

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

EARL MOSS, *Applicant*

vs.

**KAISER FOUNDATION HEALTH PLAN,
PERMISSIBLY SELF-INSURED, *Defendants***

**Adjudication Number: ADJ4668467 (SAL0114325)
Oakland District Office**

**OPINION AND ORDERS
DENYING PETITION FOR RECONSIDERATION
AND DENYING PETITION FOR DISQUALIFICATION**

Applicant seeks reconsideration of the September 6, 2024 Finding, Order Dismissing Petition to Reopen (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant's Petition to Reopen filed on July 25, 2016 was not filed timely. The WCJ dismissed the petition, accordingly.

Applicant contends that the evidence does not justify the findings of fact, that defendant unreasonably delayed medical treatment and reimbursement to applicant for out-of-pocket expenses, and that applicant received ineffective legal counsel from his former attorney.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration, recommending that the Petition be denied.

Applicant has also filed an October 10, 2024 request¹ to file supplemental pleadings and an October 10, 2024 supplement to the petition for reconsideration.²

We have received an Answer to Supplemental Petition, and a Joint Objection to Applicant's Request to Submit Supplemental Petition and Petition for Defendant to Submit

¹ The document is entitled, "Request for Consideration and Acceptance of Supplemental Petition to Pro se Applicant's 09/24/2024 Petition for Reconsideration of Judge Lilla J. Szelenyi' 09/26/2024 Report and Recommendation (R&R) of Pro se Applicant's 08/05/2015 Petition to Reopen Case for Cause."

² The document is entitled, "Supplemental Petition to 09/24/2024 Petition for Reconsideration of [Workers' Compensation] Judge 09/26/2024 Report and Recommendation (R&R)."

Answer to Supplemental Petition, wherein defendant requests permission to file an answer to applicant's Supplemental Petition.

Pursuant to Workers' Compensation Appeals Board (WCAB) Rule 10964(a), we have accepted and considered applicant's supplemental pleadings as well as defendant's supplemental pleadings.

Applicant also seeks disqualification of the WCJ based in part upon the WCJ's alleged conduct at trial. Applicant contends the WCJ has formed or expressed an unqualified opinion or belief as to the merits of the action and that the WCJ evinced enmity against or bias toward applicant.

Applicant has also filed a November 19, 2024 request³ to file supplemental pleadings and an October 19, 2024 supplement to the petition for disqualification.⁴ Pursuant to Workers' Compensation Appeals Board (WCAB) Rule 10964(a), we have accepted and considered applicant's supplemental pleadings.

We have received a Reply and Objection to Petition for Disqualification from defendant. The WCJ filed a Report and Recommendation on Petition for Disqualification recommending that we deny disqualification.

We have considered the Petition for Reconsideration, the Answer, the supplemental pleadings, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny the petition for reconsideration.

We have further considered the Petition for Disqualification, the Reply and Objection, the supplemental pleadings, and the contents of the Report. For the reasons discussed below, we will deny the petition for disqualification.

FACTS

Applicant sustained injury to the right upper extremity while employed as a technical manager by defendant Kaiser Foundation Health Plan (defendant) on January 3, 2006. The underlying case in chief resolved via Award issued on April 13, 2011, including the provision for open future medical care.

³ The document is entitled, "Request for Consideration and Acceptance of Attached 11/13/2024 Supplemental Petition to Pro se Applicant's 09/18/2025 Petition for Disqualification of WCJ in Response to Judge Lilla J. Szelenyi's 10/15/2024 Report and Recommendation (R&R)."

⁴ The document is entitled, "Supplemental Petition to 09/18/2024 Petition for Disqualification of [Workers' Compensation] Judge and 10/15/2024 Report and Recommendation (R&R)."

On August 31, 2016, applicant filed a Petition to Reopen, contending that despite applicant's filing a request for dismissal of attorney on June 29, 2011, defendant failed to comply with the dismissal and had improperly declined to provide information relevant to applicant's case. (Petition to Reopen, dated July 25, 2016.) Applicant asserted that defendant's refusal to provide requested documentation resulted in delayed treatment and medical complications. Applicant also asserted that defendant had failed to reimburse applicant for mileage and other out-of-pocket expenses.

On August 27, 2024, the parties proceeded to trial on the sole issue of the timeliness of applicant's Petition to Reopen. The WCJ ordered all other issues, including mileage and penalties, deferred. Applicant offered a personal statement, and the WCJ ordered the matter submitted for decision the same day.

On September 6, 2024, the WCJ issued the F&O, determining that the petition to reopen was not timely filed. The WCJ noted that applicant's sustained injury on January 3, 2006, that the Award issued on April 13, 2011, and that the August 5, 2016 Petition to Reopen was filed more than five years from the date of injury. The WCJ observed that pursuant to Labor Code⁵ section 5804, the WCAB lacked jurisdiction to alter or amend the Award more than five years from the date of injury.

Applicant's Petition for Reconsideration avers defendant failed to timely respond to applicant's changes in address, medical treatment requests, notice of dismissal of attorney, out of pocket expense and mileage reimbursement requests, and various evidentiary and/or documentation requests from applicant. (Petition for Reconsideration, at pp. 3-5.) Applicant's Petition also asserts that his former attorney failed to appropriately represent applicant. (*Id.* at p. 6:2.) Applicant asserted that defendant's withholding of information regarding applicant's case prejudiced applicant's ability to prosecute the Petition to Reopen and his underlying requests for treatment and/or reimbursement.

Defendant's Answer to the Petition for Reconsideration asserts that applicant's Petition does not set forth a legal basis for reconsideration, and that applicant's exhibits are not part of the record and are unrelated to the timeliness of the Petition to Reopen. (Answer to Petition for Reconsideration, at p. 6:12.)

⁵ All further references are to the Labor Code unless otherwise noted.

The WCJ's Report and Recommendation on Petition for Reconsideration observes that "[s]ince the petition to re-open was filed 10 years after the date of injury ... applicant's petition to reopen is time barred." (Report and Recommendation on Petition for Reconsideration, at p. 2.)

On September 18, 2024, applicant also filed a Petition seeking the disqualification of the WCJ based on her demeanor and conduct at the August 27, 2024 trial proceedings. The petition asserts the WCJ declined to review all of the available evidence, remarked that the issues would be someone else's problem in five years, and that the WCJ appeared angered by the complexity of the case. (Petition for Disqualification, at p. 4:1.) The Petition avers the WCJ failed to completely review the proffered evidence and that the summary of evidence fails to capture the extensive introduction and guidance portion of the trial. (*Id.* at p. 7:16.)

Defendant's Reply and Objection to Petition for Disqualification asserts applicant's petition is untimely because it was filed more than 10 days from when the alleged grounds for disqualification became known. Because the petition concerns the WCJ's conduct at trial on August 27, 2024 and the Petition for Disqualification was filed more than 10 days later, defendant avers the petition to be untimely. Defendant further asserts the petition does not demonstrate bias on the part of the WCJ. (Reply and Objection to Petition for Disqualification, dated October 8, 2024, at pp. 2-3.)

Applicant's October 11, 2024 Request for Consideration and Acceptance of Supplemental Petition requests that we consider the Petition for Reconsideration in light of applicant's pending Petition for Disqualification, and asserts that the WCJ's response in the Reports concern the procedural aspects of the case, but did not address applicant's contentions regarding defendant's alleged bad-faith actions, withholding of information, and applicant's prior inadequate counsel.

Applicant's October 11, 2024 Supplement to Petition for Reconsideration avers that his due process rights were abrogated because he did not receive a fair hearing before a neutral adjudicator, and because he was denied the right to present evidence and be heard on the issues. (Supplement to Petition for Reconsideration, dated October 11, 2024, at 5:6.)

On October 28, 2024, defendant filed its Joint Objection to Applicant's Request to Submit Supplemental Petition and filed its own Answer to Supplemental Petition. Defendant avers the F&O correctly applies statutory authority, and that applicant's Supplemental Petition does not state a cognizable basis for the requested relief. (Joint Objection to Applicant's Request to Submit Supplemental Petition, dated October 28, 2024, at pp. 4-7.)

DISCUSSION

I.

Section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
 - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
 - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on September 26, 2024, and 60 days from the date of transmission is November 25, 2024. This decision is issued by or on November 25, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on September 26, 2024, and the case was transmitted to the Appeals Board on September 26, 2024. Service of the Report and

transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 26, 2024.

II.

Applicant seeks review of a determination by the WCJ that his Petition to Reopen was not timely. Applicant's underlying case in chief concerned an injury sustained on January 3, 2006, which resolved when an Award issued on April 13, 2011. Applicant's Petition to Reopen was filed on July 25, 2016, more than ten years after the date of injury.

Pursuant to section 5803, “[t]he appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of [Division 4] ... At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.” (Lab. Code, § 5803.) This power includes the right to review, grant or regrant, diminish, increase, or terminate, within the limits prescribed by this division, any compensation awarded, upon the grounds that the disability of the person in whose favor the award was made has either recurred, increased, diminished, or terminated. (*Ibid.*)

However, section 5804 provides that “[n]o award of compensation shall be rescinded, altered, or amended after five years from the date of injury except upon a petition by a party in interest filed within such five years....” (Lab. Code, § 5804.)

Thus, the jurisdiction of the WCAB to rescind, alter or amend an award may only be invoked within five years of the date of injury. (Lab. Code §§ 5410, 5804; *Bland v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 324, 329, fn. 3 [35 Cal.Comp.Cases 513].) If no petition is filed, the WCAB lacks jurisdiction to amend an award. (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 300 [56 Cal.Comp.Cases 476].) The five year limitations period in section 5804 is jurisdictional and is not subject to waiver or estoppel. (*Sutton v. IAC* (1956) 46 Cal.2d 791 [21 Cal.Comp.Cases 205]; *Selden v. Workers' Comp. Appeals Bd.* (1986) 176 Cal.App.3d 877 [222 Cal. Rptr. 450, 51 Cal.Comp.Cases 28]; *Humphreys v. Workers' Comp. Appeals Bd.* (1988) 54 Cal.Comp.Cases 4 [1988 Cal. Wrk. Comp. LEXIS 2248] (writ den.).)

Here, there is no dispute that applicant's Petition to Reopen was not filed within five years of his date of injury. Applicant contends that his attorney, and later defendant, failed to timely

provide relevant information and documentation necessary to the filing, and that defendant's assertion that it was providing ongoing future medical care was "questionable at all levels." (Applicant's Response to Defendant's Claims that Applicant's Petition to Reopen is Barred by the State of Limitation, dated August 5, 2015, at p. 2.) However, the WCJ's ability to hear and decide the issue more than five years from the date of injury was limited by section 5804.

Thus, and to the extent that the Petition sought to alter or amend the April 13, 2011 Award, we agree with the WCJ that the Petition was not timely.

However, we also note that pleadings that merely request *enforcement* of an award are not construed as a Petition to Reopen. (*Granite Construction Co. v. Workers' Comp. Appeals Bd. (McRynolds)* (2003) 112 Cal.App.4th 1453 [68 Cal.Comp.Cases 1548].)

Moreover, the workers' compensation system "was intended to afford a *simple and nontechnical path* to relief." (*Elkins v. Derby* (1974) 12 Cal.3d 410, 419 [39 Cal.Comp.Cases 624] citing 1 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1973) § 4.01[1], pp. 4-2 to 4-3 (italics added); cf. Cal. Const., art. XX, § 21; § 3201.) Generally, "the informality of pleadings in workers' compensation proceedings before the Board has been recognized. (*Zurich Ins. Co. v. Workmen's Comp. Appeals Bd.* (1973) 9 Cal.3d 848, 852 [38 Cal.Comp.Cases 500, 512]; *Bland v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 324, 328–334 [35 Cal.Comp.Cases 513].) "[I]t is an often-stated principle that the Act disfavors application of formalistic rules of procedure that would defeat an employee's entitlement to rehabilitation benefits. (*Martino v. Workers' Comp. Appeals Bd.*, (2002) 103 Cal.App.4th 485, 490 [67 Cal.Comp.Cases 1273].) Informality of pleading in proceedings before the Board is recognized and courts have repeatedly rejected pleading technicalities as grounds for depriving the Board of jurisdiction. (*Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 200-01 [50 Cal.Comp.Cases 160]; *Liberty Mutual Ins. Co. v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 148, 152-153 [45 Cal.Comp.Cases 866].) Moreover, section 5709 states that "[n]o informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division..." (Lab. Code, § 5709.) "Necessarily, failure to comply with the rules as to details is not jurisdictional." (*Rubio, supra*, at 200–201; see Cal. Code Regs., tit. 8, § 10517.)

Additionally, it is the policy of the law to favor, whenever possible, a hearing on the merits. (*Fox v. Workers' Comp. Appeals Bd.*, (1992) 4 Cal.App.4th 1196, 1205; see also *Shamblin v.*

Brattain (1988) 44 Cal.3d 474, 478, “when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court’s order setting aside a default.”) This is particularly true in workers’ compensation cases, where there is a constitutional mandate “to accomplish substantial justice in all cases.” (Cal. Const., art. XIV, § 4.) Therefore, in workers’ compensation proceedings, it is settled law that: (1) pleadings may be informal (*Zurich Ins. Co. v. Workmen’s Comp. Appeals Bd. (Cairo)* (1973) 9 Cal.3d 848, 852 [38 Cal.Comp.Cases 500]; *Bland v. Workmen’s Comp. Appeals Bd.*, *supra*, 3 Cal.3d 324, 328–334; *Martino v. Workers’ Comp. Appeals*, *supra*, 103 Cal.App.4th 485, 491; *Rivera v. Workers’ Comp. Appeals Bd.* (1987) 190 Cal.App.3d 1452, 1456 [52 Cal.Comp.Cases 151]; *Liberty Mutual Ins. Co v. Workers’ Comp. Appeals Bd. (Aprahamian)* (1980) 109 Cal.App.3d 148, 152–153 [45 Cal.Comp.Cases 866]; *Blanchard v. Workers’ Comp. Appeals Bd.* (1975) 53 Cal.App.3d 590, 594–595 [40 Cal.Comp.Cases 784]; *Beaida v. Workmen’s Comp. Appeals Bd.* (1968) 263 Cal.App.2d 204, 207–210 [35 Cal.Comp.Cases 245]); (2) claims should be adjudicated based on substance rather than form (*Bland v. Workmen’s Comp. Appeals Bd.*, *supra*, 3 Cal.3d 324, 328–334; *Martino v. Workers’ Comp. Appeals*, *supra*, 103 Cal.App.4th 485, 491; *Bassett-McGregor v. Workers’ Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1116 [53 Cal.Comp.Cases 502]; *Rivera*, *supra*, 190 Cal.App.3d at p. 1456; *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592, 598 [24 Cal.Comp.Cases 274]); (3) pleadings should liberally construed so as not to defeat or undermine an injured employee’s right to make a claim (*Sarabi v. Workers’ Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, at pp. 925–926 [72 Cal.Comp.Cases 778]); *Martino v. Workers’ Comp. Appeals*, *supra*, 103 Cal.App.4th 485, 490; *Rubio v. Workers’ Comp. Appeals Bd.*, *supra*, 165 Cal.App.3d 196, 199–201; *Aprahamian*, *supra*, 109 Cal.App.3d at pp.152–153; *Blanchard*, *supra*, 53 Cal.App.3d at pp. 594–595; *Beaida*, *supra*, 263 Cal.App.2d at pp. 208–209); and (4) technically deficient pleadings, if they give notice and are timely, normally do not deprive the Board of jurisdiction. (*Bland v. Workmen’s Comp. Appeals Bd.*, *supra*, 3 Cal.3d 324, 331–332 & see fn. 13; *Rivera*, *supra*, 190 Cal.App.3d at p. 1456; *Aprahamian*, 109 Cal.App.3d at pp. 152–153; *Blanchard*, *supra*, 53 Cal.App.3d at pp. 594–595; *Beaida*, *supra*, 263 Cal.App.2d at pp. 208–210).)

Here, a careful reading of applicant’s July 25, 2016 Petition demonstrates that the issues being raised relate to the timely provision of various benefits available under Division 4. Applicant asserts delay in the delivery of “medical [treatment] and reimbursements (i.e. medical reports, payments made regarding case, requests for information, medical and service coordination, etc.).”

(Petition to Reopen, dated July 25, 2016, at p. 1.) The petition further asserts delay in reimbursement for mileage and other out-of-pocket expenses. (*Ibid.*)

Thus, and irrespective of the nominal title of the pleading, we are persuaded that applicant's July 25, 2016 petition asserts unreasonable delay in the provision of various forms of benefits and seeks judicial relief in response to those delays. We therefore conclude the petition should properly be considered a petition for penalties pursuant to section 5814. Because the WCJ has expressly deferred "all other issues ... included the mileage and penalties," the issue remains pending at this time, and the parties remain free to marshal evidence responsive to the issue. (Minutes of Hearing and Summary of Evidence (Minutes), dated August 27, 2024, at p. 2:10.)

In summary, we agree with the WCJ that insofar as applicant's July 25, 2016 petition seeks to alter or amend the underlying Award issued on April 13, 2011, the petition is untimely. (Lab. Code, § 5804.) However, insofar as the petition alleges unreasonable delay in the provision of benefits under section 5814, the pleading should be considered a penalty petition filed July 25, 2016.⁶ Because the issue of penalties has been deferred along with issues of reimbursement for out-of-pocket expense and mileage, we decline to disturb the F&O.

Turning to the Petition for Disqualification, applicant alleges that the WCJ formed or expressed an unqualified opinion or belief as to the merits of the action and that the WCJ evinced enmity against or bias toward applicant. Applicant avers the WCJ declined to use the pre-trial conference statement prepared by the parties, and instead chose to reframe the issues for trial. (Petition for Disqualification, dated September 18, 2024, at p. 6:3.) Applicant asserts the WCJ characterized defendant's alleged prior bad-faith actions with respect to a medical-legal evaluator as "no harm, no foul." (*Id.* at p. 6:5.) When applicant discussed the money he had spent documenting the alleged abuses of defendant, applicant asserts the WCJ instructed him to "stop spending it." (*Id.* at p. 7:5.) Applicant contends the WCJ was unwilling to review the entirety of the evidentiary record, and that the WCJ's extensive introduction and guidance discussion during the trial proceedings were not accurately or completely captured in the Minutes. (*Id.* at p. 8:1.) Applicant also avers he has received insufficient assistance from the Workers' Compensation

⁶ See Lab. Code, § 5814(g): "Notwithstanding any other provision of law, no action may be brought to recover penalties that may be awarded under this section more than two years from the date the payment of compensation was due."

Appeals Board Information and Assistance Office and from the First Appellate District Court offices. (*Id.* at p. 8:6.)

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].)⁷ 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.”].)

⁷ 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).)

Here, as discussed in the WCJ’s Report on Petition for Disqualification, the petition does not set forth facts, declared under penalty of perjury, that are sufficient to establish disqualification pursuant to section 5311, WCAB Rule 10960, and Code of Civil Procedure section 641(f) and/or (g). Accordingly, the petition will be denied.

Irrespective of our denial of the petition for disqualification, however, we observe that section 123.6, subdivision (a), requires WCJs to subscribe to the Code of Judicial Ethics. (Lab. Code, § 123.6, subd. (a).)

Canon 3 of the Code of Judicial Ethics provides, in pertinent part:

A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers and of all staff and court personnel under the judge’s direction and control.

(California Code of Judicial Ethics, Amended July 1, 2020, Canon 3B(4).)

We encourage the WCJ, and indeed all parties to these proceedings, to be mindful of their ethical obligations under statute and applicable rules of court, and to exercise the patience and courtesy necessary to maintain confidence in an impartial and unbiased tribunal.

For the foregoing reasons,

IT IS ORDERED that the September 24, 2024 Petition for Reconsideration is **DENIED**.

IT IS FURTHER ORDERED that the September 18, 2024 Petition for Disqualification is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 25, 2024

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

**EARL MOSS
ACUMEN LAW**

SAR/abs

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