3/10/21, defense attorney filed a DOR on all issues. Applicant's attorney did not object to the DOR. The matter got continued a few times due to parties failure to provide the Pre-Trial Conference Statement (hereinafter "PTCS").

On 10/4/21, Applicant's attorney filed a Petition for Additional QME in psyche and defendant did not object.

On 1/26/22, the matter was eventually set for trial on all issues over applicant's attorney's objection and discovery closed on all issues on that day.

On 3/2/22, the parties appeared for trial before the undersigned and the undersigned . . . wrote the following on the Minutes of Hearing.

Parties agree to move forward on the limited issue of additional panel in psyche and defer all other issues. Parties will submit trial briefs on the issue before the next trial.

(MINUTES OF HEARING dated 3/2/22)

* * *

On 5/31/22, the parties appeared before the undersigned for continued trial. . . The undersigned continued the matter to another trial set for 7/14/22 and wrote the following on the Minutes of Hearing:

SEDGWICK Claims Adjuster Sabrina Chavez is Ordered to appear at the next Trial re: Regs 10109. DA failed to appear in person and called WCJ's conference instead. He appeared in person at 10:30 am after being ordered to appear.

(MINUTES OF HEARING dated 5/31/22)

(Report, pp. 2-4.)

DISCUSSION

I. Removal

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).) In light of the considerations discussed below, we conclude that granting removal is appropriate in this matter.

“The Labor Code and the Board’s rules set forth what must be included in a proper trial record. It is the responsibility of the parties and the WCJ to ensure that the record of the proceedings contains at a minimum, the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Bd. en banc) (*Hamilton*)).) The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Id.* at p. 476, citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].) The WCJ’s decision “must be based on admitted evidence in the record.” (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 476.) Judgments on the pleadings are not permitted in workers’ compensation. (Cal. Code Regs., tit. 8, § 10515.)

The issue we face in the instant case is that the WCJ ordered the adjustor to appear at the next hearing but failed to provide a record as to why the appearance of the adjustor was necessary and also failed to allow the defendant to properly object to this order. The WCJ may issue a notice of intention for any proper purpose. (Cal. Code Regs., tit. 8, § 10832(a).) A notice of intention to order the adjustor to appear would have provided notice to the parties and allowed the defendant to file an objection to the proposed order. This process would have also provided an appropriate record for our review.

Accordingly, we grant the Petition for Removal, rescind the May 31, 2022 Order regarding the appearance of the claims adjuster, and return the matter to the trial level for further proceedings consistent with this decision.

II. 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.”].)

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].

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.”

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 for disqualification will be denied.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the May 31, 2022 Order that the claims adjuster appear at trial is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal that the May 31, 2022 Order that the claims adjuster appear at trial is **RESCINDED**, and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

IT IS FURTHER ORDERED that the Petition for Disqualification is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 31, 2023

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

**TYRA MONTGOMERY
PERONA, LANGER, BECK, SERBIN, MENDOZA & HARRISON
VANDERFORD & RUIZ, LLP**

JMR/ara

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