WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROSETTE SIMON, ***Applicant***

vs.

TESLA MOTORS, permissibly self-insured, administered by ZURICH SERVICES CORPORATION, ***Defendant***

Adjudication Numbers: ADJ14760285, ADJ15149347
San Jose District Office

OPINION AND ORDERS DENYING PETITIONS FOR DISQUALIFICATION AND REMOVAL

Defendant has filed a petition for removal from the May 4, 2026 order taking the matter off calendar with an order closing discovery except as to an additional primary treating physician report. Defendant argues that the matter should proceed to trial.

Applicant filed a petition, which seeks disqualification of the workers' compensation administrative law judge (WCJ) based upon the allegation that the WCJ is biased.

We have received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Removal and on Petition for Disqualification (Report) recommending that we deny removal and disqualification.

We have considered the allegations of the Petitions for Disqualification and Removal, and the contents of the WCJ's Report. Based on our review of the record and based upon the WCJ's analysis of the merits contained in the WCJ's Report, we will deny disqualification and removal.

DISQUALIFICATION

Labor Code[1] 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. (§ 5311; see also Code Civ. Proc., § 641.) Among the grounds for disqualification under section 641 are that the

[1] All future references are to the Labor Code unless noted.

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.)

Next, petitions for disqualification must be timely filed: "If the workers' compensation judge assigned to hear the matter and the grounds for disqualification are known, the petition for disqualification shall be filed not more than 10 days after service of notice of hearing or after grounds for disqualification are known." (Cal. Code Regs., tit. 8, § 10960.)

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].) 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 (emphasis added).) 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).)

Here, applicant's petition fails to establish bias on the part of the WCJ, and thus, we deny the petition for disqualification.

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).) Here, based upon the WCJ's analysis of the merits of petitioner's arguments, 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.

The WCJ ordered that this matter proceed off calendar. No trial on the merits has occurred in this proceeding.

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Furthermore, decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10761.)

Here, once the parties proceed to trial, they will have an opportunity to create a record, raise all relevant issues, and submit evidence. The trial WCJ can then consider the evidence and the legal arguments raised by the parties and determine how best to proceed. Defendant has failed to establish that the WCJ abused her discretion in ordering the matter off calendar. We observe, however, that in cases where the parties are repeatedly engaged in discovery disputes, the WCJ may wish to consider continuing the matter so that the court can more closely monitor the case to ensure that the parties are moving toward a final disposition.

The WCJ requested guidance in the Report as to how best to proceed, specifically, whether reassignment may be in the best interest of the case notwithstanding the fact that disqualification is not warranted. Code of Civil Procedure section 170 makes clear that if a judge is not disqualified, they must continue to decide the case. (See Lab. Code, § 5700.) Absent disqualification, it is rare for the Appeals Board to order reassignment of a case because the PWCJ "has full responsibility for the assignment of cases to the workers' compensation judges of each office." (Cal. Code Regs., tit. 8, § 10346(a).) Thus, if there is no basis to disqualify the WCJ, then a WCJ is encouraged to consult with the presiding WCJ regarding reassignment.

Under certain circumstances, a WCJ may wish to consider recusal, and Code of Civil Procedure section 170.1 lists the grounds for recusal. Additionally, AD Rule 9721, the regulation regarding disqualifications that is applicable to WCJs, also includes three grounds describing impartiality, bias, and recusal to "further the interests of justice" that are in fact grounds for a WCJ to recuse. (Cal.Code Regs. tit. 8, § 9721.12 (a)(3), (10), and (11).) Notably, when recusing, a judge need not disclose a basis for a recusal. However, a WCJ should not recuse lightly because

allocation of our scarce judicial resources and orderly administration of our system depend upon the cooperation of the WCJ and all parties. (See *Robbins v. Sharp Healthcare* (2006) 71 Cal.Comp.Cases 1291, 1311 (significant panel decision).) Ultimately, it is up to the individual WCJ to determine whether they can effectively manage the proceedings in any matter and the WCJ may within their sound discretion recuse themselves from a case for any reason.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Disqualification of the WCJ filed on May 27, 2026, is **DENIED**.

IT IS FURTHER ORDERED that defendant's Petition for Removal of the order taking the matter off calendar issued on May 4, 2026, by the WCJ is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ PAUL F. KELLY, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 27, 2026

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

ROSETTE SIMON
CABALLERO COLLECTIONS
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK, LLP

EDL/mt

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