

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

VINCENT DOWNEY, *Applicant*

vs.

TECHNICOLOR, INC.;
PACIFIC EMPLOYERS INSURANCE COMPANY
administered by SEDGWICK CMS; TECHNICOLOR FILM SERVICES;
FEDERAL INSURANCE COMPANY C/O CHUBB GROUP OF INSURANCE COMPANIES;
DELUXE LABORATORIES; LIBERTY MUTUAL INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ2275429 (VNO 0463950)
Van Nuys District Office

**OPINION AND ORDER
DISMISSING PETITION
FOR RECONSIDERATION AND
DISMISSING PETITION FOR
DISQUALIFICATION**

Lien claimant seeks reconsideration of the Opinion and Decision After Reconsideration (Opinion) of December 16, 2024, wherein the Appeals Board rescinded the March 22, 2021 Findings and Orders (F&O), substituted a new F&O that found that lien claimant did not meet its burden on its petitions for costs and sanctions of January 13, 2015, August 22, 2016, October 16, 2017, November 9, 2017, March 15, 2018, and June 11, 2018, and ordered that each of these petitions is denied.

We did not receive an answer from any party.

Lien claimant also filed a Petition for Disqualification, and a Declaration in Support of the Petition, in which lien claimant seeks to disqualify the WCJ.

We received the WCJ's Report and Recommendation on Petition for Disqualification (Report) wherein the WCJ recommends that the petition for disqualification be denied.

We have considered lien claimant's Petition for Reconsideration and have reviewed the record in this matter. Based on our review of the record and on our prior Opinion, and for the reasons discussed below, we will dismiss the Petition for Reconsideration. We have also

considered the allegations of the Petition for Disqualification and lien claimant's supporting declaration, and the contents of the Report of the WCJ with respect thereto. Based on our review of the record and based upon the WCJ's analysis of the merits of the petitioner's arguments in the WCJ's Report, we will dismiss the Petition for Disqualification.

I.

Former Labor Code section 5909¹ 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 January 6, 2025, and 60 days from the date of transmission is March 7, 2025. This decision is issued by or on March 7, 2025, 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

¹ All section references are to the Labor Code, unless otherwise indicated.

act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, we did not receive a Report and Recommendation by a workers' compensation administrative law judge because the Petition was filed in response to our decision, and no other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with the notice of transmission required by section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on January 6, 2025.

II.

It is well settled that where a party fails to prevail on a petition for reconsideration, the Appeals Board will not entertain a successive petition by that party unless the party is newly aggrieved. (*Goodrich v. Industrial Acci. Com.* (1943) 22 Cal.2d 604, 611 [8 Cal.Comp.Cases 177]; *Ramsey v. Workers' Comp. Appeals Bd.* (1971) 18 Cal.App.3d 155, 159 [36 Cal.Comp.Cases 382]; *Crowe Glass Co. v. Industrial Acci. Com. (Graham)* (1927) 84 Cal.App. 287, 293-295.) As stated in our en banc opinion in *Navarro v. A & A Farming* (2002) 67 Cal.Comp.Cases 296, 299 (Appeals Board en banc):

The general rule is that where a party has filed a petition for reconsideration with the Board, but the party does not prevail on that petition for reconsideration, the petitioning party cannot attack the [Appeal's] Board's action by filing a second petition for reconsideration; rather, the petitioning party must either be bound by the [Appeals] Board's action or challenge it by filing a timely petition for writ of review.

The only exception to this general rule occurs when, although the petitioning party does not prevail on its original petition for reconsideration, the Appeals Board's decision is based on some new and additional evidence not presented at the time of trial. In this limited circumstance only, the original petitioner may properly file a second petition for reconsideration because the Appeals Board's decision is based on a new record. (*Pacific Employers Ins. Co. v. Industrial Acci. Com. (Mazzanti)* (1956) 139 Cal.App.2d 22, 25-26 [21 Cal.Comp.Cases 46].)

Here, the petition for reconsideration raises the same issues that were raised in lien claimant's earlier petition for reconsideration in which petitioner did not prevail. Furthermore, no new evidence was accepted or considered at the time of the Appeals Board's decision on the

original petition. Accordingly, we dismiss the Petition for Reconsideration as successive. We observe that if we were not dismissing the Petition, we would have denied it for all of the reasons set forth in our Opinion.

III.

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 Code of Civil Procedure 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 Code of Civil Procedure 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 Acci. Com. (Thomas)* (1940) 38 Cal.App.2d 75, 79-80 [5 Cal.Comp.Cases 61].)² Additionally, even if the WCJ expresses an unqualified opinion on the merits, the WCJ is not subject to disqualification under Code of Civil Procedure 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 of Los Angeles County* (1944) 25 Cal.2d 305,

² Overruled on other grounds in *Lumbermen’s Mut. Casualty Co. v. Industrial Acci. Com. (Cacozza)* (1946) 29 Cal.2d 492, 499 [11 Cal.Comp.Cases 289].

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” (*Kreling, supra*, 25 Cal.2d at pp. 310-311; *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 Code of Civil Procedure 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 “if the worker’s compensation judge assigned to hear the matter 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.” (Cal. Code Regs., tit. 8, § 10960.) Here, lien claimant seeks disqualification in response to actions by the WCJ that took place in 2021, several years after the ten-day period specified in WCAB Rule 10960 elapsed. Thus, the Petition for Disqualification must be dismissed.

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). (Lab. Code, § 5311; Cal. Code Regs., tit. 8, § 10960; Code Civ. Proc., § 641(f) and (g).) Accordingly, if we were not dismissing the Petition as untimely, we would have dismissed the Petition on that basis as well.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Opinion and Decision After Reconsideration issued by the Workers' Compensation Appeals Board on December 16, 2024 is **DISMISSED**.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD. COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 5, 2025

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

**DAVID SILVER, M.D.
LEGAL SERVICE BUREAU
PEARLMAN, BROWN AND WAX
COST FIRST CORP**

MB/ara

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