Nosce v. United Building Contractors Inc., 2024 Cal. Wrk. Comp. P.D. LEXIS 53

Workers' Compensation Appeals Board (Board Panel Decision)

February 15, 2024 Opinion Filed

W.C.A.B. No. ADJ16374323—WCJ Sarah L. Lopez (SAC); WCAB Panel: Chair Zalewski, Deputy Commissioner Schmitz, Commissioners Capurro

Reporter
2024 Cal. Wrk. Comp. P.D. LEXIS 53 *

Nicholas Nosce, Applicant v. United Building Contractors Inc., State Compensation Insurance Fund, Defendants

Status:

Publication Status: **CAUTION:** This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: The Petition for Reconsideration is *denied*.

Core Terms

credibility, altercation, space, assaulting, punch, Reconsideration, roof, workers' compensation, witnesses

Headnotes

Injury AOE/COE—Initial Physical Aggressor Defense—WCAB, denying reconsideration, affirmed WCJ's finding that applicant roofer's workers' compensation claim for left elbow injury sustained on 1/31/2022 in physical altercation with co-worker was not barred by *Labor Code § 3600(a)(7)*'s "initial physical aggressor"

defense, when WCAB found that testimony of applicant's co-worker that applicant came into his personal space and caused him fear of bodily harm was not credible, and evidence established that co-worker threw first punch. [See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.23*; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, §§ 10.03[4], 10.04.]

Counsel

[*1] For applicant—Abramson Labor Group

For defendants—State Compensation Insurance Fund, Legal

Panel: Chair Katherine A. Zalewski; Deputy Commissioner Anne Schmitz; Commissioner Joseph V. Capurro

Opinion By: Chair Katherine A. Zalewski

Opinion

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report 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 report, which we adopt and incorporate, we will deny reconsideration. For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

Chair Katherine A. Zalewski

I concur,

Deputy Commissioner Anne Schmitz

Commissioner Joseph V. Capurro

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

1. Applicant's Occupation: Roofer

Applicant's Age: 27

Date of Injury: January 31, 2022

Parts of Body Injured: Left elbow

Mechanism of Injury: Specific

2. Identity of Petitioners: Defendant

3. Timelines: Yes

4. Verifications: Yes

5. Decision Date: December 13, 2023, Findings **[*2]** of Fact and Opinion on Decision issued

6. Defendant's Contentions: Defendant contends that by Order, Decision or Award, made and filed by the Workers' Compensation Judge, the Appeals Board acted without or in excess of its powers; the evidence does not justify the Finding of Fact; and that the Findings of Fact to do not support the Order, Decision or Award

INTRODUCTION

FACTS

1. Nicholas Nosce (applicant) was born on XX-XX-XXX.

2. On January 31, 2022, applicant was employed by United Building Contractors, Inc., (defendant employer) as a roofer.

3. At the time of injury, applicant was 27 years old.

4. On January 31, 2022, defendant employer was insured by State Compensation Insurance Fund.

5. On January 31, 2022, applicant and his co-worker, Leonardo Diaz, (Mr. Diaz) had a physical altercation on the roof of the Butte County Jail. (MOH/SOE at pp. 5:28-29; 15:4.)

6. On January 31, 2022, applicant was a new and inexperienced roofer. (*Id.* at pp. 6:37; 13:16-20.) Mr. Diaz was a more experienced roofer. (*Id.* at pp. 4:30; 13:11-13.)

7. Applicant made a work mistake on the roof. (*Id.* at pp. 5:6-7; 14:1.)

8. Mr. Diaz ordered applicant off the roof. (*Id.* at pp. 5:23; 14:36-39.

9. Mr. Diaz testified that **[*3]** applicant came into his personal space and caused him fear of bodily harm. (*Id.* at pp. 14:42-45; 15:27-28; 16:12-13; 16:35-38; 17:29.) Mr. Diaz' testimony about applicant getting into his personal space and causing him fear is not credible.

10. Mr. Diaz, not applicant, threw the first punch. (*Id.* at pp. 5:28-29; 16:33.)

11. On January 31, 2022, applicant sustained an injury arising out of and occurring during the course of employment to the left elbow.

12. Applicant's claim is not barred under *Labor Code §3600(a)(7)* as applicant's injury did not arise out of an altercation where applicant was the initial physical aggressor.

DISCUSSION

First, defendant contends that its due process rights were violated because the WCJ "refused" to allow testimony from applicant about past relevant events including him assaulting a female store clerk and him assaulting and battering his teenaged sister. The representation by defendant is inaccurate. Over the applicant's objection, defendant was allowed to question applicant about his prior convictions and offer the following evidence:

> In 2020, applicant assaulted a clerk at Porterville. Applicant did not hit the clerk.[1] He knocked coffee cups down because she would not sell him **[*4]** coffee because he was not wearing a mask. Applicant was convicted for this incident. (MOH/SOE at p. 8:42- 45.)
>
> In 2017 or 2018, applicant was convicted of assaulting his younger sister...In a public place, applicant took back the phone he gave her. The police were called. The applicant left marks on his sister's arm where he restrained her. Applicant leg swept his sister to stop her from hitting him. (MOH/SOE at p. 9:1-8.)

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[1] Applicant did hit the store clerk with coffee. (Exhibit A.)

Furthermore, over applicant's objection, Exhibit A, an article about applicant's 2020 assault on the store clerk was admitted into evidence. The applicant admitted to assaulting a store clerk and assaulting and battering his younger sister. Based on this evidence, it is undisputed that applicant has a propensity for violence against women. As such, defendant's desire to prove applicant's psychological tendency to violence against women was clearly established without the need to belabor the point.

CREDIBILITY OF WITNESSES

In a bench trial, the trial court is the "sole judge" of witness credibility. (*Davis v. Kahn (1970) 7 Cal.App.3d 868, 874, 86 Cal. Rptr. 872*.) The trial judge may believe or disbelieve uncontradicted witnesses if there is any rational ground for doing so. (*Id.*) The fact finder's determination of the veracity **[*5]** of a witness is final. (*People v. Bobeda (1956) 143 Cal.App.2d 496, 500, 300 P.2d 97*.) Credibility determinations thus are subject to extremely deferential review. (*La Jolla Casa de Manana v. Hopkins (1950) 98 Cal.App.2d 339, 345-346, 219 P.2d 871* ["[A] trial judge has an inherent right to disregard the testimony of any witness … The trial judge is the arbiter of the credibility of the witnesses"].) (*Schmidt v. Superior Court (2020) 44 Cal.App.5th 570, 582, 257 Cal. Rptr. 3d 699* [emphasis added].)

Furthermore, in workers' compensation proceedings, a WCJ's credibility determinations are "entitled to great weight because of the [WCJ's] 'opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand … .' [Citation.]" (*Garza v. Workmen's Comp. App. Bd. (1970) 3 Cal.3d 312, 318-319 [90 Cal. Rptr. 355, 475 P.2d 451, 35 Cal.Comp.Cases 500]*.)

Applicant's Testimony

Initially, Mr. Diaz was about 15' feet away from applicant working on his knees. (MOH/SOE at p. 7:38-39.)

Applicant called Mr. Diaz over to look at the mistake he made on the roof. (*Id.* at p. 7:39-41.) As they looked at the mistake together, applicant was standing to the right of Mr. Diaz who was 1 1/2 arm's length away from him. (*Id.* at p. 5:26-28.) As words were exchanged, Mr. Diaz stepped to applicant and started punching him. (*Id.* at p. 5:28-29.) Applicant fell to his knees. (*Id.* at p. 5:29.) Mr. Diaz kept punching applicant and kicked his ribs on the left side. (*Id.* at p. 5:29-30.) Mr. Diaz took off **[*6]** applicant's toolbelt. (*Id.* at p. 5:30- 31.) The fight lasted 20 to 30 seconds. (*Id.* at p. 8:29.) The fight stopped because guards from below yelled "Stop!" (*Id.* at p. 8:29-30.)

Leonardo Diaz' Testimony

Mr. Diaz was at the edge of the HVAC unit. (MOH/SOE at p. 14:41-42.) Applicant, who was aggressive, angry, muttering, and threatening, approached Mr. Diaz. (*Id.* at p. 14:41; 14:44-45.) Applicant got into Mr. Diaz' personal space. (*Id.* at p. 14:42-43.) Mr. Diaz felt the threat of bodily harm from applicant. (*Id.* at pp. 14:42-45; 15:27-28; 16:12-13; 16:35-38; 17:29.) Mr. Diaz pushed applicant back to get him out of his personal space. (*Id.* at p. 15:1.) Then, applicant charged Mr. Diaz. (*Id.* at p. 15:1-2.) Mr. Diaz hit applicant and he fell. (*Id.* At p. 15:4-5.) Mr. Diaz also fell because he tripped over some items on the floor of the roof. (*Id.* at p. 15:5-6.) Applicant and Mr. Diaz wrestled or scuffled on the roof. (*Id.* at p. 15:6-7.) Mr. Diaz punched applicant at least three times. (*Id.* at p. 17:16-17.) The incident lasted up to five minutes. (*Id.* at p. 16:41-42.)

The applicant's testimony about the altercation is not credible. Mr. Diaz' testimony about the altercation is not credible. Both **[*7]** applicant and Mr. Diaz provided conflicting testimony which portrayed him in the most favorable light. The limited testimony from applicant and Mr. Diaz that is the same is considered a fact.

Part of the credibility determination in this case was seeing applicant and Mr. Diaz in person. Applicant is slightly shorter than Mr. Diaz, but much heavier.[2] The applicant's weight is not muscle weight; he is unfit/fat. Mr. Diaz' weight, though less, is muscle weight; he is fit. Physically, Mr. Diaz is stronger and clearly capable of winning a physical altercation between the two men. In light of this obvious disparity in physical fitness and strength, on day of trial, applicant's attorney even asked Mr. Diaz if he works-out; Mr. Diaz said no. (*Id.* at p. 16:13.)

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[2] Applicant is 5'7" tall and 245 pounds; Mr. Diaz is 5'9' tall and 195 pounds. (Exhibit AA at p. 3.)

With this in mind, defendant's initial aggressor defense fails. Specifically, Mr. Diaz testified at length that the physical part of the altercation began when applicant got into his personal space or "bubble" and made him fearful or afraid of harm. (MOH/SOE at pp. 14:42- 45; 15:27-28; 16:12-13; 16:35-38; 17:29.) Based on the physical appearance of applicant and Mr. Diaz, the undersigned does not believe Mr. Diaz was afraid of this applicant **[*8]** at any point during their brief working relationship and ongoing. This lack of fear and knowledge of his superior, physical capabilities is reflected in the fact that at least twice, Mr. Diaz testified that he fell to the ground during the altercation because he tripped (*Id.* at p. 15:5-6; 17:13-14) not because the applicant physically took him down.

Furthermore, the undersigned does not believe this applicant stepped to Mr. Diaz and got into his personal space. The altercation occurred at 11:25 a.m., an investigation of the altercation began at 11:26 a.m., and a police report was filed. (Exhibit AA.) Mr. Diaz did not contemporaneously report that applicant first got into his personal space causing him fear. (Exhibit AA at p. 5.) Deputy LaRue heard the loud verbal argument between applicant and Mr. Diaz. (*Id.* at p. 6.) Deputy LaRue heard Mr. Diaz tell applicant to go home. (*Id.*) Deputy LaRue saw Mr. Diaz walk towards applicant. (*Id.*) Deputy LaRue did not see who threw the first punch, (*Id.*) but we know that Mr. Diaz did. (MOH/SOE at pp. 5:28-29; 16:33.)

Defendant argues the undersigned erred in relying on the statement of Deputy LaRue, Butte County Sheriff[']s Office investigative report. **[*9]** (Exhibit AA.) Generally, the proceedings are not bound by the common law or by statutory rules of evidence and procedure but the court may make inquiry in the manner, through oral testimony and records, that is best calculated to ascertain the substantial rights of the parties. (*Labor Code §§ 5708*, *5709*; see also, *Gill v. Workers' Comp. Appeals Bd. (1985) 167 Cal.App.3d 306, 310 213 Cal. Rptr. 140, 50 Cal.Comp.Cases 258*.) This rule allows for significant latitude in the admission of relevant evidence. Then, once admitted the weight and sufficiency of the evidence are matters to be determined by the trier of fact and more weight may be given to the evidence presented by one party as opposed to the evidence presented by another. (*Labor Code, § 5312*; *Cal. Code Regs., tit. 8, § 10348*; see also *Clendaniel v. Industrial Acc. Com. (1941) 17 Cal.2d 659, 111 P.2d 314, 6 Cal.Comp.Cases 85.*)

Exhibit AA was offered jointly by the parties. The document was prepared by a law enforcement officer after a contemporaneous investigation. Deputy LaRue is not only a law enforcement officer, but also the best non-party witness available. Furthermore, defendant was given an opportunity to call witnesses on day of trial—defendant rested. Deputy LaRue heard applicant and Mr. Diaz arguing, he looked up and saw Mr. Diaz approaching applicant followed by punches—this was not a great span time and more clearly aligns with applicant's assertion that Mr. Diaz approached him and **[*10]** punched him. Hence, Mr. Diaz' repeated, adamant testimony that applicant stepped to him, got into his personal space or "bubble" and caused him fear is found not credible.

CONCLUSION

For the foregoing reasons, I recommend that the Petition for Reconsideration be denied.

Sarah L. Lopez

Workers' Compensation Administrative Law Judge

Dated: January 19, 2024

Aguilar v. B&S Plastics, 2024 Cal. Wrk. Comp. P.D. LEXIS 58

Workers' Compensation Appeals Board (Board Panel Decision)

February 27, 2024, Opinion Filed

W.C.A.B. No. ADJ16655371—WCAB Panel: Commissioners Razo, Capurro, Chair Zalewski

Reporter
2024 Cal. Wrk. Comp. P.D. LEXIS 58 *

Lauriano Aguilar, Applicant v. B&S Plastics dba Waterway Plastics, Safety National Casualty Company, administered by Tristar Risk Management, Defendants

Status:

Publication Status: **CAUTION:** This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: Reconsideration is *granted*, and the December 21, 2023 decision is *affirmed in part* and *amended in part*.

Core Terms

layoff, termination notice, credible, RECONSIDERATION, termination, notice

Headnotes

Post-Termination Claims—WCAB, granting reconsideration, amended WCJ's decision to find that applicant's claim for industrial injury was barred by *Labor Code § 3600(a)(10)* post-termination defense, when defendant established that applicant was laid off from his employment on 7/22/2022, and filed injury

claim after notice of layoff, that burden then shifted to applicant to establish exception to post-termination defense, and that although applicant asserted that *Labor Code § 3600(a)(10)(A)* exception, allowing claims where employer had notice of injury prior to layoff, was applicable to his claim because he reported his injury to supervisor before he was laid off, WCJ found that applicant's testimony regarding notice was not credible, and that testimony of applicant's supervisor, who denied applicant reported injury, was more credible and supported finding that applicant's claim was barred. [See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 11.02[3][a]*, *21.03[1][a]*; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[7].]

Counsel

[*1] For applicant—Blomberg, Benson & Garrett

For defendants—Tobin Lucks

Panel: Commissioner Jose H. Razo; Commissioner Joseph V. Capurro; Chair Katherine A. Zalewski

Opinion By: Commissioner Jose H. Razo

Opinion

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, amend the WCJ's decision to reflect that compensation is barred by *Labor Code*[1] *section 3600(a)(10)*, and otherwise affirm the decision of December 21, 2023.

The WCJ's Findings and Order (F&O) determined that the testimony of defense witness Carlos Mora was more credible than that of the applicant, and based thereon, that applicant did not sustain injury arising out of and in the course of employment. (Finding of Fact No. 1.)

The WCJ's Report also discusses the bar to compensation found in *Labor Code section 3600(a)(10)*, which provides in relevant part:

> *(10)* Except for psychiatric injuries governed by *subdivision (e) of Section 3208.3*, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, **[*2]** and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:
>
> > *(A)* The employer has notice of the injury, as provided under Chapter 2 (commencing with *Section 5400*), prior to the notice of termination or layoff.
> >
> > *(B)* The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.
> >
> > *(C)* The date of injury, as specified in *Section 5411*, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.

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

(*Lab. Code, § 3600(a)(10)*.)

The initial burden in asserting a post-termination bar to compensation rests with the defendant, who must establish that the claim for compensation was filed after a notice of termination or layoff, including voluntary layoff, and that the claim is for an injury occurring prior to the time of notice of termination or layoff. Here, applicant alleges a specific injury occurring on July 11, 2022. (Minutes of Hearing and Summary of Evidence, dated July 11, 2023, at p. 2:8.) Applicant further testified he was laid off the same **[*3]** month as the injury, and the employee separation form in evidence reflects a layoff date of July 22, 2022. (Ex. A, Employee Separation Form, dated July 22, 2022.) Applicant's DWC-1 claim is dated August 20, 2022, and was filed in the Electronic Adjudication Management System (EAMS) on September 7, 2022. Thus, defendant has established that there was an actual layoff, and that applicant's claim for a specific injury was filed after notice of termination or layoff.

Once the defendant has made the initial showing necessary to a post-termination defense, the burden shifts to applicant to establish one of the available exceptions listed in *subdivisions (a)(10)(A) through (D)*.

Here, applicant asserts the exception of *subdivision (a)(10)(A)* applies because he reported the injury to supervisor Carlos Mora prior to his layoff. (Minutes of Hearing, dated July 11, 2023, at p. 4:17.) Therefore, applicant has the burden of demonstrating, by a preponderance of the evidence that the employer had notice of injury, as provided under Chapter 2 (commencing with *Section 5400*), prior to the notice of termination or layoff. (*Lab. Code, § 3202.5*.)

In determining whether applicant met this burden, the WCJ relied on the testimony of Mr. Mora, who denied that applicant reported any injuries. (Minutes **[*4]** of Hearing, December 13, 2023, at p. 2:17.) The WCJ's Report observes that she found the testimony of Mr. Mora to be direct and credible, while the testimony of applicant was inconsistent and not credible. (Report, at p. 3.) The Report also notes that applicant has not offered other credible evidence to establish a report of injury prior to layoff. (*Ibid.*) Accordingly, the Report concludes that defendant made a prima facie showing of a claim filed after notice of termination or layoff, that applicant has not met his burden of establishing an exception to the post-termination bar, and that compensation is barred pursuant to *section 3600(a)*. We accord to the WCJ's credibility determinations the great weight to which they are entitled. (*Garza v. Workmen's Comp. Appeals. Bd. (1970) 3 Cal. 3d 312 [90 Cal. Rptr. 355, 475 P.2d 451] [35 Cal. Comp. Cases 500]*.) Following our review of the record we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s).

We have also considered whether any of the other exceptions available under *3600(a)(10)(A)–(D)* would be applicable herein. As is discussed above, the record does not establish that the claimed injury was reported to the employer prior to the notice of termination or layoff (*subsection (a)(10)(A)*. In addition, there is no evidence of medical **[*5]** records existing prior to notice of termination or layoff containing evidence of the injury (*subsection (a)(10)(B)*). Applicant's claimed specific date of injury pursuant to *section 5411* was not made subsequent to the notice of termination or layoff but prior to the effective date of such termination or layoff (*subsection (a)(10)(C)*). Finally, applicant does not claim cumulative injury, obviating the exception for a date of injury pursuant to *section 5412* occurring on or after the notice of termination or layoff (*subsection (a)(10)(D)*). Accordingly, applicant has not met the burden of establishing that any of the exceptions available under *section 3600(a)(10)(A)-(D)* are applicable.

Applicant's Petition also contends that Mr. Mora "could not have knowledge to perceive or to recollect the incident since he was not present in the plastic fabrication operation of the company where … Mr. Aguilar's claimed injury occurred." (Petition, at p. 3:12.) However, we find this argument unpersuasive because it was *applicant* who testified that he reported the injury to Mr. Mora, and on that basis asserted the exception to a post-termination filing available under *subdivision (A)*. (Minutes of Hearing, dated July 11, 2023, at p. 4:17.)

Applicant also contends that the WCJ should have accorded less weight to Mr. Mora's testimony **[*6]** because the witness continued to work for the employer and "would fear losing his job with the employer's recent layoffs." (Petition, at 3:16.) However, applicant elicited no testimony from the witness supporting this claim and offers no citation to the evidentiary record that would otherwise undermine the WCJ's credibility determination.

Accordingly, we concur with the WCJ's analysis as set forth in the Report that compensation herein is barred under *section 3600(a)(10)*. Given the bar to compensation, we will amend the Findings of Fact to reflect that applicant claims injury to the face and right shoulder on July 11, 2022, and that compensation is barred by *Labor Code section 3600(a)(10)*.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of December 21, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision issued on December 21, 2023 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

1. **LAURIANO AGUILAR**, born [], while employed on July 11, 2022, as an assembler, occupational group number 320, at Oxnard, California, by **B&S PLASTICS DBA WATERWAY PLASTICS**, claims to have sustained injury arising out of and in the **[*7]** course of employment to the face and right shoulder.

2. Compensation is barred by *Labor Code section 3600(a)(10)*.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Jose H. Razo

I concur,

Commissioner Joseph V. Capurro

Chair Katherine A. Zalewski

Vasquez v. Magnuson Tire Pros, 2024 Cal. Wrk. Comp. P.D. LEXIS 49

Workers' Compensation Appeals Board (Board Panel Decision)

February 20, 2024 Opinion Filed

W.C.A.B. No. ADJ8227110—WCJ Michael Joy (LBO); WCAB Panel: Commissioners Razo, Capurro, Deputy Commissioner Schmitz (concurring, but not signing)

Reporter
2024 Cal. Wrk. Comp. P.D. LEXIS 49 *

Moises Vasquez, Applicant v. Magnuson Tire Pros, Mid-Century Insurance Company, Defendants

Status:

Publication Status: **CAUTION:** This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: The Petition for Reconsideration is *denied*.

Core Terms

undersigned, workers' compensation, Reconsideration, parties, suspend, Notice, locate

Headnotes

Workers' Compensation Appeals Board Powers—Administration of Awards—Unavailable Applicants—WCAB, denying reconsideration, affirmed WCJ's order that defendant void all proceeds of applicant's workers' compensation Award which were previously paid to applicant but remained uncashed and unreturned, that ongoing payments to applicant under Award be held in trust account created for applicant, who could not be located, and that parties file quarterly accounting of trust account and their efforts to

locate applicant, when WCAB reasoned that WCJ has broad authority to implement workers' compensation laws in California and that ordering defendant to void prior payments and sequester ongoing payment into bank account, rather than allowing defendant to withhold applicant's Award money, will protect applicant's money while parties seek to locate him. [See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 1.11[3][d]*, *[6]*; Rassp & Herlick, California Workers' Compensation Law, Ch. 1, § 1.07[2].]

Counsel

[*1] For applicant—Perona, Langer, Serbin, Beck & Harrison

For defendants—Law Offices of Scott Stratman

Panel: Commissioner Jose H. Razo; Commissioner Joseph V. Capurro; Deputy Commissioner Anne Schmitz (concurring, but not signing)

Opinion By: Commissioner Jose H. Razo

Opinion

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of defendant's Petition for Reconsideration[1] and the contents of the Report 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 Report, which we adopt and incorporate only to the extent set forth in the attachment to this opinion, and the Opinion on Decision, which we adopt incorporate in its entirety, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Jose H. Razo

I concur,

Commissioner Joseph V. Capurro

Deputy Commissioner Anne Schmitz (concurring, but not signing)

* * * * *

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

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[1] Defendant filed the Petition for Reconsideration on January 3, 2024, which was unverified. Defendant filed a supplemental Petition for Reconsideration on January 4, 2024, which was verified. We will not consider the issue of supplemental pleadings further, however, because we deny the Petition on other grounds.

1. Applicant's Occupation: Tire changer

Applicant's Age: 29 at DOI

Date of **[*2]** injury: January 9, 2012

Parts of Body Injured: Various

2. Identity of Petitioner: Defendant

Timeliness: Yes

Verification: No

3. Date of Order: December 4, 2023

4. Petitioner's Contentions: That despite answering ready for the underlying trial and obtaining a Finding and Award without knowing the Applicant's whereabouts, that Defendant should now be able to suspend payment of the Award.

II

STATEMENT OF THE CASE AND FACTS

The applicant sustained an admitted specific injury. Substantial discovery took place given the seriousness of the injury. Sometime before the Findings and Award on the underlying case, it appears the Applicant became unavailable. Counsel for both parties appeared at trial on May 2, 2022, and expressed their joint desire to go on the record to obtain an Award. The undersigned continued the proceedings with notice on the Minutes of Hearing that Applicant should appear, otherwise his case could be heard without his participation.

At the continued trial of June 15, 2022, the undersigned instead ordered on the Minutes of Hearing that the Applicant appear at the next hearing, otherwise the matter would proceed forward. At the August 1, 2022, trial, the matter proceeded on the record **[*3]** and a Findings and Award issued in this matter. Defendant subsequently petitioned the court to suspend payment of the Award on February 9, 2023, as payments of the Award were going uncashed and unreturned.

[Publisher's Note: As indicated above, the Appeals Board adopted only a part of the WCJ's Report. Pages 2 and 3 of the WCJ's Report were not adopted and not included below.]

The undersigned issued a Notice of Intention (NOI), dated March 20, 2023, to modify payment of the Award, essentially having Defendant void all outstanding payments, issue payments to a bank account created for the Applicant, and to have the parties file a quarterly accounting of the account and their efforts to locate the Applicant. Defendant objected to this NOI on March 29, 2023. From these pleadings, the matter eventually went to trial on September 18, 2023, and the undersigned issued a Findings and Order (F&O) along with Opinion on Decision (Opinion), dated December 4, 2023. The F&O was consistent with the previously issued NOI. It is from this F&O that Defendant, through counsel, files a timely, but unverified, Petition for Reconsideration (Recon).

III

DISCUSSION

***

The Court's F&O is a better method of protecting the Applicant than suspending payment of the Award.

The Appeals Board has continuing jurisdiction over all its orders, decisions, and awards.[7] Awards may subsequently be **[*4]** amended after notice and opportunity to be heard.[8] The manner of payment may be specified by the Appeals Board.[9] The legislature has granted broad latitude to the Appeals Board to implement the workers' compensation system's laws.[10] Moreover, workers' compensation laws "shall be liberally construed" to protect injured workers.[11]

As discussed in the Opinion, there are concerns regarding Defendant's proposal to suspend payment of the Award. The money from the Award is now the Applicant's, not the carriers. Although money is "held in trust" at times in our proceedings, that frequently arises for attorney fee splits which are resolved fairly quickly and between sophisticated parties, not a severely injured Applicant. In this instance, it is uncertain if the Applicant will resurface tomorrow, next week, next year, or ever. The fact is that there is now an Award that has not been challenged by any party and it is now the Applicant's money. Placing the proceeds in an independent FDIC insured bank account protects the money. The F&O also incentivizes the parties to actually locate the Applicant.

The Labor Code provides "broad authority" to the Appeals Board to implement workers' compensation laws **[*5]** in the state.[12] Ordering payments voided and paid out to an account addresses the concerns of Defendant in having checks "out in the wild." It also accomplishes substantial justice by protecting Applicant's Award from any business disruption with Defendant. The Recon also asserts that payment of "any fees/costs" is unfair to Defendant. The undersigned appreciates how this might be the initial impression; however, that is the very way the system itself is set up. Defendant is already responsible for numerous ancillary costs in administering a claim, e.g., parking at medical appointments.

The Recon also asserts that there is no time limitation on the F&O. While it is true that the F&O does not "expire" on its face, the undersigned notes specifically that the F&O would remain in effect until the Order is rescinded.[13] It would be unfair to put a definite time limit on the F&O given that the Award deals with a Life Pension, which by its nature has no defined duration and only expires upon the Applicant's death. Defendant maintains its right to bring a new petition and revisit the issue. The undersigned could reasonably foresee Defendant bringing a petition in the future, after having produced **[*6]** the required quarterly reports and continued efforts to locate the Applicant, and having a more compelling argument at that time to possibly rescind the F&O and suspend payment of the Award.[14] Due Process rights for Defendant are protected in this instance as Defendant could renew its arguments with a new Petition after having made further documented efforts to locate the Applicant. The F&O and this mechanism specifically protects the Due Process rights of both sides.

The Recon also asserts that Applicant must be held responsible for failing to participate in the proceedings, as well as not cashing any of the checks or making his whereabouts known.[15] The undersigned notes that the parties appeared at three trial settings before submitting the matter on the record before the Award issued. Defendant

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[7] *Labor Code 5803*

[8] Id.

[9] *Labor Code 5801*

[10] *Labor Code 133*

[11] *Labor Code 3202*

[12] *Labor Code 133*

[13] F&O, Order C

[14] Right now the Award is still relatively new and continued efforts to locate the Applicant would be reasonable; however, in the future, the balancing of equities might shift in Defendant's favor.

[15] Recon, Page 6, Lines 21–23

assented to the matter going forward and did not challenge the Award at any time. The time to properly raise challenges to Applicant's whereabouts would have been prior to engaging the Court's time on the matter. The District Office has now devoted time to two trials, a petition, NOI, objection, and now the Recon. These concerns should have been raised prior to the underlying trial, not after **[*7]** agreeing to allow the matter to go forward and obtaining a favorable result in the Award, given the range of the underlying evidence. Defendant cannot agree to the Award, then argue it is unfairly prejudiced when payment becomes an issue.

IV

CONCLUSION

The undersigned respectfully recommends that the Petition for Reconsideration be DENIED for the reasons set forth above.

Michael Joy

Workers' Compensation Administrative Law Judge

Dated: January 3, 2024

* * * * *

OPINION ON DECISION

Defendant's Petition / Court's Notice of Intention

The Appeals Board has continuing jurisdiction over all its orders, decisions, and awards.[1] Awards may subsequently be amended after notice and opportunity to be heard.[2] The manner of payment may be specified by the Appeals Board.[3] The legislature has granted broad latitude to the Appeals Board to implement the workers' compensation system's laws.[4] Moreover, workers' compensation laws "shall be liberally construed" to protect injured workers.[5]

The issue is essentially how to handle the Applicant's Award payments as the Applicant now appears to be absent. The parties previously answered ready at trial and the undersigned issued a Findings and Award, dated October 21, 2022. **[*8]** [6]

Defendant's Petition asks that the undersigned suspend payments of the Award.[7] 7 The undersigned is not inclined to do this for a variety of reasons. Although Defendant is a large insurance carrier, there is a possibility still that they may become insolvent or undergo some form of business disruption that may make it difficult for the Applicant to receive his Award. Additionally, the Award is now the Applicant's money, not the carrier's money. It would be

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[1] *Labor Code 5803*

[2] Id.

[3] *Labor Code 5801*

[4] *Labor Code 133*

[5] *Labor Code 3202*

[6] The undersigned notes that the parties do not have any belief that the Applicant might be deceased. Assuredly, the parties would not have answered ready for a trial with any reasonable belief that the Applicant was deceased. 7 EAMS DOC ID 45203566

[7] EAMS DOC ID 45203566

inequitable for the carrier to hold onto Applicant's money post-Award. Moreover, concerns about the Applicant's whereabouts should have been raised prior to proceeding on the record. It is not appropriate to litigate these concerns post-Award.

The undersigned's prior Notice of Intention, dated March 20, 2023, is more closely aligned with the statutory authority and principles outlined above.[8] The NOI would have the money placed in a separate bank account, subject to FDIC insurance. This would protect Applicant's money from any insolvency or business disruption. The NOI ensures that the entirety of the accrued Award, and continuing, would go into the bank account. The NOI lastly places additional onus on the parties to locate the Applicant **[*9]** and provide the undersigned with an update as to that process.

The NOI is crafted in such a way to protect the Applicant, the Applicant's Award, and accomplish substantial justice. As a result, the undersigned will issue an order consistent with the NOI.

Michael Joy

Workers' Compensation Administrative Law Judge

Dated: December 4, 2023

[8] EAMS DOC ID 76541328

Gaul (Thomas) v. Department of Corrections Inmate Claims, 2023 Cal. Wrk. Comp. P.D. LEXIS 229; 88 Cal. Comp. Cases 1196

Workers' Compensation Appeals Board (Board Panel Decision)

September 5, 2023 Opinion Filed

W.C.A.B. Nos. ADJ1655822 (LBO 0397196), ADJ8188338

Reporter
2023 Cal. Wrk. Comp. P.D. LEXIS 229 *; 88 Cal. Comp. Cases 1196 **

Thomas Gaul, Applicant v. Department of Corrections Inmate Claims, legally uninsured and adjusted by State Compensation Insurance Fund, Defendants

Status:

CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425, fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, **[**1197]** claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Prior History:

W.C.A.B. Nos. ADJ1655822 (LBO 0397196), ADJ8188338—WCJ Simon Hovakimian (LBO); WCAB Panel: Commissioners Capurro, Palugyai, Razo (concurring, but not signing)

Disposition: Defendant Department of Correction Inmate Claims' Petition for Reconsideration is *granted*, and the June 15, 2023 Joint Findings of Fact and Award is *amended*.

Core Terms

Reconsideration, parties, stipulations, inmate, average weekly earning, disability, permanent disability, undersigned, permanent, permanent disability benefits, workers' compensation, RECOMMENDATION, computed, cases, rates

Headnotes

CALIFORNIA COMPENSATION CASES HEADNOTES

Permanent Disability—Offers of Work—Adjustment in Compensation for Prison Inmates—WCAB, after granting reconsideration, affirmed WCJ's finding that applicant prison inmate was entitled to 15 percent increase in permanent disability benefits in accordance with *Labor Code § 4658(d)*, based on defendant's failure to make return-to-work offer after applicant suffered industrial injuries, and WCAB rejected defendant's reliance on *Scott v. California Department of Corrections, 2010 Cal. Wrk. Comp. P.D. LEXIS 152* (Appeals Board noteworthy panel decision), for its position that provisions of *Labor Code § 3370(a)(5)* preclude application of *Labor Code § 4658(d)* increase on benefits awarded to state prison inmates who sustain injury while incarcerated, noting that *Scott* is not binding precedent, and that *Labor Code § 3370(a)(5)* restricts inmate workers' average weekly earnings to statutorily prescribed minimum amount prescribed in *Labor Code § 4453*, but does not restrict amount of permanent disability benefits as computed in *Labor Code § 4658(d)*.

[See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 7.02[4][d][iii]*, *32.04[2]*; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, § 7.51[2].]

Counsel

[*1] For applicant—Perona, Langer, Serbin, Beck & Harrison

For defendants—State Compensation Insurance Fund

Panel: Commissioner Joseph V. Capurro; Commissioner Natalie Palugyai; Commissioner Jose H. Razo (concurring, but not signing)

Opinion By: Commissioner Joseph V. Capurro

Opinion

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Department of Correction Inmate Claims, by and through its adjusting agency State Compensation Insurance Fund, seeks reconsideration of the June **[**1198]** 15, 2023 Joint Findings of Fact and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant is entitled to 15% increase in permanent disability benefits after nine weeks of benefits in accordance with *Labor Code, section 4658(d)*.[1]

Defendant contends that per *Scott v. Cal. Dep't of Corr. (ADJ2736625 (OAK 0345167), ADJ6471430, April 26, 2010) [2010 Cal. Wrk. Comp. P.D. LEXIS 152]*, the increase in *section 4658(d)* does not apply to state prison inmates who sustained injury while incarcerated.

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

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt **[*2]** and incorporate, and for the reasons discussed below, we grant reconsideration in order to correct the June 15, 2023 Joint Findings of Fact and Award to state that applicant is entitled to 85.50 weeks of permanent disability benefits in ADJ8188338.

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[1] All statutory references are to the Labor Code unless otherwise indicated.

As the WCJ pointed out in his Report, defendant conveniently failed to address that in the Pre-trial Conference Statement as well as in trial, the parties stipulated to the increase found in section 4658(d) and improperly raised this issue for the first time in the Petition. (Pre-trial Conference Statement; Minutes of Hearing/Summary of Evidence (MOH/SOE) dated May 2, 2023, pp. 3:7–9, ¶ 7; 4:11–13, ¶7.)

Moreover, *Scott, supra, 2010 Cal. Wrk. Comp. P.D. LEXIS 152*, is a panel decision that is not binding. Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1424, fn. 6 [118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*.) Although the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive (see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, 242, fn. 7* (Appeals Board en banc)), we decline to do so.

Section 3370(a)(5) provides that in "determining temporary and permanent disability indemnity benefits for the inmate, the average weekly earnings shall be taken at not more than the minimum amount set forth in *Section 4453*." *Section 4453* provides that **[*3]** in "computing average annual earnings for purposes of permanent partial disability indemnity, except as provided in *Section 4659*[2], the average weekly earnings shall be taken at: … *(6)(D)* not less than one hundred ninety-five dollars ($195), nor more than three hundred forty-five dollars ($345), for injuries occurring on or after January 1, 2006." (*§ 4453(b)(6)(D)*.) *Section **[**1199]** 4658(d)(1)* provides that for injuries occurring on or after January 1, 2005, a 25% permanent disability rating (ADJ1655822) is computed at two thirds of the average weekly earnings for 100.75 weeks and a 22% permanent disability rating (ADJ8188338) is computed at two thirds of the average weekly earnings for 85.50[3] weeks. (*§ 4658(d)(1)*.) Two thirds of the minimum average weekly earning of $195.00 is $130.00.

Section 4658(d)(2) provides:

> (2) If, within 60 days of a disability becoming permanent and stationary, an employer does not offer the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, each disability payment remaining to be paid to the injured employee from the date of the end of the 60-day period shall be paid in accordance with paragraph (1) and increased by 15 percent. **[*4]** This paragraph shall not apply to an employer that employs fewer than 50 employees.

Defendant contends that per *Scott, supra, 2010 Cal. Wrk. Comp. P.D. LEXIS 152*, the specific provision of *section 3370(a)(5)* prevails over the general provision of *section 4658(d)(2)*. (Petition, p. 3:7–5:20.) We respectfully disagree. *Section 3370(a)(5)* restricts an inmate worker's average weekly earnings to the statutorily prescribed minimum amount set forth in *section 4453*. It does not restrict the amount of permanent disability benefits as computed in *section 4658(d)*. *Section 4658(d)* computes the amount of permanent disability benefits by applying two-thirds of the average weekly earnings and then increasing it by 15% in certain circumstances or decreasing it by 15% in other circumstances. Here, defendant admits that it did not make a return to work offer to applicant in either injury, entitling applicant to the 15% increase. (Petition, p. 2:13–14, ¶ 3.)

Accordingly, we grant reconsideration and amend the June 15, 2023 Joint Findings of Fact and Award to state that applicant is entitled to 85.50 weeks of permanent disability benefits in ADJ8188338.

For the foregoing reasons,

IT IS ORDERED that defendant Department of Correction Inmate Claims' Petition for Reconsideration of the June 15, 2023 Joint Findings of Fact and Award is **GRANTED**.

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[2] *Section 4659* computes average weekly earnings for total permanent disability, which is not the issue here, and is therefore not applicable. (*§ 4659*.)

[3] The June 15, 2023 Joint Findings of Fact and Award erroneously states 83.5 weeks. (Joint Findings of Fact and Award dated June 15, 2023, p. 3, ¶ 4.) We believe this is a typographical error.

IT IS FURTHER [*5] ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 15, 2023 Joint Findings of Fact and Award is **AMENDED** as follows:

Findings of Fact (ADJ8188338)

…
[1200]**

4. Applicant's injury caused permanent disability of 22%, entitling applicant to 85.50 weeks of disability indemnity payable at the rate of $130.00 per week for the first nine (9) weeks and seventy-four and half (76.5) weeks at a rate of 149.50 due to the *Labor Code 4658(d)* increase in the total amount of $12,606.75 less payments previously made and less applicant attorney fee.

…

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Joseph V. Capurro

I concur,

Commissioner Natalie Palugyai

Commissioner Jose H. Razo (concurring, but not signing)

* * * *

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Dates of Injury: 04/01/2010 (ADJ8188338); 05/14/2007 (ADJl655822)

Ages on DOis: 67; 64

Parts of Body Injured: lumbar spine and left hip (ADJ8188338); cervical spine and lumbar spine (ADJ1655822)

Identity of Petitioner: Defense Counsel, Tran Meltzer

Timeliness: The petition was timely filed and served on July 7, 2023.

Verification: The petition was verified

Date of Findings of Fact and Order: June **[*6]** 15, 2023

Petitioners Contentions: Petitioner contends that the *Labor Code § 4658 (d)* increase for permanent disability does not apply to inmate cases.

II

FACTS

This matter was set for a Mandatory Settlement Conference (MSC) before the undersigned on March 13, 2023. Prior to the MSC, the parties filed a Pretrial Conference Statement (PTCS) and as the parties were unable to

resolve the case, the undersigned set the matter for trial. At the trial on May 2, 2023, after it was determined that the matter would not be able to resolve, the undersigned reviewed **[**1201]** the PTCS with the parties. At this time, the parties agreed to amend the original PTCS for both cases. In addition to other stipulations on case ADJ8188338, the parties stipulated to the following:

> 7. The medical report of Agreed Medical Examiner Michael Luciano, MD, dated 12/02/2021, rates 22 percent permanent disability after apportionment, or $12,606.75 after the *Labor Code 4658(d)* increase. (Minutes of Hearing, page 4, lines 11–13)

In addition to other stipulations on case ADJ1655822, the parties stipulated to the following:

> 7. The medical report of Agreed Medical Examiner Michael Luciano, MD, dated 12/02/2021, rates 25 percent permanent disability after apportionment, or $14,886.63 **[*7]** after the *Labor Code 4658(d)* increase. (Minutes of Hearing, page 3, lines 7–9)

Based on the above, the matter was submitted, a decision was served on June 15, 2023, and it is from this decision the Petition for Reconsideration is sought.

III

DISCUSSION

THE *LABOR CODE § 4658(d)* INCREASE FOR PERMANENT DISABILTY DOES NOT APPLY TO INMATE CASES

Petitioner contends that the *Labor Code § 4658 (d)* increase for permanent disability does not apply to inmate cases. Although Petitioner makes persuasive and correct arguments as to why the *Labor Code § 4658(d)* increase does not apply to inmate cases, the fact remains that the amounts ordered by the undersigned were stipulated by the parties at the trial. The law is well established that the parties to a controversy may stipulate to the facts in a matter and the Appeals Board may thereupon make its findings and award based upon such stipulation. *Labor Code § 5702*. Stipulations are ordinarily entered into for the purpose of avoiding delay, trouble or expense and should be encouraged, as they serve to obviate the need for proof or to narrow the range of litigable issues. *County of Sacramento v. Workers' Comp. Appeals Bd (Weatherall) (2000) 77 Cal. App. 4th 1114, 1118–1120 [92 Cal. Rptr. 2d 290, 65 Cal. Comp. Cases 1]*.

While the Appeals Board has the discretion to reject factual stipulations, this does not validate capricious decision making and must not be done absent good cause. *Id. at 1119*. A poor outcome **[*8]** is not a reason to set aside a stipulation by counsel and does not sweep away the authority of said counsel to enter into the stipulation. *Id. at 1121*.

In the matter at hand, the undersigned went over the original PTCS and framed new stipulations prior to going on the record and there were no objections by the parties either at the time of submission or after the Minutes of Hearing and Order of Consolidation were served. A decision was rendered forty-four (44) days after submission and this is the first time that these two stipulations are “at issue.” The parties were represented by competent counsel, who voluntarily entered into said **[**1202]** stipulations with respect to the ratings of permanent disability of the medical reports and their corresponding values. Thus, the undersigned sees no reason to set aside these stipulations and award the amounts agreed to by the parties.

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Simon Hovakimian

Workers' Compensation Administrative Law Judge

End of Document

Salcido v. Waste Management Collection and Recycling, 2024 Cal. Wrk. Comp. P.D. LEXIS 63

Workers' Compensation Appeals Board (Board Panel Decision)

February 21, 2024 Opinion Filed

W.C.A.B. No. ADJ11237703—WCAB Panel: Commissioners Razo, Snellings, Deputy Commissioner Schmitz

Reporter
2024 Cal. Wrk. Comp. P.D. LEXIS 63 *

Ramberto Salcido, Applicant v. Waste Management Collection and Recycling, ACE American Ins. Co., adjusted by Gallagher Bassett, Defendants

Status:

Publication Status: **CAUTION:** This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: Reconsideration is *granted*, and the April 26, 2021 Findings of Fact is *affirmed*, except that Findings of Fact number 6 is *amended*.

Core Terms

reconsideration, good cause, petition for reconsideration, removal, internal medicine, body part, exhibits, treating physician, primary physician, allegations, threshold, diabetes, cases

Headnotes

Medical-Legal Procedure—Additional Qualified Medical Evaluator Panels—WCAB, granting reconsideration and applying removal standard, reversed WCJ's finding and held that applicant who filed claim for orthopedic and internal injuries through end of his employment on 1/4/2018 was entitled to additional qualified medical evaluator (QME) panel in specialty of internal medicine/gastroenterology based on testimony of orthopedic QME that it would be appropriate for different specialist to evaluate applicant's internal injuries, even though no treating physician reported that applicant sustained injuries other than orthopedic injuries, when WCAB reasoned that under *8 Cal. Code Reg. § 31.7(b)*, additional panel shall issue upon showing of good cause that QME panel in different specialty is needed, that obtaining opinion of primary treating physician and then objecting per *Labor Code § 4062* is one way to show good cause, that another way to show good cause is to ask currently-serving QME whether they are capable of commenting upon all disputed issues in case, which applicant here did, and that if currently-serving PQME is not capable of resolving all disputed medical issues, good cause exists to order additional panel; although defendant asserted that applicant could allege body part without any medical evidence of industrial injury and immediately be entitled to new QME specialty, WCAB pointed out that, in many cases, including instant case (where claim was denied), injured employee's *initial* QME appointment is obtained based solely on allegations of injury, without any reporting of primary treating physician, that allegations of injury to other body systems should be treated similarly, and that while need for expeditions resolution of cases is paramount in workers' compensation proceedings, sufficient remedies exist to combat those rare cases where litigant may request additional panels frivolously or in bad faith. [See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.11[7]*; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.53[7].]

Counsel

[*1] For applicant—Graiwer & Kaplan

For defendants—Law Offices of Slade Neighbors

Panel: Commissioner Jose H. Razo; Commissioner Craig Snellings; Deputy Commissioner Anne Schmitz

Opinion By: Commissioner Jose H. Razo

Opinion

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted the petition for reconsideration filed by applicant which seeks reconsideration of the Findings of Fact (Findings) issued on April 26, 2021, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

The WCJ found, in pertinent part, that applicant was not entitled to an additional panel in internal medicine / gastroenterology (MMG).

Applicant contends that the WCJ erred because good cause existed to order an additional panel based upon the reporting and testimony of the qualified medical evaluator (QME).

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the answer, and the contents of the WCJ's Report. Based on our review of the record and **[*2]** for the reasons discussed below, as our Decision After Reconsideration we will affirm the April 26, 2021 Finding of Fact, except that we will amend it to find that good

cause exists to issue an additional panel in Internal Medicine (MMM). As a procedural matter, we will issue an order renumbering the exhibits.

FACTUAL BACKGROUND

Applicant claims injury to various body parts, both orthopedic and internal as a cumulative trauma through January 4, 2018, which was his last date of work. Defendant denied the claim. (Defendant's Exhibit B, Notice of Denial, April 5, 2018.)

Applicant was evaluated by PQME Charles Glatstein, M.D., who issued three reports in evidence and was deposed. (Applicant's Exhibits 1 through 4.) Dr. Glatstein's reporting encompassed complaints to the neck, low back, left shoulder, and in the form of headaches. (Applicant's Exhibit 1, Report of PQME Charles Glatstein, M.D., May 22, 2018, pp. 2–4.) However, applicant also alleges internal injuries to his lungs and gastrointestinal system, and in the form of diabetes and high blood pressure. (Application for Adjudication, filed March 5, 2019.) Applicant requested an additional panel in Internal Medicine—Gastroenterology. **[*3]**

The QME took the following history:

> Mr. Salcido is under treatment by doctors at Kaiser Baldwin Park for high blood pressure and diabetes. He has had high blood pressure for approximately fifteen years and is taking medication. He has been on medication for diabetes five years. He does not know the name of his medication for hypertension or diabetes.

(Exhibit 1, *supra* at p. 5.)

Applicant's primary treater notes a history of epigastric pain with hematemesis. (Applicant' Exhibit 7, Report of Alamy Moustafa, M.D., September 5, 2019, p. 4.)

Applicant asked the QME in deposition:

> Q If the applicant is having any cardiological or internal complaints that he is alleging may have occurred as a result of his employment, would it be appropriate for him to be evaluated by an internist or the appropriate specialist, in your opinion, sir?
>
> A Yes.

(Applicant's Exhibit 4, Deposition of PQME Charles Glatstein, M.D., August 14, 2019, p. 13, lines 1–6.)

DISCUSSION

Here, applicant solely challenges the finding that he is not entitled to an additional QME panel and does not otherwise challenge the decision. If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all **[*4]** issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc)*.) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona) (2016) 5 Cal.App.5th 658, 662 [210 Cal. Rptr. 3d 101, 81 Cal.Comp.Cases 1122]*.) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See *Lab. Code, § 5904*.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes a finding regarding employment, a threshold issue. **[*5]** Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

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 [38 Cal. Rptr. 3d 922, 71 Cal.Comp.Cases 155]*; *Kleemann v. Workers' Comp. Appeals Bd. (2005) 127 Cal.App.4th 274, 280, fn. 2 [25 Cal. Rptr. 3d 448, 70 Cal.Comp.Cases 133]*.) The Appeals Board will grant removal only if the petitioner shows that significant 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, we are persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

Defendant argues that no additional QME is required in this case because "no medical providers found an industrial injury requiring an internal QME to resolve a medical dispute." (Answer to Petition for Reconsideration, June 10, 2021, p. 2, lines 12–13.) Defendant's argument appears to conflate the process for additional panels **[*6]** where a case is accepted. Where defendant has accepted liability for an injury, the compensability of an additional body part is ordinarily a medical determination to be made by the primary treating physician pursuant to *section 4062*. (See *Lab. Code, §§ 4060(a)*, *4062*.) In cases where applicant is being provided treatment, the ordinary procedure is to first obtain the opinion of the primary treating physician who "shall render opinions on all medical issues necessary to determine the employee's eligibility for compensation[.]" (*Cal. Code Regs., tit. 8, § 9785(d)*.) In cases where the additional body part is outside the expertise of the primary physician, the primary physician should refer applicant to a secondary physician who "shall report to the primary physician in the manner required by the primary physician." (*Id.* at *§ 9785(e)(3)*.) Then, the primary physician "shall be responsible for obtaining all of the reports of the secondary physicians and … incorporate, or comment upon, the findings and opinions of the other physicians[.]" (*Id.* at *§ 9785(e)(4)*.) Once the parties receive the report of the primary treating physician that either incorporates or comments upon the compensability of the additional body part, either party may object to the primary physician's report pursuant **[*7]** to *section 4062*. Upon such objection, the parties should seek agreement on obtaining an additional panel. If the parties cannot agree, then either party can petition for an order of the Appeals Board pursuant to *Rule 31.7(b)*. (*Cal. Code Regs., tit. 8, § 31.7(b)*.)[1]

The above procedure has been the traditional way to obtain an additional panel for a disputed body part in an accepted claim, but this is not an accepted claim. In denied claims, proceeding through a primary treater to obtain an additional panel is not possible.

Per *Rule 31.7(b)*, an additional panel shall issue "[u]pon a showing of good cause that a panel of QME physicians in a different specialty is needed[.]" (*Ibid.*) Obtaining the opinion of the primary treating physician, and then objecting per *section 4062* is one way to show good cause. Another way to show good cause is to ask the currently serving QME(s) whether they are capable of commenting upon all disputed issues in the case. This is precisely what applicant did. Where the currently serving QME is not capable of resolving all disputed medical issues, good cause exists to order an additional panel.

Defendant notes a concern in its answer that: "An applicant could simply allege a body part without any medical evidence of industrial injury and immediately **[*8]** be entitled to get a new QME specialty." (Answer to Petition for Reconsideration, June 10, 2021, p. 3, lines 23–26.) In essence, this is true. However, in many cases, including this one, applicant's *initial* QME appointment is obtained based solely on allegations of injury, without any reporting of a primary treating physician. Allegations of injury to other body systems should be treated the same. The need for

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[1] We note that the above procedure is not the only way to establish good cause for additional panels and in no way prevents the parties to litigation from agreeing to either an additional panel request or an agreed medical evaluator. This procedure only outlines one process for procuring an order of the Appeals Board to issue an additional panel.

expeditious resolution of cases is paramount. Sufficient remedies exist to combat those rare cases where a litigant may request additional panels frivolously or in bad faith. (*§ 5813*.)

Here, applicant alleges various internal medical complaints, which the QME has already explained are outside his area of expertise. Based upon that fact, we find that good cause exists to order an additional panel in the specialty of Internal Medicine (MMM). We find that applicant's requested panel of Internal Medicine—Gastroenterology (MMG) is not appropriate as applicant has alleged multiple internal injuries in varying specialties including cardiology, pulmonology, gastroenterology, and endocrinology.

As a technical matter, the exhibits were not properly numbered when they were initially admitted **[*9]** into evidence. Please remember that "[e]ach medical report, medical-legal report, medical record, or other paper or record having a different author/provider and/or a different date is a separate 'document' and must be listed as a separate exhibit[.]" (*Cal. Code Regs., tit. 8, § 10629(d)*.) In this case, three QME reports with three separate dates were jointly marked, in error, as Exhibit 1. Also, the three reports of Dr. Moustafa, with three separate dates were jointly marked, in error, as Exhibit 3. We have corrected this error and renumbered the exhibits.

Accordingly, as our Decision After Reconsideration we affirm the April 26, 2021 Findings, except that we amend to find that an additional panel in internal medicine is needed. We have also ordered renumbering of the exhibits and ordered the requested internal medicine panel.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued on April 26, 2021, is **AFFIRMED** except that Findings of Fact number 6 it is **AMENDED** as follows:

FINDINGS OF FACT

6. Good cause exists to order an additional panel in Internal Medicine (MMM) as applicant has alleged injury to his lungs and gastrointestinal **[*10]** system, and in the form of diabetes and high blood pressure, and further development of the record with the current QME would not be fruitful.

ORDERS

IT IS ORDERED that the exhibits admitted into evidence are renumbered as follows:

Applicant's Exhibit 1, Report of PQME Charles Glatstein, M.D., May 22, 2018

Applicant's Exhibit 2, Report of PQME Charles Glatstein, M.D., July 26, 2018

Applicant's Exhibit 3, Report of PQME Charles Glatstein, M.D., October 22, 2018

Applicant's Exhibit 4, Deposition of PQME Charles Glatstein, M.D., August 14, 2019

Applicant' Exhibit 5, Report of Alamy Moustafa, M.D., September 5, 2019

Applicant' Exhibit 6, Report of Alamy Moustafa, M.D., September 5, 2019

Applicant' Exhibit 7, Report of Alamy Moustafa, M.D., September 5, 2019

Defendant's Exhibit A, Notice of Delay, March 2, 2018

Defendant's Exhibit B, Notice of Denial, April 5, 2018

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Jose H. Razo

I concur,

Commissioner Craig Snellings

Deputy Commissioner Anne Schmitz

Ledezma (Alfredo) v. Kareem Cart Commissary and Mfg, 89 Cal. Comp. Cases 462; 2024 Cal. Wrk. Comp. LEXIS 12

Workers' Compensation Appeals Board (en banc)

April 10, 2024 Opinion Filed

W.C.A.B. Nos. ADJ8965291, ADJ10451326, ADJ10750348, ADJ15382349, ADJ15382351, ADJ16951068, ADJ16951573, ADJ16953628, ADJ16953629, ADJ16124753, ADJ16124750, ADJ17290772, ADJ16953860

Reporter
89 Cal. Comp. Cases 462 *; 2024 Cal. Wrk. Comp. LEXIS 12 **

Alfredo Ledezma, et al., Applicants v. Kareem Cart Commissary and Mfg; State Compensation Insurance Fund, et al., Defendants

Subsequent History:

Costs and fees proceeding at, Sanctions allowed by, Remanded by *LeDezma v. Commissary, 2024 Cal. Wrk. Comp. LEXIS 19 (Cal. Workers' Comp. App. Bd., May 16, 2024)*

Prior History:

[1]** Alfredo Ledezma (ADJ15382349, ADJ15382351)—WCJ Karinneh Aslanian (LAO); Roberto Beltran (ADJ8965291)—WCJ Keith Pusavat (LAO); Pedro Reyes (ADJ10451326, ADJ10750348)—WCJ Tanya Lee (AHM); Ever Meza (aka Heber Valladares) (ADJ16951068, ADJ16951573)—WCJ Elisha Landman (LAO); Sandra De Rivas (ADJ16953628, ADJ16953629)—WCJ Michael Holmes (LAO); Josefa Perdomo Flores (ADJ16124753, ADJ16124750)—WCJ Stephanie Spencer (LAO); Lennoris Doss (ADJ17290772)—WCJ Stephanie Spencer (LAO); Jovanni Hernandez (ADJ16953860)—WCJ Andrew Malagon (LAO); WCAB En Banc: Chair Zalewski, Commissioners Razo, Williams Dodd, Snellings, Capurro

Disposition: The cases are *consolidated* for the limited purpose of deciding the issues of sanctions and reasonable expenses, including attorney's fees and costs, related to the filing of petitions for reconsideration. Notice is *given* that absent written objection in which good cause to the contrary is demonstrated, the Workers' Compensation Appeals Board will order Susan Garrett (CA BAR #195580) to pay sanctions and reasonable expenses, including attorney's fees and costs. It is *ordered* that all responses to these notices by any party must be filed within twenty (20) days plus **[**2]** five (5) additional days for mailing after service of these Notices.

Core Terms

appears, sanctions, reconsideration, costs, continuance, workers' compensation, Minutes, reasonable expenses, attorney's fees, proceedings, notice, Removal, petition for reconsideration, calendar conflict, file a petition, indisputably, improper motive, willful intent, disrupt, request for a continuance, orders, notice of intent, day of trial, Garrett Law, cases, matters, consolidation, PARTIES, impose sanctions, reset

Headnotes

CALIFORNIA COMPENSATION CASES HEADNOTES

Sanctions—Bad Faith or Frivolous Conduct—WCAB, granting removal on its own motion, en banc, consolidated eight cases and issued separate notices of intention to impose sanctions of up to $20,000.00 each against attorney Susan Garrett and hearing representative Lance Garrett pursuant to *Labor Code § 5813* and *8 Cal. Code Reg. § 10421(b)*, when WCAB believed they filed petitions for reconsideration with willful intent to disrupt or delay WCAB proceedings or with improper motive, or that their actions were indisputably without merit, when Susan and Lance Garrett engaged in similar tactic of requesting series of continuances of multiple trial dates in different cases days before trial was set to begin, and then filing petitions for reconsideration of orders denying continuances in lieu of appearing for trial, effectively halting proceedings at trial level, even though they were notified by WCAB in prior decision that order denying continuance is interim order subject to petition for removal and that petition for reconsideration is not proper vehicle to challenge trial setting order, and WCAB found that, based upon timing of their filings, Susan and Lance Garrett filed petitions solely to delay trial proceedings in each case, as evidence by their failure to appear at trials, that filing petition for reconsideration does not, by itself, excuse any party from appearing at properly noticed hearing, and that filing petitions for reconsideration designed to delay trial can be described as frivolous or bad faith conduct, which is sanctionable.

[See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 23.15*; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.35[2].]

Panel: Katherine A. Zalewski, Chair; Jose H. Razo, Commissioner; Katherine Williams Dodd, Commissioner; Craig Snellings, Commissioner; Joseph V. Capurro, Commissioner

Opinion By: Chair Zalewski, Commissioners Razo, Williams Dodd, Snellings, Capurro

Opinion

ORDER OF CONSOLIDATION AND NOTICE OF INTENT TO IMPOSE SANCTIONS AND COSTS (En Banc)

We previously granted removal in these matters on our own motion to provide an opportunity to study and address the issues of sanctions and costs under *Labor Code section 5813*[1] Having completed our review, we now issue an Order of Consolidation and a Notice of Intent to Impose Sanctions and Costs (En Banc).
[*464]

To secure uniformity of decisions in the future, the Chair of the Appeals Board, upon a unanimous vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision.[2] (*§ 115*.)

We will issue an order consolidating eight (8) cases to decide the common issues of sanctions and reasonable expenses, including costs and attorney's fees. Thereafter, we will issue a notice of intent to impose sanctions of up to $2,500.00 against Susan Garrett in eight (8) instances where it appears that she filed petitions for reconsideration **[**3]** with willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board or with an improper motive, or where it appears that such actions were indisputably without merit (up to $20,000.00 total). We will also issue a notice of intent to impose sanctions of up to $2,500.00 against Lance Garrett in eight (8) instances where it appears that he filed petitions for reconsideration with willful intent to disrupt or delay

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

[2] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers' compensation administrative law judges. (*Cal. Code Regs., tit. 8, § 10325*; ***City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia) (2005) 126 Cal. App. 4th 298, 316, fn. 5 [23 Cal. Rptr. 3d 782, 70 Cal. Comp. Cases 109]***; ***Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1424, fn. 6 [118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]***.) This en banc decision is also adopted as a precedent decision pursuant to *Government Code section 11425.60(b)*.

the proceedings of the Workers' Compensation Appeals Board or with an improper motive, or where it appears that such actions were indisputably without merit (up to $20,000.00 total). Lastly, we will issue a notice of intent to award reasonable expenses, including attorney's fees and costs, associated with the petitions for reconsideration filed in each of these matters. If awarded, the issue of the amount of expenses will be deferred to the trial level, so that no response to the issue of the amount of expenses shall be filed at this time.

FACTS

These matters involve a course of conduct that appears to have occurred across eight (8) cases, involving attorney Susan Garrett and hearing representative Lance Garrett's representation of seven applicants **[**4]** and one lien claimant.[3] The Appeals Board takes judicial notice of the Electronic Adjudication Management System ("EAMS") files in each of these cases.

1. Alfredo Ledezma—ADJ15382349; ADJ15382351

On November 4, 2021, Susan Garrett filed an application for adjudication of claim ("application") alleging that applicant sustained a specific injury to the hands and fingers. (Application, ADJ15382349, November 4, 2021.) That same day, Susan Garrett filed a second application alleging that applicant sustained a cumulative injury to the back, shoulders, hand, and fingers. (Application, ADJ15382351, November 4, 2021.)

On May 25, 2023, these matters were jointly set for trial, which was scheduled for June 29, 2023. (Pre-trial Conference Statement, ADJ15382349; ADJ15382351, **[*465]** May 25, 2023.) On the day of trial, June 29, 2023, Susan Garrett filed a "Petition for Reconsideration or in the alternative Petition for Removal" objecting to the order closing discovery and setting the matter for trial. (Petition for Reconsideration or in the alternative Petition for Removal, ADJ15382349; ADJ15382351, June 29, 2023.)

On August 28, 2023, the Appeals Board issued an "Opinion and Order Dismissing Petition for **[**5]** Reconsideration and Dismissing Petition for Removal" (Opinion). The Petition for Reconsideration was dismissed as it was not timely filed. The Appeals Board noted that decisions involving intermediate procedural or evidentiary issues are not final orders and are not appropriate for reconsideration. (Opinion, August 28, 2023, p. 2 (emphasis added).) The Opinion expressly stated that: "Such interlocutory decisions include, but are not limited to, **pre-trial orders regarding** evidence, discovery, **trial setting**, venue, or similar issues." (*Id.* at p. 2, (emphasis added).) The Appeals Board noted that had the petition not been dismissed as untimely, it would have been dismissed as applicant improperly sought reconsideration of a non-final order. (*Ibid.*, (emphasis added).) The Appeals Board further denied removal as applicant failed to demonstrate irreparable harm. (*Id.* at p. 3.)

This matter was reset for trial on September 27, 2023. Lance Garrett requested a continuance due to illness. (Minutes of Hearing, ADJ15382349; ADJ15382351, September 27, 2023.) Over defendant's objection, the WCJ continued the trial to November 2, 2023. (*Ibid.*)

On October 23, 2023, Susan Garrett requested another continuance **[**6]** of the trial due to calendar conflict. Although minutes of hearing were not prepared, it appears that the WCJ granted the continuance request as the trial date was reset to November 28, 2023.

On November 16, 2023, Susan Garrett asked for a continuance of the November 28, 2023 trial date due to calendar conflict. The WCJ denied this continuance request via email to the parties. On November 28, 2023, Lance Garrett appeared on applicant's behalf; however, he claimed that he was too ill to go forward with trial. (Order Denying Petition to Dismiss, November 28, 2023; Minutes of Hearing, ADJ15382351, November 28, 2023.) Applicant's attorney was ordered to have a representative present at the next trial date. (*Ibid.*) The matter was reset for trial to occur on January 11, 2024.

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[3] Garrett Law Group is the law firm, which is apparently operated by Susan Garrett.

On January 3, 2024, Susan Garrett again requested a continuance of the trial date due to calendar conflict. On January 5, 2024, the WCJ issued an order denying the continuance request. (Joint Order, ADJ15382349; ADJ15382351, January 5, 2024.)

On the day of trial, January 11, 2024, Susan Garrett filed a "Petition for Reconsideration or in the alternative Petition for Removal" from the order denying her request for continuance. **[**7]** Applicant did not appear and no one from Garrett Law Group appeared for trial.
[*466]

2. Roberto Beltran—ADJ8965291

On June 7, 2013, Susan Garrett filed an application alleging that applicant sustained a cumulative injury to the right shoulder, back, knees, legs, head, right hand, chest, neck, and in the form of diabetes. (Application, ADJ8965291, June 7, 2013.)

Following years of discovery, defendant filed a Declaration of Readiness to Proceed (DOR) on October 6, 2023, requesting to proceed to trial on all issues. Applicant did not object.

A mandatory settlement conference occurred on December 13, 2023, where it appears that Lance Garrett disappeared. The minutes note the following:

> MR GARRETT DID NOT CHECK BACK IN WITH THE COURT AT THE APPOINTED TIME FOR SECOND CALL (9:45 AM). THE COURT WAITED UNTIL 10:00 AM TO HEAR BACK, THEN SET THE MATTER FOR TRIAL. THE MATTER HAD ALREADY BEEN CONTINUED ONCE BEFORE. PTCS DUE BY 5:00 PM.

(Minutes of Hearing, ADJ8965291, December 13, 2023.)

The matter was set for trial on January 11, 2024. On January 8, 2024, Susan Garrett filed a "Petition for Reconsideration or in the alternative Petition for Removal" from the order closing discovery and setting the matter **[**8]** for trial. Applicant did not appear at trial, nor did any representative of Garrett Law Group.

3. Pedro Reyes—ADJ10451326; ADJ10750348

Lien claimant, AV Management, filed a lien in ADJ10451326 on September 26, 2018. AV Management designated Nina Kavorkian and Lance Garrett as authorized representatives on its lien. The matter proceeded to a lien conference on September 27, 2023. (Minutes of Hearing, ADJ10451326, September 27, 2023.) The hearing was continued to the next day, September 28, 2023, where the parties completed the Pre-Trial Conference Statement and set the matter for lien trial on November 6, 2023.

On the day of the lien trial, lien claimant's representative emailed the court saying they were sick.[4] (Minutes of Hearing, ADJ10451326, November 6, 2023.) A new trial date was set for December 4, 2023. (*Ibid.*)

On December 1, 2023, defendant wrote to the court advising that lien claimant had a calendar conflict, and thus, defendant requested a continuance. The matter was reset for lien trial on January 10, 2024.

On the day of trial, January 10, 2024, Susan Garrett filed a "Petition for Reconsideration or in the alternative Petition for Removal" from the September 28, 2023 order closing **[**9]** discovery and setting the matter for lien trial. Lien claimant did not appear and no one from Garrett Law Group appeared for trial.
[*467]

4. Ever Meza, aka Heber Valladares—ADJ16951068; ADJ16951573

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[4] The minutes of hearing do not identify the lien representative that contacted the court.

On October 7, 2022, Susan Garrett filed an application alleging that applicant sustained a specific injury to the neck, back, and left shoulder. (Application, ADJ16951068, October 7, 2022.) That same day, Susan Garrett filed a second application alleging that applicant sustained a cumulative injury to the arms, wrists, hands, fingers, back, and feet. (Application, ADJ16951573, October 7, 2022.)

On December 1, 2022, Susan Garrett filed a *section 132a* claim in these cases.

On May 23, 2023, defendant filed a DOR and a petition for costs alleging that Susan Garrett cancelled a qualified medical evaluator ("QME") appointment the day before it was scheduled. Defendant further alleged that applicant did not attend the appointment. Applicant did not object to the DOR.

At the mandatory settlement conference, the matter was set for trial on the issues of costs and sanctions. (Pre-Trial Conference Statement, ADJ16951068; ADJ16951573, August 2, 2023.) The trial was set for September 5, 2023. On the day of trial, no one **[**10]** appeared for applicant. The minutes reflect the following:

> EMAIL FROM A/A OFFICE AT 6:50 AM THIS MORNING ADVISING OF FAMILY MEDICAL EMERGENCY AND REQUESTING CONTINUANCE. WCJ NOTES THAT A/A DID NOT PARTICIPATE IN PTCS THAT WAS UPLOADED AS PER WCJ DAVID ORDER AT MSC.

(Minutes of Hearing, ADJ16951573, September 5, 2023.)

Trial was reset for October 11, 2023. The October 11, 2023 trial did not proceed on the record. The minutes reflect the following:

> APPLICANT'S REPRESENTATIVE HAVING MEDICAL ISSUES; MATTER CONTINUED ON THAT BASIS; PTCS BEGAN TO BE REVIEWED WITH PARTIES BUT NOT COMPLETED.

(Minutes of Hearing, ADJ16951573, October 11, 2023.)

The trial was reset for November 1, 2023. It appears that on October 20, 2023, applicant's attorney requested another continuance due to calendar conflict. (Objection to Continuance Request, October 24, 2023.) No one appeared for applicant at the November 1, 2023 trial. The minutes of hearing reflect the following:

> AT DISCUSSION WITH PARTIES AT APPROX 9:00 AM MR GARRETT ASSERTED THAT HE WAS AT A PERSONAL MEDICAL EVALUATION. I ASKED PARTIES TO CALL BACK AT 11:00 AM. D/A CALLED BACK FOR THE 11 AM DISCUSSION BUT NEITHER MR GARRETT NOR THE INTERPRETER CALLED BACK **[**11]** IN. WCJ WAITED WITH D/A UNTIL APPROX 11:15 AM AND AT THAT TIME INSTRUCTED D/A TO ADVISE MR GARRETT THAT THEY SHOULD BOTH CALL BACK AT 1:30 PM. IT IS NOW 2:12 PM AND THERE HAS BEEN NO CONTACT BY ANYONE FROM GARRETT LAW (INCLUDING ATTORNEY GARRETT, HEARING **[*468]** REPRESENTATIVE GARRETT, NOR ANYONE ELSE ON THE APPLICANT'S BEHALF) NOR BY THE INTERPRETER. NOI TO ISSUE SANCTIONS ISSUING CONCURRENTLY AND MATTER CONTINUED TO ADDRESS THE OUTSTANDING PANEL QME ISSUES THAT ARE THE BASIS FOR THIS MATTER BEING PLACED ON THE TRIAL CALENDAR. MATTER TO BE HEARD REMOTELY.

(Minutes of Hearing, ADJ16951573, November 1, 2023.)

The trial was reset for December 20, 2023. On December 14, 2023, Susan Garrett requested another continuance of the trial due to calendar conflict. The record is unclear, but it appears that the WCJ granted this request for continuance as the trial was rescheduled for January 22, 2024.

On January 12, 2024, Susan Garrett requested another continuance due to calendar conflict. The WCJ issued an order denying the continuance request on January 16, 2024.

On the day of trial, January 22, 2024, Susan Garrett filed a "Petition for Reconsideration or in the alternative Petition for Removal" from the **[**12]** WCJ's order denying her request for continuance. Applicant did not appear and no one from Garrett Law Group appeared for trial.

5. Sandra De Rivas—ADJ16953628; ADJ16953629

On October 21, 2022, Susan Garrett filed an application alleging that applicant sustained a specific injury to the neck and right shoulder. (Application, ADJ16953628, October 21, 2022.) That same day, Susan Garrett filed a second application alleging that applicant sustained a cumulative injury to the neck, right shoulder, right arm, back, chest, and in the form of anxiety and headaches. (Application, ADJ16953629, October 21, 2022).

On May 8, 2023, defendant filed a DOR requesting an expedited hearing on a QME panel dispute. Applicant did not object to the DOR. The hearing was set for August 7, 2023. Per the minutes of hearing:

> PRIOR TO CALLING CASE, LANCE GARRETT WAS ON AT&T AND STATED "TURN SIGNAL DUMB ASS." COURT TO ISSUE NOI SANCTIONS $250.00. WHEN MR. GARRETT APPERED (*sic*) ON THIS CASE, HE INITIALLY INDICATED A HEARING REP AUTHORIZATION FORM IS IN EAMS, AND THEN INDICATED IT MAY NOT BE. AS IT IS NOT IN EAMS, AN ATTORNEY WILL NEED TO APPEAR. PER DEFENSE, ISSUE RELATES TO ADDITIONAL PANEL WERE NOTICED IN BOTH CASES. **[**13]** PER AA, THEY WERE NOT NOTICED. MATTER IS SET FOR TRIAL ON ISSUES RELATED TO QME PANEL/PANELS, AND TRIAL JUDGE TO REVIEW DOCUMENTS TO DETERMINE IF MATTER SHOULD PROCCED TO TRIAL. PTCS DUE TODAY BY 5:00 PM AND EXHIBITS ARE DUE AT LEAST 20 DAYS BEFORE TRIAL. TRIAL IS IN PERSON ABSENT ORDER FROM TRIAL JUDGE.
> **[*469]**

(Minutes of Hearing, ADJ16953628; ADJ16953629, August 7, 2023.)

The parties completed the PTCS and the matter was set for trial on September 12, 2023. At the trial, applicant did not appear. The minutes reflect the following:

> After submitting the matter, I was reminded that counsel did bring up earlier that he received an email from Mr. Garrett, and counsel indicated that there was a family matter that prevented Mr. Garrett from appearing today.

(Minutes of Hearing, ADJ16953628; ADJ16953629, September 12, 2023, p. 5, lines 10–12.)

On September 15, 2023, the WCJ issued two notices of intent to impose sanctions. The first notice was to impose sanctions of $250.00 against Lance Garrett for his use of foul language in court. The next notice was against Susan Garrett and Garrett Law Group, P.C., for their failure to appear at trial.

Susan Garrett filed an objection and explained that the failure **[**14]** to appear was because Lance Garrett was scheduled to appear for trial but was sick. (Response to Notice of Intent to Sanction, filed October 6, 2023, p. 2.) Susan Garrett questioned whether sanctions may issue against a supervising attorney when it is based on the conduct of a hearing representative. (*Ibid.*) Susan Garrett objected to the sanctions due to Lance Garrett's use of profane language on the grounds that it was an inadvertent and isolated incident. (Second Response to Notice of Intent to Sanction, filed October 6, 2023.)

On October 6, 2023, the WCJ signed the Findings and Order from the September 12, 2023 trial. The Findings and Order was served on October 10, 2023.

That same day, October 10, 2023, Susan Garrett filed a "Petition for Reconsideration or in the alternative Petition for Removal" from the WCJ's order submitting the matter for decision on September 12, 2023.

The WCJ vacated the Findings and Order and reset the matter for hearing with an order to show cause why the matter should not be resubmitted and why sanctions should not issue. (Order Vacating Order Submitting September 12, 2023 Trial; Order to Show Cause Why the Matter Should Not Be Submitted and Why Sanctions **[**15]** Should Not Be Imposed, October 16, 2023.) The WCJ ordered all parties to appear in person at the next hearing. (*Ibid.*)

The matter was set for hearing on November 30, 2023, wherein the minutes reflect the following disposition:

> ALL PARTIES WERE ORDERED TO APPEAR IN PERSON TODAY. INTERPRETER APPEARED, IN PERSON, BASED ON A REQUEST FROM AA. APPLICANT FAILED TO APPEAR. LANCE GARRETT APPEARED ON AT&T LINE, INDICATING HE IS AWAITING ADA ACCOMODATION AND ASSERTED HE AND SUSAN HAVE FLU LIKE SYMPTOMS. SUSAN GARRETT LATER APPEARED THROUGH AT&T, AND WHEN ASKED WHY SHE WAS NOT **[*470]** PERSONALLY PRESENT, SHE INDICATED SHE HAS RECEIVED AN ADA ACCOMODATION, ALLOWING HER TO APPEAR THROUGH AT&T. MATTER IS CONTINUED BY JUDGE, AND ALL PARTIES ARE ORDERED TO APPEAR AT FUTURE DATE. ISSUES ARE IN REFERENCE TO SANCTIONS AND RESUBMISSION OF PROR TRIAL. AS THE COURT HAS BEEN ADVISED ADA ACCOMODATIONS HAVE NOT BEEN GRANTED, FUTURE FAILURE TO APPEAR, ABSENT VALID ADA ACCOMODATION, SHALL RESULT IN ADDITIONAL NOI FOR SANCTIONS. PARTIES INDICATE THE DATE IS CLEAR.

(Minutes of Hearing, ADJ16953628; ADJ16953629, November 30, 2023.)

The matter was continued again with a new trial date set for January 18, 2024. Susan Garrett **[**16]** wrote a letter dated January 5, 2024, requesting a continuance due to calendar conflict. The trial was rescheduled for January 25, 2024. Susan Garrett requested another continuance on January 12, 2024, again due to calendar conflict. On January 16, 2024, the WCJ issued an order denying the continuance request.

On the day of trial, January 25, 2024, Susan Garrett filed a “Petition for Reconsideration or in the alternative Petition for Removal” from the WCJ's order denying her request for continuance. Applicant did not appear and no one from Garrett Law Group appeared for trial.

6. Josefa Flores—ADJ16124753; ADJ16124750

On April 22, 2022, Susan Garrett filed an application alleging that applicant sustained a specific injury to the hands and fingers. (Application, ADJ16124753, April 22, 2022.) That same day, Susan Garrett filed a second application alleging that applicant sustained a cumulative injury to the neck, back, shoulders, and heels. (Application, ADJ16124750, April 22, 2022).

On September 29, 2023, defendant filed a DOR, checking all issues on the form. Applicant did not object. At the hearing on November 29, 2023, the WCJ set the matter for trial, which was to occur on January **[**17]** 8, 2024. On January 3, 2024, Susan Garrett requested a continuance of the trial due to calendar conflict. The trial was rescheduled for January 24, 2024.

On January 12, 2024, Susan Garrett asked for another continuance due to calendar conflict. The WCJ denied the continuance request on January 17, 2024.

On the day of trial, January 24, 2024, Susan Garrett filed a “Petition for Reconsideration or in the alternative Petition for Removal” from the WCJ's order denying her request for continuance. Applicant did not appear and no one from Garrett Law Group appeared for trial.

7. Lennoris Doss—ADJ17290772

On January 31, 2023, Susan Garrett filed an application alleging that applicant sustained a cumulative injury to the eyes, hands, bilateral thumbs, and respiratory system. (Application, ADJ17290772, January 31, 2023.)
[*471]

On August 14, 2023, defendant filed a DOR to proceed on a panel QME dispute. At the hearing on September 25, 2023, no one for applicant appeared. (Minutes of Hearing, ADJ17290772, September 25, 2023.)

The matter was continued to November 1, 2023, where applicant again failed to appear. The WCJ issued a notice of intent to impose sanctions against Susan Garrett and Garrett Law Group, **[**18]** P.C., in the amount of $750.00. Susan Garrett did not respond to the notice of intent.

Lance Garrett appeared at the next hearing on December 12, 2023, wherein the panel dispute was set for trial. Trial was scheduled for January 11, 2024.

On January 3, 2024, Susan Garrett requested a continuance of the trial due to calendar conflict. The WCJ granted the continuance request and reset the trial for January 24, 2024. (Minutes of Hearing, ADJ17290772, January 11, 2024.)

On January 12, 2024, Susan Garrett requested another continuance due to calendar conflict. The WCJ issued an order denying the continuance request on January 16, 2024.

On the day of trial, January 24, 2024, Susan Garrett filed a "Petition for Reconsideration or in the alternative Petition for Removal" from the WCJ's order denying her request for continuance. Applicant did not appear and no one from Garrett Law Group appeared for trial.

8. Jovanni Hernandez—ADJ16953860

On October 28, 2022, Susan Garrett filed an application alleging that applicant sustained a cumulative injury to the left arm, shoulders, and feet. (Application, ADJ16953860, October 28, 2022.)

On April 14, 2023, defendant filed a DOR to set the matter for trial **[**19]** on the issue of injury arising out of and occurring in the course of employment. Applicant did not object to the DOR.

Trial was scheduled for July 24, 2023, wherein the first day of trial proceeded with applicant's testimony. The trial was continued to September 13, 2023 for further testimony. (Minutes of Hearing and Summary of Evidence, July 24, 2023, p. 1.)

On September 13, 2023, the trial was continued to October 17, 2023, with the following notation on the minutes:

> APPLICANT REP REACHED OUT TO COURT TO REQUEST CONTINUANCE DUE TO FAMILY MEDICAL MATTERS. DA DOES NOT HAVE AN OBJECTION TO CONTINUANCE. NEXT TRIAL DATE IS IN PERSON.

(Minutes of Hearing, ADJ16953860, September 13, 2023.)

On September 20, 2023, defendant requested a continuance due to calendar conflict; however, that request was not acted upon. The minutes of the continued trial date note as follows:

[*472]

> TRIAL WAS ORDERED TO BE IN PERSON. APPLICANT HEARING REP MR. GARRETT CALLED IN AND INDICATED THAT HE COULD NOT APPEAR DUE TO MEDICAL REASONS. PER HEARING REP, APPLICANT IS AVAILABLE BY PHONE TODAY. DA REQUESTS AN NOI TO DISMISS THE CASE DUE TO NON-APPEARANCE IN PERSON.
>
> TRIAL IS CONTINUED TO IN PERSON DATE. APPLICANT JOVANNI HERNANDEZ **[**20]** IS ORDERED TO APPEAR IN PERSON AND ON TIME AT 8:30AM ON THE NEXT DAY OF TRIAL.

(Minutes of Hearing, ADJ16953860, October 17, 2023.)

The trial was continued to December 20, 2023. On December 14, 2023, Susan Garrett requested a continuance of the trial due to calendar conflict. On December 15, 2023, the WCJ issued an order denying the request for continuance.

On the day of trial, December 20, 2023, Susan Garrett filed a "Petition for Reconsideration or in the alternative Petition for Removal" from the WCJ's order denying her request for continuance. Applicant did not appear and no one from Garrett Law Group appeared for trial.

DISCUSSION

I.

"Consolidation may be ordered by the Workers' Compensation Appeals Board on its own motion[.]" (Cal. Code Regs., tit. 8, § 10396(b).) Here, consolidation is appropriate as these matters involve common issues of fact and law, and consolidation avoids the issuance of duplicate or inconsistent orders and promotes the efficient use of judicial resources by deciding these matters in a single proceeding. (*Cal. Code Regs., tit. 8, § 10396(a)*.)

As discussed further below, in each of these cases, eight (8) instances total, attorney Susan Garrett and hearing representative Lance Garrett each appear to have engaged in the similar tactic **[**21]** of requesting trial continuances, then filing a petition for reconsideration of the order denying the trial continuance on or near the day of trial and then failing to appear at trial. It appears that Susan Garrett and Lance Garrett are each aware that the effect of filing a petition for reconsideration is to halt further proceedings at the trial level. (*Cal. Code Regs., tit. 8, § 10961*.) It appears that the sole purpose for seeking reconsideration was to delay a trial date after being denied a continuance. The sheer volume of petitions being filed by Susan Garrett and Lance Garrett with similar fact patterns appears to evidence an intentional course of conduct, which further warrants consolidation of these proceedings.

Thus, we issue an order consolidating the eight (8) cases discussed above so that we may address the issues of sanctions and reasonable expenses, including costs and attorney's fees.
[*473]

II.

It is every attorney's duty to supervise non-attorneys in their firm and ensure that the non-attorney's conduct "is compatible with the professional obligations of the lawyer." (*Cal. Rules of Prof'l Conduct, Rule 5.3(a)*.)[5] *Section 5700* provides that a party "may be present at any hearing, in person, by attorney, or by any other agent. …" *Section 4907* provides that "[non-attorney] **[**22]** representatives shall be held to the same professional standards of conduct as attorneys." (See *Cal. Code Regs., tit. 8, § 10401(b)*.) Per WCAB Rule 10401, "a non-attorney representative may act on behalf of a party in proceedings before the Workers' Compensation Appeals Board if the party has been informed that the non-attorney representative is not licensed to practice law by the State of California." (*Cal. Code Regs., tit. 8, § 10401(a)*.)[6]

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[5] *Business and Professions Code section 6068* provides in part that an attorney must respect the courts of justice and judicial officers (*subdivision (b)*); maintain only actions that are legal or just (*subdivision (c)*); be truthful at all times, including never to mislead a judge or judicial officer by false statement of fact or law (*subdivision (d)*); and, refrain from beginning or continuing a proceeding from "any corrupt motive" (*subdivision (g)*).

Rule 3.3 of the California Rules of Professional Conduct provides in part that a lawyer shall not: "(1) knowingly make a false statement of fact or law to a tribunal. …" *Rule 5.3* requires that: (a) "a lawyer who … possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; (b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm, shall make reasonable efforts to ensure that person's conduct is compatible with professional obligations of the lawyer; and (c) a lawyer shall be responsible for conduct of such a person that would be a violation of these rules or the State Bar Act if engaged in by a lawyer if: (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or (2) the lawyer… possesses managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person whether or not an employee of the same law firm, and knows of the conduct at a time when its consequences be avoided or mitigated but fails to take reasonable remedial action."

[6] We note that in most of these cases, it does not appear that Susan Garrett has filed the appropriate notices required to allow a hearing representative to appear on her behalf. In many of these cases, we were unable to identify anything in the record indicating that applicant was informed that a hearing representative would appear on their behalf. Moreover, in those cases where the applicant is not informed of the use of hearing representatives and a notice of representation is not on file, it is unclear why Lance Garrett is signing petitions for reconsideration. Susan Garrett and Lance Garrett are admonished that they are required to comply with WCAB Rules, specifically:

[*474]

Section 5813 permits the Workers' Compensation Appeals Board to award reasonable expenses, including attorney's fees and costs to any party, which result from "… bad-faith actions or tactics that are **frivolous** or **solely intended to cause unnecessary delay**." (*§ 5813*, (emphasis added).)

WCAB *Rule 10421(b)* states in relevant part that:

> Bad faith actions or tactics **[**23]** that are frivolous or solely intended to cause unnecessary delay include actions or tactics that result from a willful failure to comply with a statutory or regulatory obligation, that result from a willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board, or that are done for an improper motive or are indisputably without merit.

WCAB *Rule 10421(b)* then provides a comprehensive but non-exclusive list of actions that could be subject to sanctions. As applicable here, *subdivision (b)* states that a party may be subject to sanctions where the party has engaged in the following actions:

> *(1)* Failure to appear or appearing late at a conference or trial where a reasonable excuse is not offered or the offending party has demonstrated a pattern of such conduct.
>
> *(2)* Filing a pleading, petition or legal document unless there is some reasonable justification for filing the document.
>
> ***
>
> *(4)* Failing to comply with the Workers' Compensation Appeals Board's Rules of Practice and Procedure … or with any award or order of the Workers' Compensation Appeals Board, including an order of discovery, which is not pending on reconsideration, removal or appellate review and which is not subject to a **[**24]** timely petition for reconsideration, removal or appellate review. …
>
> *(5)* Executing a declaration or verification to any petition, pleading or other document filed with the Workers' Compensation Appeals Board: *(A)* That:
>
> > *(i)* Contains false or substantially false statements of fact;
> >
> > *(ii)* Contains statements of fact that are substantially misleading;
> >
> > *(iii)* Contains substantial misrepresentations of fact;
> >
> > *(iv)* Contains statements of fact that are made without any reasonable basis or with reckless indifference as to their truth or falsity;
> > **[*475]**
> >
> > *(v)* Contains statements of fact that are literally true, but are intentionally presented in a manner reasonably calculated to deceive; and/or

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"A non-attorney representative shall file and serve a notice of representation **before** filing a document or appearing on behalf of a party unless the information required to be included in the notice of representation is set forth on an opening document." (*Cal. Code Regs., tit. 8, § 10401(c)*, (emphasis added).)

"A non-attorney representative whose name is not on the notice of representation must file a notice of appearance as provided in *rule 10751* **before** appearing before the Workers' Compensation Appeals Board." (*Cal. Code Regs., tit. 8, § 10401(f)*, (emphasis added).)

(vi) Conceals or substantially conceals material facts …

(6) Bringing a claim, conducting a defense or asserting a position:

(A) That is:

(i) Indisputably without merit;

(ii) Done solely or primarily for the purpose of harassing or maliciously injuring any person; and/or

(iii) Done solely or primarily for the purpose of causing unnecessary delay or a needless increase in the cost of litigation …

(7) Presenting a claim or a defense, or raising an issue or argument, that is not warranted under existing law …

(8) Asserting **[**25]** a position that misstates or substantially misstates the law …

(Cal. Code Regs., tit. 8, § 10421(b).)

WCAB Rule 10748 states in pertinent part that:

> Requests for continuances are inconsistent with the requirement that workers' compensation proceedings be expeditious and are not favored. Continuances will be granted only upon a clear showing of good cause.

(Cal. Code Regs., tit. 8, § 10748.)

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (Rymer v. Hagler (1989) 211 Cal. App. 3d 1171, 1180, 260 Cal. Rptr. 76; Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer) (1980) 104 Cal. App. 3d 528, 534–535 [163 Cal. Rptr. 750, 45 Cal. Comp. Cases 410]; Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer) (1978) 82 Cal. App. 3d 39, 45 [43 Cal. Comp. Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd. (2000) 81 Cal. App. 4th 1068, 1070, 1075 [97 Cal. Rptr. 2d 418, 65 Cal. Comp. Cases 650].*) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id. at p. 1075* ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; Rymer, supra, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; Kramer, supra, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, **[**26]** **trial setting**, venue, or similar issues.
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The above language has been used in dozens, if not hundreds of panel decisions issued by the Appeals Board, including the August 28, 2023 Opinion served upon Garrett Law Group in *Alfredo Ledezma* (ADJ15382349; ADJ15382351). (See, e.g., Navroth v. Mervyn's Stores, 2023 Cal. Wrk. Comp. P.D. LEXIS 318, *4; Mendoza v. Rapid Manufacturing, 2023 Cal. Wrk. Comp. P.D. LEXIS 240, *2; Ramirez v. Vons, PSI, 2022 Cal. Wrk. Comp. P.D. LEXIS 316, *5.)[7] The Appeals Board has consistently issued opinions stating that orders affecting trial setting are

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[7] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See ***Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6 [118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]***.) However, panel decisions are citable authority, and the Appeals Board may consider these decisions to the extent that their reasoning is found persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc); Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2 [257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145].) Here, we refer to these

not final orders subject to reconsideration. In sum, **an order denying a request for continuance is not a final order** because it does not resolve a threshold issue in a case. Thus, a party who disagrees with an order denying a continuance should only seek removal in response to that order, not reconsideration.

In some cases, a WCJ may issue a hybrid decision that includes both final and non-final orders, or awards. For example, a decision that finds industrial injury (a final finding), but orders further development of the record on nature and extent of injury (an interlocutory order) would be a hybrid decision. Where a party is appealing a hybrid decision, but only seeks relief with respect to an interlocutory order, or where there is **genuine** confusion as to whether a decision is final, a party may file a petition **[**27]** seeking both reconsideration and/or removal. **A party may only file an alternative petition for reconsideration where good cause exists to believe that a final decision, order, or award issued**. When a petition is titled as a petition for reconsideration, even in the alternative, the Appeals Board must process it as a petition for reconsideration, which halts proceedings at the trial level. (*Cal. Code Regs., tit. 8, § 10961* [limiting the WCJ's power to act upon filing a petition for reconsideration].) Filing an alternative petition for reconsideration when it is not warranted is sanctionable. When a party files for reconsideration in response to a denied continuance, it would appear that the sole purpose is to obtain their initial objective: stop the trial from proceeding. Here, the only orders that issued were orders denying requests for continuance. In response to these orders, Lance and Susan Garrett filed alternative petitions for reconsideration.

It appears that in each of these cases Garrett Law Group through Susan Garrett or its hearing representative Lance Garrett, while supervised by attorney Susan Garrett, requested a series of continuances of multiple trial dates. However, the requests for continuance due **[**28]** to calendar conflict were not filed when the notice of **[*477]** hearing was issued. Instead, they waited until days before trial to request a continuance. When the WCJ denied the request for continuance, **they waited until the day of trial** to file petitions for reconsideration in lieu of appearing for trial and to prevent the matters from proceeding, even though they were given notice by the Appeals Board in a prior decision that reconsideration is not proper from an order setting the matter for trial. That is, based upon the timing of their filings, it appears that they filed the petitions for reconsideration solely to delay the trial proceedings in each case, as evidenced by their action of not appearing at trial in each case and not ensuring that their client appeared. We emphasize that filing a petition for reconsideration does not by itself excuse any party from appearing at a properly noticed hearing because only the Workers' Compensation Appeals Board can excuse an appearance.[8] Moreover, their delay in seeking a continuance and filing for removal on or near the day of trial would not have provided sufficient time for the Appeals Board to act.

Filing petitions for reconsideration designed **[**29]** to delay a trial can be described as frivolous and/or bad-faith conduct, which is sanctionable. (See *United States Fire Ins. Co. v. Workers' Comp. Appeals Bd. (Palafox) (2013) 78 Cal. Comp. Cases 1021 [2013 Cal. Wrk. Comp. LEXIS 137*].) Based upon our review of the record, it appears that the following same or similar sanctionable conduct has occurred in each of these cases:

1. In *Alfredo Ledezma* (ADJ15382349; ADJ15382351), it appears that Lance Garrett signed a petition for reconsideration, which was verified by Susan Garrett, that appears to have been filed with willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board or with an improper motive, or was an action that appears to be indisputably without merit.

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panel decisions to show continuity amongst our prior panel decisions, which have repeatedly stated that orders affecting trial setting are not final orders.

[8] *WCAB Rule 10745* (*Cal. Code Regs., tit. 8, § 10745*) states in pertinent part that: "The Workers' Compensation Appeals Board may, on its own motion with or without notice, set any case for any type of hearing and may order that hearings be conducted electronically." *WCAB Rule 10752(a)* (*Cal. Code Regs., tit. 8, § 10752(a)*) requires that every party appear or have a representative appear at all hearings. *Subdivision (d)* states in part that: "[a]ny appearance required by this rule may be excused by the Workers' Compensation Appeals Board." When a petition for reconsideration is filed and a hearing is on calendar, parties must diligently coordinate with opposing counsel and the court and request that the matter be taken off calendar. Otherwise, they must appear until excused by the court.

2. In *Roberto Beltran* (ADJ8965291), it appears that Lance Garrett signed a petition for reconsideration, which was verified by Susan Garrett, that appears to have been filed with willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board or with an improper motive, or was an action that appears to be indisputably without merit.

3. In *Pedro Reyes* (ADJ10451326; ADJ10750348), it appears that Lance Garrett signed a petition for reconsideration, which was verified by a non-attorney, Sako Arutyunyan, that was filed by Susan Garrett of Garret Law **[**30]** Group, as identified in the case caption, with willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board or with an improper motive, or was an action that appears to be indisputably without merit.
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4. In *Ever Meza, aka Heber Valladares* (ADJ16951068; ADJ16951573), it appears that Lance Garrett signed a petition for reconsideration, which was verified by Susan Garrett, that was filed with willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board or with an improper motive, or was an action that appears to be indisputably without merit.

5. In *Sandra De Rivas* (ADJ16953628; ADJ16953629), it appears that Lance Garrett signed a petition for reconsideration, which was verified by Susan Garrett, that was filed with willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board or with an improper motive, or was an action that appears to be indisputably without merit.

6. In *Josefa Flores* (ADJ16124753; ADJ16124750), it appears that Lance Garrett signed a petition for reconsideration, which was verified by Susan Garrett, that was filed with willful intent to disrupt or delay the proceedings of the **[**31]** Workers' Compensation Appeals Board or with an improper motive, or was an action that appears to be indisputably without merit.

7. In *Lennoris Doss* (ADJ17290772), it appears that Lance Garrett signed a petition for reconsideration, which was verified by Susan Garrett, that was filed with willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board or with an improper motive, or was an action that appears to be indisputably without merit.

8. In *Jovanni Hernandez* (ADJ16953860), it appears that Lance Garrett signed a petition for reconsideration, which was verified by Susan Garrett, that was filed with willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board or with an improper motive, or was an action that appears to be indisputably without merit.

To be clear, the sole issue for sanctions and costs before us is the filing of petitions for reconsideration with what appears to be willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board or with an improper motive, or which appear to be actions that were indisputably without merit. Other issues involving sanctions and costs may exist in **[**32]** the record of each case and it appears that in some cases, petitions for sanctions and/or costs have been filed regarding other conduct. Our notice of intent does not preclude further action for other alleged conduct by us or once the matters are returned to the trial level.

Thus, we issue notice of our intent to impose sanctions as follows:

(1) **Sanctions of up to $2,500.00 against Susan Garrett in eight (8) instances** where it appears that she filed petitions for reconsideration with willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board or with an improper motive, or where it appears that such actions were indisputably without merit **(up to $20,000.00 total)**.

(2) **Sanctions of up to $2,500.00 against Lance Garrett in eight (8) instances** where it appears that he filed petitions for reconsideration with **[*479]** willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board or with an improper motive, or where it appears that such actions were indisputably without merit **(up to $20,000.00 total)**.

(3) **Reasonable expenses, including attorney's fees and costs**, associated with the petitions for reconsideration filed in each of these **[**33]** matters. If awarded, the issue of the amount of expenses will be deferred to the trial level.

WCAB Rule 10421(a) (*Cal. Code Regs., tit. 8, § 10421(a)*) requires that: "Before issuing such an order, the alleged offending party or attorney must be given notice and an opportunity to be heard. In no event shall the Workers' Compensation Appeals Board impose a monetary sanction pursuant to *Labor Code section 5813* where the one subject to the sanction acted with reasonable justification or other circumstances make imposition of the sanction unjust."

Therefore, Susan Garrett and Lance Garrett each may file separate written objections in which good cause is demonstrated, within twenty (20) days plus five (5) additional days for mailing (*Cal. Code Regs., tit. 8, §§ 10605(a)(1)*, *10600*) after service of this Notice. The objections shall be filed only with the Office of the Commissioners of the Workers' Compensation Appeals Board at its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102), its e-mail address (WCABgrantforstudy@dir.ca.gov), or electronically filed in the Electronic Adjudication System (EAMS). To be timely, any written response ***must be received*** at one of those addresses or electronically filed in EAMS within twenty (20) days plus five (5) additional days for mailing (*Cal. Code Regs., tit. 8, §§ 10605(a)(1)*, *10600*) after **[**34]** service of this Notice. **Untimely or misfiled responses may not be accepted or considered.**

If awarded, the issue of the amount of expenses will be deferred to the trial level, so that any response raising the issue of the amount of expenses shall not be filed at this time and will not be considered.

Accordingly, we order consolidation of these matters, and issue notices of intent to impose sanctions up to $2,500.00 for each action and award reasonable expenses, including attorney's fees and costs against Susan Garrett and separately against Lance Garrett.

For the foregoing reasons,

IT IS ORDERED that per *WCAB Rule 10396* (*Cal. Code Regs., tit. 8, § 10396*), the following cases are **CONSOLIDATED** for the limited purpose of deciding the issues of sanctions and reasonable expenses, including attorney's fees and costs, related to the filing of petitions for reconsideration:

Case Number(s)	Applicant	Defendant(s)
ADJ15382349; ADJ15382351	Alfredo Ledezma	Kareem Cart Commissary and MFG; SCIF
ADJ8965291	Roberto Beltran	Paint and Body; Clarendon National Ins. Co.

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Case Number(s)	Applicant	Defendant(s)
ADJ10451326; ADJ10750348	Pedro Reyes	Garden Fresh Restaurant Corp.; Travelers
ADJ16951068; ADJ16951573	Ever Meza, aka Heber Valladares	Homestate Hospitalities; Hartford Sacramento
ADJ16124753; ADJ16124750	Josefa **[**35]** Flores	Partners Personnel Management Services, LLC; Starr Specialty Ins. Co.
ADJ16953628; ADJ16953629	Sandra De Rivas	KHRG Wilshire LLC; Indemnity

Case Number(s)	Applicant	Defendant(s)
ADJ17290772	Lennoris Doss	Ins. Co. of North America; ESIS Yo Fab; Hartford
ADJ16953860	Jovanni Hernandez	Partners Personnel Management Services, LLC; Starr Specialty Ins. Co.

NOTICE IS HEREBY GIVEN that absent written objection in which good cause to the contrary is demonstrated, within twenty (20) days plus five (5) additional days for mailing (*Cal. Code Regs., tit. 8, §§ 10605(a)(1)*, *10600*) after service of this Notice that pursuant to *Labor Code section 5813* and *Appeals Board Rule 10421* (*Cal. Code Regs., tit. 8, § 10421*) the Workers' Compensation Appeals Board will order **SUSAN GARRETT** (CA BAR #195580), to pay sanctions and reasonable expenses, including attorney's fees and costs, as follows:

1. In *Alfredo Ledezma* (ADJ15382349; ADJ15382351), sanctions of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.

2. In *Roberto Beltran* (ADJ8965291), sanctions of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.

3. In *Pedro Reyes* (ADJ10451326; ADJ10750348), sanctions of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.

4. In **[**36]** *Ever Meza, aka Heber Valladares* (ADJ16951068; ADJ16951573), sanctions of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.

5. In *Sandra De Rivas* (ADJ16953628; ADJ16953629), sanctions of up to $2,500.00 payable to the General Fund reasonable expenses, including costs and attorney's fees.

6. In *Josefa Flores* (ADJ16124753; ADJ16124750), sanctions of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.

7. In *Lennoris Doss* (ADJ17290772), sanctions of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.

8. In *Jovanni Hernandez* (ADJ16953860), sanctions of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.
[*481]

NOTICE IS HEREBY GIVEN that absent written objection in which good cause to the contrary is demonstrated, within twenty (20) days plus five (5) additional days for mailing (*Cal. Code Regs., tit. 8, §§ 10605(a)(1)*, *10600*) after service of this Notice that pursuant to *Labor Code section 5813* and *Appeals Board Rule 10421* (*Cal. Code Regs., tit. 8, § 10421*) the Workers' Compensation Appeals Board will order **LANCE GARRETT**, to pay sanctions and reasonable expenses, including attorney's fees and costs, as follows: **[**37]**

1. In *Alfredo Ledezma* (ADJ15382349; ADJ15382351), sanctions of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.

2. In *Roberto Beltran* (ADJ8965291), sanctions of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.

3. In *Pedro Reyes* (ADJ10451326; ADJ10750348), sanctions of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.

4. In *Ever Meza, aka Heber Valladares* (ADJ16951068; ADJ16951573), sanctions of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.

5. In *Sandra De Rivas* (ADJ16953628; ADJ16953629), sanctions of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.

6. In *Josefa Flores* (ADJ16124753; ADJ16124750), sanctions of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.

7. In *Lennoris Doss* (ADJ17290772), sanctions of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.

8. In *Jovanni Hernandez* (ADJ16953860), sanctions **[**38]** of up to $2,500.00 payable to the General Fund and reasonable expenses, including costs and attorney's fees.

IT IS FURTHER ORDERED that all responses to these notices *by any party* must be filed within twenty (20) days plus five (5) additional days for mailing (*Cal. Code Regs., tit. 8, §§ 10605(a)(1)*, *10600*) after service of these Notices, and shall be filed only with the Office of the Commissioners of the Workers' Compensation Appeals Board at its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102), its e-mail address (WCABgrantforstudy@dir.ca.gov), or electronically filed in the Electronic Adjudication System (EAMS). To be timely, any written response ***must be received*** at one of those addresses or electronically filed in EAMS within twenty (20) days plus five (5) additional days for mailing (*Cal. Code Regs., tit. 8, §§ 10605(a)(1)*, *10600*) after service of this Notice.

Untimely or misfiled responses may not be accepted or considered.

No response to the issue of the amount of expenses shall be filed at this time, and any response to this notice that raises the issue of the amount of expenses will not be considered.
[*482]

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

Katherine A. Zalewski, Chair

Jose H. Razo, Commissioner

Katherine Williams Dodd, Commissioner

[39] Craig Snellings, Commissioner**

Joseph V. Capurro, Commissioner

Massachusetts Bay Insurance Company v. W.C.A.B. (Kelly, Bruce), 89 Cal. Comp. Cases 350; 2024 Cal. Wrk. Comp. LEXIS 8

Court of Appeal of California, Second Appellate District, Division One

February 16, 2024 Writ of Review Denied

Civil No. B332438

Reporter
89 Cal. Comp. Cases 350 *; 2024 Cal. Wrk. Comp. LEXIS 8 **

Massachusetts Bay Insurance Company, administered by The Hanover Insurance Group, Petitioners v. Workers' Compensation Appeals Board, Bruce Kelly, Respondents

Prior History:

W.C.A.B. No. ADJ11998537—WCJ Jiblet Croft (VNO); WCAB Panel: Commissioners Dodd, Capurro, Razo [see **[**1]** *Kelly v. Communication Technology Services, LLC, 2023 Cal. Wrk. Comp. P.D. LEXIS 249 (Appeals Board noteworthy panel decision)]*

Kelly v. Communication Technology Services, LLC, 2023 Cal. Wrk. Comp. P.D. LEXIS 249 (Aug. 29, 2023)

Disposition: Petition for writ of review denied

Headnotes

CALIFORNIA COMPENSATION CASES HEADNOTES

Medical Treatment—Utilization Review—Medical Treatment Utilization Schedule Guidelines for Traumatic Brain Injury—WCAB, denying reconsideration, affirmed WCJ's finding that applicant who suffered traumatic brain injury on 1/24/2019 while employed as wire and cable installer was entitled to inpatient neurorehabilitation, when WCAB found that there was substantial medical evidence in record establishing applicant had severe cognitive impairment due to his brain injury which made it unsafe for him to live without supervision, and WCAB concluded that inpatient rehabilitation was reasonable and necessary medical treatment based on applicable Medical Treatment Utilization Schedule guidelines for brain injuries and inpatient treatment.

[See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02*, *22.05[6]*; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10.]

CALIFORNIA COMPENSATION CASES SUMMARY
[*351]

Applicant suffered a traumatic brain injury (TBI) when he fell from a ladder on 1/24/2019, while employed as a wire and cable installer by Defendant Communication Technology Services, LLC. He subsequently developed symptoms, including dizziness, blurred vision, balance difficulties, irritability, memory problems, and other cognitive issues. In September 2019, Applicant was referred for care to David Patterson, M.D., at Casa Colina Hospital Centers for Healthcare. Dr. Patterson diagnosed Applicant with moderate to severe TBI, resulting in an array of cognitive deficits.

Applicant received inpatient rehabilitation at Casa Colina from 1/30/2020 until 5/6/2020, at which time UR denied continuation of the program. Following his discharge from Casa Colina, Applicant received home healthcare services for eight hours per day, seven days per week for 60 days. Subsequent RFAs for home healthcare and neurorehabilitation were non-certified.

On 9/9/2020, Applicant was evaluated by Marcel Ponton Ph.D., who noted Applicant's subjective complaints of positional dizziness, balance difficulties, speech problems, double vision, irritability, **[**2]** social withdrawal, decreased concentration, word finding difficulties, decreased reading comprehension, and decreased mental agility. Dr. Ponton diagnosed diffuse TBI with loss of consciousness, post-concussion syndrome, mild neurocognitive impairment, personality change, mood disorder, pseudobulbar affect (episodes of sudden uncontrollable and inappropriate laughing or crying), chronic post-traumatic stress disorder, chronic pain syndrome, and vertiginous syndrome.

On 1/26/2022, Applicant was evaluated by neurology QME Andrew Schreiber, M.D., who diagnosed a TBI with subarachnoid hemorrhage, concussion and post-concussion syndrome, diffuse axonal injury, headaches, sleep disturbance, memory disturbance, and difficulty with executive function. Dr. Schreiber determined that Applicant's cognitive and memory difficulties rendered him unable to work.

A progress report dated 5/18/2022 prepared by Dr. Patterson's associate, Marline Sangnil, M.D., stated that Applicant's care status had changed. Specifically, a neighbor who had been assisting Applicant with ADLs after his injury was no longer able to provide assistance. Dr. Sangnil described Applicant's significant functional and cognitive **[**3]** impairments, which she found created unsafe living conditions for Applicant. She also noted that Applicant had issues with medication management and had already fallen on multiple occasions, several of them leading to head trauma. Due to the significant risks of injury Applicant faced by living alone in his apartment without assistance or supervision, Dr. Sangnil strongly recommended the services of a nurse case manager (which Applicant had briefly received previously) in addition to continued therapy sessions.

On 6/2/2022, Dr. Patterson submitted an RFA for a 60-day inpatient neurorehabilitation program. Along with the RFA, Dr. Patterson submitted a medical report describing the same neurologic findings reflected in the 5/18/2022 progress report. On 6/10/2022, Defendant issued a UR non-certification of the requested treatment, finding that the treatment was not medically necessary and appropriate per the **[*352]** relevant MTUS treatment guidelines for TBIs and inpatient treatment programs. However, the UR was invalid due to lack of service on Applicant's attorney, thereby giving the WCAB jurisdiction to decide the medical dispute. The matter proceeded to trial regarding whether Applicant was **[**4]** entitled to inpatient neurorehabilitation as reasonable and necessary medical treatment.

The WCJ issued a Findings and Order concluding in pertinent respects that the inpatient neurorehabilitation requested by Dr. Patterson was reasonable and necessary to cure or relieve the effects of Applicant's industrial injury. Defendant filed a Petition for Reconsideration, contending in relevant part that Applicant did not meet his burden of proof to support the award of inpatient medical treatment. Defendant argued that the disputed treatment was not supported by the applicable MTUS guidelines, specifically pointing out that the 6/10/2022 UR determination non-certifying the treatment (although found invalid due to lack of service) applied the same guidelines relied upon by the WCJ to find that the inpatient treatment was not medically necessary and appropriate.

The WCJ submitted a report recommending that reconsideration be denied. Therein, the WCJ noted that in finding the neurorehabilitation reasonable and necessary medical treatment, she relied on evidence admitted at trial in conjunction with the MTUS guidelines for traumatic brain injuries and inpatient treatment, which, at page 210, provide **[**5]** the following indications for such treatment:

> Sufficient residual symptoms and/or signs of mostly acute TBI to necessitate ongoing and daily treatment, be it medical, physical therapy, occupational therapy, or other. Most programs are multidisciplinary and generally TBI inpatients are sufficiently severely affected to require multidisciplinary services. Most patients will have incurred severe TBI, but occasionally, patients with moderate TBI may also be benefited by these programs. Generally not used for chronic patients unless the TBI was severe and the patient is making functional gains not possible or substantially less likely in an outpatient setting.

Although Defendant argued that these were the same guidelines applied in the 6/10/2022 UR non-certification to deny the inpatient treatment, the WCJ explained that the UR reviewer apparently denied the treatment based on his determination that Applicant had not previously benefited from inpatient rehabilitation. However, Applicant credibly testified at trial that he had significantly benefitted from his previous inpatient treatment. Further, the WCJ noted that Applicant's cognitive deficits were severe, potentially creating an unsafe **[**6]** living condition, and, as Dr. Sangnil pointed out, there was a change in Applicant's care status. Accordingly, the WCJ concluded that the inpatient neurorehabilitation was reasonable and necessary medical treatment.

The WCAB denied reconsideration for the reasons stated in the WCJ's report, which the WCAB adopted and incorporated. Additionally, the WCAB pointed out that Dr. Sangnil believed Applicant's dizziness, impaired memory, vestibular dysfunction, anxiety, blurry vision, gait imbalance, migraine headaches, and insomnia constituted unsafe living conditions and that Applicant had already fallen **[*353]** on multiple occasions, resulting in further head trauma. The WCAB also noted that the WCJ found Dr. Sangnil's discussion of Applicant's condition consistent with Applicant's presentation, mood, affect, and testimony at trial. The WCAB concluded that Applicant met his burden of proving that the inpatient program was reasonable and necessary to cure or relieve the effects of his industrial injury.

Defendant filed a Petition for Writ of Review, asserting in relevant part that Applicant did not meet the MTUS guideline criteria to support the award of inpatient rehabilitation as reasonable and **[**7]** necessary medical treatment, that the reporting of Applicant's treating physician relied upon by the WCJ to award treatment made no reference to the specific treatment guidelines, and that the WCAB acted in excess of its authority by awarding treatment that was not based on the applicable MTUS guidelines.

WRIT DENIED February 16, 2024.

Counsel

For petitioners—Bradford & Barthel, LLP, by Louis A. Larres

Kwah v. San Mateo County Transit Dist., 2024 Cal. Wrk. Comp. P.D. LEXIS 32

Workers' Compensation Appeals Board (Board Panel Decision)

January 29, 2024 Opinion Filed

W.C.A.B. Nos. ADJ8893425, ADJ10186004

Reporter
2024 Cal. Wrk. Comp. P.D. LEXIS 32 *

Amos Kwah, Applicant v. San Mateo County Transit District, PSI, Cities Group, Defendants

Status:

Publication Status: **CAUTION:** This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Prior History:

W.C.A.B. Nos. ADJ8893425, ADJ10186004—WCJ Christopher Miller (OAK); WCAB Panel: Chair Zalewski, Commissioner Capurro, Deputy Commissioner Schmitz

Disposition: The Petition for Reconsideration is *denied*.

Core Terms

travel, reconsideration, workers' compensation, RECOMMENDATION

Headnotes

Medical Treatment—Reimbursement for Travel Costs—WCAB, denying reconsideration, affirmed WCJ's decision that out-of-state applicant who suffered industrial injuries to his neck, shoulders, low back, and knees in 2013 and 2015 while employed as bus driver, was entitled to reimbursement for cost of travel to California for medical care, when applicant attempted to obtain medical care for his injury in his home state of Georgia, but was unable to do so, and WCAB, weighing competing interests in this matter, found that defendant failed to provide necessary medical care to applicant in Georgia, making travel to California reasonable and necessary and justifying reimbursement award. [See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.08[1]*; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, §§ 4.01[1], 4.05[1].]

Counsel

[*1] For applicant—Kurlander, Burton & Mack

For defendants—AGM Law Offices

Panel: Chair Katherine A. Zalewski; Commissioner Joseph V. Capurro; Deputy Commissioner Anne Schmitz

Opinion By: Chair Katherine A. Zalewski

Opinion

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report 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 report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

Chair Katherine A. Zalewski

I concur,

Commissioner Joseph V. Capurro

Deputy Commissioner Anne Schmitz

* * * *

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

By timely, verified petition filed on December 12, 2023, defendant seeks reconsideration of the decision filed herein on November 17, 2023, in this case, which arises out of two injuries, in 2013 and 2015, to the neck, shoulders, low back and knees, collectively, of a bus driver who reportedly last worked in 2016. Applicant Amos Kwah has been treating **[*2]** with Dr. Babak Jamasbi for several years. He moved to Georgia, where he was able, sporadically, to receive medical care for his work-related injuries, but such treatment is not reliably available and he now seeks reimbursement for travel to California, on three occasions, to see Dr. Jamasbi. Defendant San Mateo County Transit District contests the liability for such expenses.

In the instant decision, I found that petitioner, hereinafter defendant, must reimburse applicant for the costs associated with his travel, in May, July, and August, 2023, from Georgia to California for medical care. That is now challenged. Applicant has filed an answer to the petition. I will recommend that reconsideration be denied.

BACKGROUND

As a result of one or the other of his injuries, Mr. Kwah has undergone surgical procedures to his neck (a two-level decompression and fusion, in 2014), his left shoulder (2018), his left knee (2018), and his right shoulder (2018). In an earlier decision (rendered August 6, 2020, I found that the 2013 injury had resulted in 58% permanent disability, and the 2015 injury 18%. In reviewing that decision, it appears that defendant prevailed on most of the issues, chiefly relating **[*3]** to the calculation of permanent disability.

As stated in the current decision,

> Piecing together the recent history from medical reporting and applicant's trial testimony, it appears that he was able to see physicians and obtain refills of his ongoing pharmaceutical remedies in Georgia through what he understood to be a Covid-related exception to the Medicare Secondary Payer Act, but that has expired. (Exh. A) The travel at issue, to see Dr. Jamasbi, took place in May, July, and August, 2023. (Exhs. 2, 3, 4)
>
> After trial, I calculated the total travel-related expenses claimed for the three trips to California, excluding the submitted receipts for prescription medications obtained here on the ground that medical reimbursement had not been raised at trial. The instant petition followed.

DISCUSSION

The rationale for the decision is explained in the opinion:

> Applicant's testimony, which I found candid and credible, was that he had tried unsuccessfully to find a doctor near his home in Georgia who would accept the California medical fee schedule and comply with our state's utilization review and reporting requirements. There is evidence of his attorney's attempts to work with defendant to locate **[*4]** a physician. (Exh.1) There is no evidence of any such efforts undertaken by defendant. Mr. Kwah did testify, however, that he received two pieces of correspondence from defendant on the topic. The first, from a nurse, asked that he call the nurse, which he did, and there was no return call. The second indicated that the first nurse was now gone, and applicant's case was too old to interest a local doctor. (Minutes of hearing/summary of evidence)
>
> Quite obviously, traveling from Georgia to California for monthly medical appointments is not objectively reasonable. At trial, the parties related that Dr. Jamasbi is able to conduct such visits remotely (telehealth), but that applicant's medication regimen requires regular drug screening (urine tests) because of his ongoing use of opioids, and that must be accomplished in person. A solution to this dilemma had already been devised, as it turned out: A national laboratory chain with facilities in Georgia, is available to accept California requirements and report to the doctor. The hope is that this alleviates the problem in the future. In the meantime, we have the recent past.
>
> Applicant points out that defendant in a workers' compensation matter **[*5]** has the primary duty to furnish necessary medical treatment, quoting *Bell v. Samaritan Medical Clinic, Inc. (1976) 60 Cal.App.3d 486 [131 Cal. Rptr. 582, 41 Cal.Comp.Cases 415]*: "One of the fundamental principles of the Workers' Compensation Act is that it is the employer's responsibility to provide all medical treatment reasonably required to effect the proper care and speedy recovery of injured employees." He cites, as well, *Simien v. Indust. Accid. Commn. (1956) 138 Cal.App.2nd 397 [21 Cal.Comp.Cases 10]*, *State Comp. Ins. Fund v. Wkrs. Comp. Appeals Bd. (Silva) (1977) 71 Cal.App.3d 133 [139 Cal. Rptr. 410, 42 Cal.Comp.Cases 493]*, and *Union Iron Works v. Indust. Accid. Commn. (Henneberry) (1922) 190 Cal. 33 [9 IAC 223]*

Applicant has established certain facts that bear on the issue under study: Before the travel in question, he had attempted to find a local physician (i.e., in Georgia) to provide ongoing care, both through this defendant and on his

own, without success; defendant did not, itself, initiate a meaningful search; and he did not decline any offer of appropriate treatment that would save defendant the cost of flying him to California, other than to bear that cost himself. While I applaud the solution, conveyed at trial, of having laboratory work done near applicant's home and medical appointments via telehealth, there is no indication that this could not have been accomplished before Mr. Kwah undertook the travel for which he now seeks reimbursement. Under the rather unusual circumstances presented here, the cost of that travel must be borne by this employer.

Further **[*6]** authorities are cited in applicant's answer; those will not be repeated here. (Mr. Kwah also points out that defendant's petition cites no statutory, regulatory or judicial authority for its contention that it should not bear the expenses at issue.) While, as I have indicated, traveling to California from Georgia for routine medical appointments is not "objectively reasonable," such a distance was no more so in *Braewood Convalescent Hospital v. Wkrs. Comp. Appeals Bd. (Bolton) (1983) 34 Cal.3d 159 [193 Cal. Rptr. 157, 666 P.2d 14, 48 Cal.Comp.Cases 566]*. There, an employee with a low back injury atop a lifelong problem with obesity followed the recommendation of physicians and the suggestion of a friend and enrolled in Duke University's weight-reduction program in North Carolina. The costs involved in his participation in the program and the temporary disability indemnity associated with it were found to be the responsibility of Mr. Bolton's employer.

Here, of course, the direction of travel is reversed. However, the principal is the same: Where the defendant in a workers' compensation case has not furnished or offered effective medical treatment, it relinquishes some of the control it would otherwise have over the cost of that treatment. And treatment includes travel to and from medical providers.

As stated, this defendant **[*7]** has not provided legal authority supporting denial of the care at issue. (Instead, it offers invective, unsupported by evidence, demeaning applicant's character and sincerity.) Nonetheless, the authorities cited above and in applicant's answer certainly require a measure of reasonableness. Reasonableness, however, must be analyzed in the particular context of a particular case. Here, the parties indicated at trial that they had managed to cobble together a plan whereby Mr. Kwah could continue to see Dr. Jamasbi by means of telehealth, and obtain lab work locally, in Georgia. That would obviate future travel such as that under study. It remains my hope that that plan may be successfully implemented if it has not already been put in place. In the meantime, I remain persuaded that this defendant is responsible for the costs awarded.

RECOMMENDATION

I recommend that reconsideration be denied.

Christopher Miller

Workers' Compensation Administrative Law Judge

Dated: December 26, 2023

Gonzalez v. Vermont Healthcare Center, 2024 Cal. Wrk. Comp. P.D. LEXIS 18

Workers' Compensation Appeals Board (Board Panel Decision)

February 07, 2024 Opinion Filed

W.C.A.B. No. ADJ12673751—WCJ Jerilyn Cohen (LAO); WCAB Panel: Commissioners Capurro, Snellings, Razo

Reporter
2024 Cal. Wrk. Comp. P.D. LEXIS 18 *

Francisco Gonzalez, Applicant v. Vermont Healthcare Center, LLC, and CompWest Insurance Company, Defendants

Status:

Publication Status: **CAUTION:** This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425, fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: Reconsideration is *granted*, the March 13, 2020 Findings and Order is *affirmed in part* and *amended in part*, and the matter is *returned* to the WCJ for further proceedings consistent with this opinion.

Core Terms

exposure, tuberculosis, disease, treating physician, testing, medical treatment, designate, diagnosis, petition for reconsideration, industrial injury, undersigned, workers' compensation, medical provider, second opinion, Reconsideration, RECOMMENDATION, Network, latency period, industrial, disputes, treating, further treatment, injured worker, entitlement, contracted, evaluated

Headnotes

Medical Provider Networks—Release from Medical Care—Second Opinion Process—WCAB, granting reconsideration, held that applicant who was industrially-exposed to tuberculosis while employed as

certified nurse assistant on 5/6/2019 was not permitted to designate new treating physician within defendant's medical provider network (MPN) under *Labor Code § 4616.3* and *8 Cal. Code Reg. § 9785(b)(3)*, and was not entitled to treat outside MPN based on alleged denial of medical care, after applicant's primary treating physician within MPN determined that applicant's exposure did not result in tuberculosis infection (based on negative test result) and released applicant from further medical treatment, when WCAB, relying on prior panel decisions analyzing issue, found that dispute over release from medical care does not constitute dispute over "diagnosis or recommendation for medical treatment" for purposes of applying second opinion process in *Labor Code §§ 4616.3* and *4616.4*, nor does request for second opinion MPN physician constitute request for authorization of medical treatment, that applicant's argument that she was entitled to designate new treating physician under *Labor Code § 4616.3* and *8 Cal. Code Reg. § 9785(b)(3)* misconstrued these provisions, and that applicant was entitled to no further medical treatment at defendant's expense without first being evaluated by panel QME pursuant to *Labor Code § 4061* or *4062*, but because WCJ did not address issue raised at trial as to whether applicant waived right to evaluation by panel qualified medical evaluator (QME), and record contained no evidence pertaining to this issue, matter must be returned to trial level for further development of record regarding applicant's right to QME evaluation. [See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 5.03[4]*, *[5]*; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.12[8], [9].]

Counsel

[*1] For applicant—Lexa Law Group

For defendants—CompWest

Panel: Commissioner Joseph V. Capurro; Commissioner Craig Snellings; Commissioner Jose H. Razo

Opinion By: Commissioner Joseph V. Capurro

Opinion

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the Findings and Order (F&O)[2] issued by the workers' compensation administrative law judge (WCJ) on March 13, 2020, wherein the WCJ found in pertinent part that on May 6, 2019, applicant sustained injury arising out of and occurring in the course of employment (AOE/COE), to his internal system in the form of tuberculosis exposure, and that applicant is not entitled to further medical treatment for the industrial exposure to tuberculosis.

Applicant contends that based on the provisions of *Labor Code section 4616.3* and Administrative Director (AD) *Rule 9785(b)(3)* he can designate another treating physician after being released from care by his prior physician; that defendant's refusal to allow applicant to designate a new treating physician constitutes a denial of care and applicant is entitled to receive **[*2]** treatment from a physician outside defendant's Medical Provider Network (MPN) at defendant's expense; and that based on *Labor Code section 4062(c)*, applicant has not waived his right to be evaluated by a qualified medical examiner (QME).

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[1] Commissioner Sweeney who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

[2] There appears to be a clerical error identifying the decision as a Finding & Award.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&O except that we will amend the F&O to defer the issues of applicant's entitlement to be evaluated by a QME and whether applicant is in need of further medical treatment (Finding of Fact 3), and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his pulmonary system in the form of exposure to tuberculosis while employed by defendant as a certified nurse assistant on May 6, 2019. He received treatment from Barry Huang, M.D., and in the October 4, 2019 Primary Treating Physician's Progress Report Dr. Huang indicated that applicant had no symptoms and had reached **[*3]** maximum medical improvement status. He stated that:

> [The] T spot [blood test for tuberculosis] is negative. Patient is asymptomatic with no functional deficits ... requires no further skilled attention and will be discharged from medical care. The patient has been released to full duty. Discharge as cured with no permanent impairment, work restrictions or need for future medical care.
>
> (Def. Exh. E, Dr. Huang, October 4, 2019, p. 2 [EAMS p. 6].)

On November 19, 2019, applicant's counsel sent correspondence to defendant (mail and email) designating Gary Zagelbaum, M.D., as applicant's primary treating physician (PTP). (App. Exh. 1, p. 3.) On December 13, 2019, defendant authorized transfer of care to Ronald Glousman M.D., for treatment of applicant's left wrist injury in case number ADJ12674396 (Def. Exh. A). Based on the report from Dr. Huang, defendant denied the request to designate Dr. Zagelbaum to be applicant's PTP in the present matter (ADJ12673751). (Def. Exh. B.)

The parties proceeded to an expedited hearing on December 26, 2019. The issues submitted for decision included: whether defendant may deny applicant's designation of a new treating physician within the MPN, when the previous **[*4]** MPN doctor released applicant from ongoing treatment; whether the denial constitutes a denial of care, allowing applicant to treat outside of defendant's MPN; and whether applicant waived the provisions of *Labor Code sections 4061* and *4062*. (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 26, 2019, pp. 2 - 3.)

DISCUSSION

To be timely, a petition for reconsideration must be filed with (i.e., received by) the Appeals Board within 25 days from a "final" decision that has been served by mail upon an address in California. (*Lab. Code, §§ 5900(a)*, *5903*; *Cal. Code Regs., tit. 8, former § 10507(a)(1)*, now *§ 10605(a)(1)*, former *§ 10845(a)*, now *§ 10940(a)*; former *§ 10392(a)*, now *§ 10615(b)* (eff. Jan. 1, 2020).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (*Cal. Code Regs., tit. 8, former § 10840(a)*, now *§ 10940(a)* (eff. Jan. 1, 2020).) *Section 5909* provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (*Lab. Code, § 5909*.) *Section 5315* provides the Appeals Board with 60 days within which to confirm, adopt, modify, or set aside the findings, order, decision, or award of a workers' compensation administrative law judge. (*Lab. Code, § 5315*.)

The Division of Workers' Compensation (DWC) closed its **[*5]** district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19). In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In re: COVID-19 State of Emergency En Banc (2020) 85 Cal. Comp. Cases 296 (Appeals Board en banc)*.) The district offices reopened for filing on April 13, 2020. Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices' closure was tolled until

April 13, 2020, and the Petition was timely filed. Applicant's Petition is deemed filed on April 13, 2020, and the Opinion and Order granting the Petition was issued within the 60 day period.

Regarding the contentions in the Petition, AD *rule 9785* states in part:

> If the employee disputes a medical determination made by the primary treating physician, including a determination that the employee should be released from care, the dispute shall be resolved under the applicable procedures set forth at *Labor Code sections 4060*, *4061* *4062*, *4600.5*, *4616.3*, or *4616.4*. …
>
> (*Cal. Code Regs., tit. 8, § 9785(b)(3)*.)

Pursuant to *Labor Code sections 4616.3* and *4616.4*:

> If an injured employee disputes either the diagnosis or the treatment prescribed by the treating physician, the employee may seek the opinion **[*6]** of another physician in the medical provider network. If the injured employee disputes the diagnosis or treatment prescribed by the second physician, the employee may seek the opinion of a third physician in the medical provider network.
>
> (*Lab. Code, § 4616.3(c)*.)
>
> If, after the third physician's opinion, the treatment or diagnostic service remains disputed, the injured employee may request an MPN independent medical review regarding the disputed treatment or diagnostic service still in dispute after the third physician's opinion in accordance with *Section 4616.3*. ...
>
> (*Lab. Code, § 4616.4(b)*.)

An Appeals Board panel has previously concluded that:

> [A]n MPN physician's determination that an injured worker is no longer in need of medical treatment does not constitute a "diagnosis or recommendation for medical treatment," as provided in *Section 4062(c)*, and that the applicable Administrative Director's Rules mandate that the parties follow the panel QME process to resolve a dispute over the physician's determination, and not the MPN dispute resolution process in *Section 4616.3* and *4616.4*. ¶ … As cited above, *Rule 9785(b)(3)* expressly provides that a dispute over a medical determination by a treating physician "including a determination that the employee should be released from care," must be resolved **[*7]** under the applicable procedures in *Sections 4061* and *4062*. That this mandate applies to a release from care determination by an MPN physician is made evident in *Rule 9785(a)(1)*, which includes in the definition of a "primary treating physician," a physician selected "in accordance with the physician selection procedures contained in the medical provider network pursuant to *Labor Code section 4616*." Thus ... the rules are expressly applicable to the determinations of treating physicians in the employer's MPN.
>
> (See *Acosta v. Balance Staffing Services, October 7, 2014, ADJ8751227 [2014 Cal. Wrk. Comp. P.D. LEXIS 480]*.)[3]

In a subsequent decision, the Appeals Board held that an injured worker's request for evaluation by an MPN second opinion physician did not constitute a request for authorization of medical treatment, and, instead, was equivalent to a request for a panel QME in a non-MPN case. The concurring opinion indicated that an injured worker who had been released from care by a treating physician within the MPN is entitled to resolve the dispute

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[3] Although panel decisions of the Appeals Board are not binding precedent and have no stare decisis effect, they are citable to the extent they point out the contemporaneous interpretation and application of the workers' compensation laws by the Board. (***Smith v. Workers' Comp. Appeals Bd. (2000) 79 Cal. App. 4th 530, 537, fn. 2 [94 Cal. Rptr. 2d 186, 65 Cal. Comp. Cases 277]***; *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2 [257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145, 147]*; (*Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, 242, fn. 7* [Appeals Board en banc].)

regarding the treating physician's diagnosis or treatment by either obtaining a second opinion from a doctor within the MPN or by selecting a panel QME pursuant to *Labor Code § 4062*; and that a defendant's refusal to authorize the second opinion process does not rise to level of denial of care. (See *Fernandez v. Kmart, January 12, 2016, ADJ9667092 [2016 Cal. Wrk. Comp. P.D. LEXIS 18]*.)

Applicant's **[*8]** argument that since he disputes having been released from care by PTP Dr. Huang, he is entitled to designate a new PTP misconstrues the language of *Labor Code sections 4616.3* and *4616.4* and AD *rule 9785(b)(3)*. We agree with the Appeals Board panels' analysis in the decisions noted above, that a request for a second opinion MPN physician does not constitute a request for authorization of medical treatment, and that a release from care is not a diagnosis or a recommendation for medical treatment. (*Fernandez v. Kmart, supra; Acosta v. Balance Staffing Services, supra.*)

It is important to note that having reviewed the evidence submitted at the trial, we agree with the WCJ that the record indicates:

> No objection to the report of PTP Huang was served or filed. No request for a panel was made by Applicant. No challenge was made under utilization review statutes or Independent Medical Review. No objection under *Sections 4061–4062* were served.
>
> (Report, p. 3.)

The WCJ was also correct in noting that, "There was no specific finding on the issue of the right to a PQME …" (Report, p. 9.)

Thus, under the circumstances of this matter, applicant is not entitled to designate Gary Zagelbaum, M.D., as his PTP, he is not entitled to receive treatment from Dr. Zagelbaum at defendant's expense, nor is he entitled to receive treatment for **[*9]** the May 6, 2019 injury from medical providers outside of defendant's MPN at defendant's expense.

However, the issue of whether applicant waived the provisions of *Labor Code sections 4061* and *4062* (evaluation by a QME) was raised at trial but was not addressed by the WCJ in the F&O. We see no basis for concluding that applicant has waived his right to be examined by a QME but the record does not contain evidence pertaining to that issue. The Appeals Board has the discretionary authority to develop the record when there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd. (1998) 62 Cal. App. 4th 1117, 1121–1122 [72 Cal. Rptr. 2d 898, 63 Cal. Comp. Cases 261]*.) Upon return of this matter to the WCJ the parties may further develop the record as to the issue of applicant's entitlement to be evaluated by a QME, as raised at trial. Based upon our deferral of the QME issue, and the absence of any medical evidence other than the report from Huang, we will also defer the issue of whether applicant is in need of further medical treatment to cure or relieve from the effects of the May 6, 2019 exposure to tuberculosis.

Accordingly, we affirm the F&O except that we amend the F&O to defer the issues of applicant's entitlement to be evaluated by a QME and whether applicant is in need of further medical treatment (Finding of Fact **[*10]** 3), and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued by the WCJ on March 13, 2020, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. The issues of applicant's entitlement to continued medical treatment to cure or relieve from the effects of the May 6, 2019 exposure to tuberculosis, and applicant's entitlement to be evaluated by a qualified medical examiner are deferred, jurisdiction reserved.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Joseph V. Capurro

I concur,

Commissioner Craig Snellings

Commissioner Jose H. Razo

* * * * *

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

1. Applicant, FRANCISCO GONZALEZ, was aged 43 and employed as a Certified Nurse's Assistant at Torrance, California by VERMONT HEALTHCARE CENTER LLC when he sustained injury to his internal system in the form of tuberculosis exposure arising out of and occurring **[*11]** in the course of his employment on May 6, 2019. The Employer was insured on the date of injury by COMPWEST INSURANCE COMPANY.

2. Applicant filed a verified Petition for Reconsideration on April 13, 2020 30 days after the March 13, 2020 Findings and Award issued, which is timely under the In re Covid-19 Emergency En Banc. No answer was filed by Defendants.

3. Petitioner's Contentions:

A. The WCJ was in error to find that Applicant was not entitled to designate a new treating physician after being found to not have tuberculosis.

B. The WCJ was in error in finding *Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd. (2000) 80 Cal. App. 4th 1041, 1044, 65 Cal. Comp. Cases 477*, "controlling".

C. The WCJ was in error to find make a finding on the issue of denial of care.

D. The WCJ was in error regarding the Applicant's right to a PQME.

4. The WCJ asks the indulgence of the Commissioners to offer contentions that:

A. Treatment which is testing due to an industrial exposure to a disease that is subject to a scientifically verified, well-established, reliable and objective test administered beyond the latency period should be an exception to *Labor Code section 4616.3(c)* in that second and third administrations of the same test are duplicative and therefore unreasonable.

B. After a finding by the Primary Treating Physician that the injured **[*12]** worker has not contracted the subject disease, the issue becomes one of AOE/COE, not further treatment.

II.

FACTS

1. The Petitioner sustained an admitted specific injury on May 6, 2019 phrased as "exposure to tuberculosis".

2. Primary Treating Physician Barry Huang M.D. saw the Applicant on October 4, 2019, within the Medical Provider Network, Exhibit E. At that time, five months after the incident of exposure, after a prior negative T Spot Test, and no symptoms of tuberculosis, he found the Applicant permanent and stationary, and returned the Applicant to full duty with no limitations or restrictions.

3. Petitioner counsel for Applicant designated a new internal Primary Treating Physician on November 19, 2019 outside the Medical Provider Network.

4. Defendant denied further treatment on December 13, 2019.

5. No objection to the report of PTP Huang was served or filed. No request for a panel was made by Applicant. No challenge was made under utilization review statutes or Independent Medical Review. No objection under *Sections 4061–4062* were served.

6. Applicant did not testify at trial. No information or evidence was offered regarding the current state of the Applicant's health or employment. No evidence or **[*13]** argument was offered that the testing done was inadequate, invalid or incorrect.

7. Both parties submitted Trial Briefs.

8. The Applicant is concurrently litigating a July 5, 2016 specific injury to the shoulders, neck, back, face and teeth ADJ10495048, which was not a part of this trial.

III.

DISCUSSION

A. Is Reconsideration Appropriate

Petitioner has chosen to file a Petition for Reconsideration. A Petition for Reconsideration is properly taken from a "final" order, decision or award. (*Labor Code sections 5900 (a)*, *5902*, *5903*). A final order is defined as an order "that determines the substantive right or liability of those involved in the case." (*Rymer v. Hagler (1989) 211 Cal. App. 3d 528, 534–535, 45 Cal. Comp. Cases 410, 413*; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer) (1978) 82 Cal. App. 3d 39, 45; 43 Cal. Comp. Cases 661, 665*.) An order regarding whether an Applicant may obtain a second opinion in the MPN may in itself not be a final order, given the option to obtain a panel and take the matter to trial. However, it could be argued that the instant Findings and Order was dispositive of the issue of the narrow right to obtain a second opinion from a treating doctor. A Petition to Remove is not appropriate, since given recourse to a panel qualified medical examiner, there is no irreparable harm. The undersigned cannot support the Petition for Reconsideration, given that it is not finally dispositive **[*14]** of the issue as framed by Petitioner, the right to further treatment.

B. Testing for Exposure Without Contracture of a Disease Should be an Exception to *Section 4616.3(c)*

In cases of disease exposure allegation such as AIDS, Hepatitis or Tuberculosis, the Application is not technically accurate. Exposure is the threshold issue, not the entire injury claim. The real issue is whether the worker has actually contracted the disease, in which case treatment and compensation are furnished on an industrial basis. There may be a non-physical component to the exposure portion of the case within the constraints of *Labor Code section 3208.3*, but that will also depend on the results of the unstated part of the claim, whether the worker is sick. In the instant case, the focus is on the part of the claim that was assumed rather than pled, and what happens when an exposure occurs but the disease is not found.

The instant case presents an admitted specific instance of exposure to tuberculosis. Mercifully, there is an effective, reliable scientific and evidence-based test for whether an exposure led to contraction of the disease and therefore an industrial injury. In this case, the test was negative more than twelve weeks after the exposure, **[*15]** beyond the latency period. The Applicant did not actually contract the disease. Applicant has not alleged that the test was

incorrect or invalid. This is an entirely distinguishable situation from the usual treatment issue found in the workers' compensation arena. Once the patient tests negative beyond the latency period, no treatment should be necessary as a matter of medicine.

In the usual orthopedic injury, for example a sprain of the lumbar spine, further reasonable and necessary treatment is a matter of medical judgement, where qualified and reasonable doctor's opinions could differ even in light of MTUS. In this case, the only purpose in a second opinion is to duplicate the test. There has been no allegation, testimony or evidence that the Applicant may have actually contracted the disease or that the testing was inadequate or invalid. There was no utilization review issue raised. As a matter of public policy, even before the current pandemic, it may not be reasonable to allow such workers to burden the system with multiple tests 9 months after the end of the medically known latency period.

The undersigned contends that there should be a distinction in the law for a disease exposure **[*16]** which is ultimately found negative. The law makes a special exception to the Statute of Limitations for invidious disease exposure, a lengthy and silent exposure to an industrial injury, based on public policy, In *General Foundry Service v. WCAB (Jackson), (1986) 41 Cal. 3d 331, 51 Cal. Comp. Cases 375*. Why not a special exception to treatment rules at the other end of the spectrum, where there is a specific exposure to a disease with a known latency period and a well-established medical test for the disease that proves negative?

A limitation on the burden to the Medical Provider Network of second and third opinions does not prejudice the injured worker, who has the ability to obtain a Panel Qualified Medical Examination on the issue of what is then AOE/COE, not treatment.

C. After a Finding by the Primary Treating Physician that the Injured Worker Has Not Contracted the Subject Disease, the Issue becomes AOE/COE

Petitioner in essence raises the question of the proper recourse for the Applicant who is found to have no industrial injury through a test by the PTP, yet wishes to have further treatment. After receiving the test results, the issue is whether there is an industrial injury at all, not a second or third opinion. The code sections regarding second opinions do not **[*17]** contemplate this situation. The undersigned was unable to find case law on the issue either.

The undersigned considers the rationale for second and third opinions from treating doctors an assumption that reasonable and qualified doctors may differ on the appropriate treatment or diagnosis of an injury. However, when the diagnosis is based on a simple objective, scientific based test which has not been challenged, the rationale for going from one doctor to another taking the same test long after the expiration of the latency period does not hold up. There is a public policy interest in not burdening the system with duplicative objective testing.

The Application for Adjudication alleges an injury of 'exposure to tuberculosis'. But the physical industrial injury alleged is in reality tuberculosis, not exposure to tuberculosis. In this case, the treating doctor tested the Applicant and determined that there was no disease, so there was no industrial injury. There was a diagnosis in issue by the Primary Treating Physician, but that diagnosis led to a determination of AOE/COE, not treatment or future medical care. If the Applicant did not have tuberculosis, no further treatment was necessary. **[*18]**

Here the real issue is not diagnosis or treatment, it is not nature and extent of injury, it is whether there is an industrial injury at all. The appropriate path to contest an AOE/COE determination is *section 4060 et. seq*, the panel process. There is no legislative history of *section 4616.3(c)* or any case law to offer any guidance in the interpretation of the section in the unusual situation where exposure to a disease occurred but Applicant is proved to not have the disease. The undersigned contends that there must be a distinction under the law between exposure and actually acquiring the disease. Certainly where exposure is industrial the employer should and does have an obligation to test. But if that test is negative, the employer should not have an obligation to continue to offer doctor visits that are not treating an industrial condition. At that point the direction of the case should shift to a disputed claim, so the Applicant should follow the path of *section 4060* to a panel doctor.

D. Petitioner's Contentions

Applicant's Contention 1, that the WCJ was in error to find that Applicant was not entitled to designate a new treating physician

The Applicant was released by the PTP because there was no industrial tuberculosis found. **[*19]** As described above, it is futile to repeat testing under these facts. *Labor Code section 4616.3(c)* and *Regulation 9785(b)(3)* presume treatment in the MPN. Treatment in the MPN will not occur where there is no industrial injury. If the Commissioners choose to allow the Applicant two further duplicative tests, rather than a Panel doctor's test to position the case for trial, this is a public policy decision. It is a matter of first impression. A diligent search found only two Panel Decisions interpreting *Labor Code section 4616.3(c)* or *Regulation 9785(b)(3)* in light of *Tenet, supra*, and no mention of the particular subsections in the Legislative History. There are no cases addressing the point where treatment leads to a finding of AOE/COE, where the issue is not a lengthy course of treatment, but rather a simple test such as routinely faced in tuberculosis or AIDS exposure.

Applicant's Contention 2. The WCJ was in error in finding *Tenet/Centinela Hospital Medical Center* "controlling."

Respectfully, the undersigned did not make such a finding. The case was considered, as it has not been overruled, along with other sources including *Labor Code section 4616.3(c)*, and *Regulation 9785(b)(3)*. Given the result of the testing was to find no industrial injury, the undersigned considered further testing in the MPN inappropriate, while a panel determination **[*20]** of AOE/COE was entire appropriate and useful to move the litigation forward.

Petitioner cites the only two cases the undersigned noted related to the intersection of the *Tenet* decision, *Section 4616.3(c)* and *Regulation 9785(b)(3)*, *Fernandez v. Kmart, 2016 Cal. Wrk. Comp. P.D. LEXIS 18* and *Ramirez v. A & L Staffing, 2009 Cal. Wrk. Comp. P.D. LEXIS 548*. Both cases are Board Panel decisions regarding treatment of traditional orthopedic claims with multiple body parts therefore are distinguished.

Applicant's Contention 3. The WCJ was in error to not make a finding on the issue of denial of care.

The issue of denial of care was not relevant under the Findings and Award as issued.

Applicant's Contention 4. The WCJ was in error regarding the Applicant's right to a PQME.

There was no specific finding on the issue of the right to a PQME, and the issue was not before the undersigned.

IV.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Jerilyn Cohen

Workers' Compensation Administrative Law Judge

Dated: May 8, 2020

Richter (Mark) v. Frontier Communications, 2024 Cal. Wrk. Comp. P.D. LEXIS 20; 89 Cal. Comp. Cases 381

Workers' Compensation Appeals Board (Board Panel Decision)

January 5, 2024 Opinion Filed

W.C.A.B. No. ADJ12335903

Reporter
2024 Cal. Wrk. Comp. P.D. LEXIS 20 *; 89 Cal. Comp. Cases 381 **

Mark Richter, Applicant v. Frontier Communications, Zurich, Defendants

Status:

CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425, fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California. **[**382]**

Prior History:

W.C.A.B. No. ADJ12335903—WCJ Alicia Hawthorne (SDO); WCAB Panel: Commissioners Capurro, Razo, Deputy Commissioner Schmitz (concurring, but not signing)

Disposition: Defendant's Petition for Reconsideration is *granted*, and the October 13, 2023 Findings and Award is *affirmed in part* and *amended in part*.

Core Terms

benefits, reimbursed, temporary, disability, petition for reconsideration, workers' compensation, temporary disability, disability benefits, reconsideration, RECOMMENDATION, parties, disability indemnity, time of trial, contends, carrier, Notice

Headnotes

CALIFORNIA COMPENSATION CASES HEADNOTES

Temporary Disability—Credit for Disability Benefits Paid by Employment Development Department—WCAB, granting reconsideration, amended WCJ's decision to reflect that defendant was required to pay applicant statutory maximum of 104 weeks of temporary disability benefits for period 8/25/2018 to 8/23/2020, and affirmed WCJ's finding that defendant was not entitled to credit against its temporary disability liability for one year of State Disability Insurance (SDI) paid to applicant by Employment Development Department (EDD) because there was no evidence defendant reimbursed EDD for SDI paid to applicant.

[See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 7.04[9][a]*, *31.14[1]*; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.19[1].]

Counsel

[*1] For applicant—Thomas DeBenedetto & Associates

For defendants—Floyd, Skeren, Manukian, Langevin, LLP

Panel: Commissioner Joseph V. Capurro; Commissioner Jose H. Razo; Deputy Commissioner Anne Schmitz (concurring, but not signing)

Opinion By: Commissioner Joseph V. Capurro

Opinion

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the October 13, 2023 Findings and Award issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained admitted industrial psychiatric and urological injury and injury to his back while employed as a field technician on August 18, 2018. As relevant here, the WCJ further found that "[d]efendant is not allowed to take any credit for any benefits administered by the [Employment Development Department (EDD)] and shall administer benefits such that applicant is compensated from the carrier a total of 104 weeks of temporary total disability indemnity benefits."

Defendant contends that the WCJ erred in failing to find it entitled to credit for benefits paid by EDD.
[383]**

We received an Answer from applicant. The WCJ **[*2]** prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, the contents of the Report, and we have reviewed the record in this matter. For the reasons stated in the Report, which we adopt and incorporate, except as noted below, and for the reasons discussed below, we will grant reconsideration, amend the WCJ's decision to find that applicant is entitled to temporary disability benefits from August 25, 2018 to August 23, 2020 and that defendant is entitled to credit for temporary disability payments it previously made; to affirm that defendant is not entitled to credit for benefits paid by EDD; to make an award of temporary disability; and to clarify that the award is made against the insurance carrier and not the employer. We otherwise affirm the WCJ's decision.

We do not adopt or incorporate the WCJ's recommendation that we deny reconsideration. Rather, we grant reconsideration to make a finding of applicant's entitlement to temporary disability from August 25, 2018 to August 23, 2020, based on defendant's November 3, 2020 Notice Regarding Temporary Disability **[*3]** Benefits Payment Termination. (Joint Exhibit 104). Defendant does not dispute that applicant is entitled to 104 weeks of temporary

disability or that the period of entitlement is from August 25, 2018 to August 23, 2020. In its November 3, 2020 Notice, defendant stated:

> Payments are ending because you have received a maximum 104 weeks of TTD benefits (including EDD payment from 8/25/18–8/24/19). Benefits paid to you total [$61,234.68.] Benefits were paid to you as temporary total disability: Period(s) paid were from 08/25/19 through 08/23/20 at $1,177.59 per week. Please see the attached detailed payment record for specific periods and amount paid.
>
> (Notice Regarding Temporary Disability Benefits Payment Termination, 11/3/20, Joint Exhibit 104.)

The WCJ provided the following relevant facts in the Opinion on Decision:

> Applicant alleges he is entitled to temporary disability for the statutory maximum period of 104 weeks. Parties submitted Joint Exhibit 105 dated November 3, 2020, which is the "Notice Regarding Temporary Disability Benefits Payment Start". This letter indicates payment for temporary disability commencing 8/25/19 through 8/23/2020 and continuing until applicant is able to return **[*4]** to work or the medical condition becomes permanent and stationary. The parties further submitted into evidence a letter from the defendant to the applicant dated November 3, 2020, wherein it is noted that payments were ending because he had received a maximum 104 weeks of TTD benefits (*including EDD payments from 8/25/18–8/25/19*).
> **[**384]**
>
> Included in evidence is Board Exhibit "A", a benefits printout. A review of such printout shows that defendant has only paid TTD from 08/25/2019–8/23/2020 on 11/3/2020 to applicant with no indication that EDD has ever been reimbursed.
>
> The case law provides that "When a defendant reimburses EDD for SDI, it is as if EDD never paid those benefits, and, instead, the payments were actually made to applicant by defendant, i.e., the reimbursement effectively converts the SDI payments into workers' compensation disability indemnity." *Salazar v. WTS Int'l, Inc., 2014 Cal. Wrk. Comp. P.D. LEXIS 160, *5 (Cal. Workers' Comp. App. Bd. March 10, 2014)* (See also *Lab. Code, §§ 4903(f)*, *4904(b)(1)* & *(2)*
>
> *Cal Unemp Ins Code § 2629.1*, states in relevant part:
>
> "*(e)* An employer or insurance carrier who subsequently assumes liability or is determined to be liable for reimbursement to the department for unemployment compensation disability benefits which the department has paid in lieu of other benefits shall be assessed for this liability by the department. **[*5]** In addition, the employer shall pay the department interest on the disability benefits at the annual rate provided in *Section 19521 of the Revenue and Taxation Code*. The employer shall also pay a penalty of 10 percent of the amount reimbursed to the department if the Workers' Compensation Appeals Board finds that the failure of the employer to pay other benefits upon notice by the department under this section was unreasonable and a penalty has not been awarded for the delay under *Section 5814 of the Labor Code*. All funds received by the department pursuant to this section shall be deposited in the Disability Fund.
>
> *(f)* The employer shall reimburse the department in accordance with *subdivision (e)* within 60 days of either voluntarily accepting liability for other benefits or after a final award, order, or decision of the Workers' Compensation Appeals Board."
>
> At the time of trial, no evidence was presented that EDD has been reimbursed. Therefore, defendant cannot take credit for a payment that was never made. Furthermore, at the time of trial, the parties were given an opportunity to file post-trial briefs. Defendant filed such brief on September 8, indicating that an agreement was reached to settle with EDD on the day of trial, with such settlement including interest. (Defendant **[*6]** post-trial brief, page 2, lines 23–24) Again, although a settlement may have been reached, it did NOT confirm that any payment to EDD has been made in full and final satisfaction of the agreement. Most notably, defendant fails to realize that if they had adhered to both the Labor Code and the Insurance Code as written, wherein if an

applicant is found temporarily totally disabled beyond the 104 weeks and EDD is properly reimbursed, applicant would be able to access such funds with State Disability for the timeframes beyond the statutory 104 **[**385]** weeks' timeframes. By failing to reimburse EDD, defendant inappropriately withheld applicant's own funds normally available through EDD. It has now been almost three years since defendant indicated that they are liable for TTD but have yet to reimburse EDD. Therefore, defendant is not allowed to take any credit for any benefits administered by EDD. Despite any claim that this would be a windfall the applicant, the facts clearly show that had the benefits been properly administered by defendant, applicant would have received TTD for 104 weeks and have the ability to access up to an additional 52 weeks of SDI.

(Report, at pp. 3–5, emphasis in original.) **[*7]**

There were no stipulations or evidence presented on the issue of the temporary disability indemnity rate. Therefore, we will defer that issue and order defendant to adjust payment, subject to proof, with jurisdiction reserved at the trial level if there is any dispute.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the October 13, 2023 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 13, 2023 Findings and Award is **AFFIRMED, EXCEPT** as **AMENDED** below.

FINDINGS OF FACT

* * *

4. The injury herein caused temporary disability from August 25, 2018 to August 23, 2020, for a total of 104 weeks. Defendant is entitled to credit for temporary disability payments it previously made on account thereof. Defendant is not entitled to credit for benefits paid by EDD. The temporary disability indemnity rate is deferred.

* * *

AWARD

AWARD IS MADE in favor of **MARK RICHTER** against **ZURICH NORTH AMERICA of**:

* * *

d. Temporary disability indemnity at a weekly rate to be adjusted by the parties, subject to proof, with jurisdiction reserved at the trial level if there is any dispute, **[*8]** beginning August 25, 2018 to and including August 23, 2020, less credit for any sums heretofore paid by defendant on account thereof.

[386]**

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Joseph V. Capurro

I concur,

Commissioner Jose H. Razo

Deputy Commissioner Anne Schmitz (concurring, but not signing)

* * *

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

Petitioner, Frontier Communications, by and through their attorney of record, has filed a timely, verified, petition for reconsideration and petition for removal on the standard statutory grounds, from the trial court's October 13, 2023, Findings and Award, pleading that:

1. The evidence does not justify the Findings of Fact;
2. The Findings of Fact do not support the Order, Decision or Award;
3. By the Decision and Award, the Board acted without or in excess of its powers.
4. That the petitioner has evidence which he or she could not, with reasonable diligence, have produced at the hearing.

Specifically, Petitioner contends that this Judge erred in failing to allow credit against the 104- week temporary disability cap for benefits the applicant received from EDD.

The facts surrounding the EDD lien are simple. EDD filed their **[*9]** lien with the WCAB on 9/3/2019. (EAMS DOC ID 30248549).

Applicant's claim was originally denied for benefits on November 16, 2018. Applicant proceeded to a QME with Dr. Anant Ram. Dr. Ram found applicant's injury compensable in his report dated May 23, 2019. This is over 4 years prior to the date of trial and the issuing of the Findings of Facts, Opinion on Decision. However, despite the carrier's knowledge of the EDD lien, they failed to reimburse EDD or address EDD's lien until the date of trial when this WCJ asked the parties about it.

This lien was not hidden from the petitioner; this lien was not unknown to the parties, nor was EDD not forthcoming of their lien. Despite the knowledge of the lien, the carrier did nothing to address the lien until after confronted with this issue and their disregard to applicant's rights.

Understand, applicant is only entitled to 104 weeks of TTD. If applicant is still found to be disabled after they have exhausted the 104 weeks of TTD, applicant **[**387]** can and should turn to EDD to supplement their income up to another year, if appropriate. By failing to address the lien of EDD and attempting to now take credit for 52 weeks of benefits of the 104 weeks applicant **[*10]** is entitled to, applicant loses out of 52 weeks of benefits from SDI he would have absolutely been entitled to once the TTD benefit ran out.

Petitioner contends that the applicant would be unjustly enriched by not being allowed to take credit for the EDD benefits. This argument is seriously flawed. In fact, by not allowing the petitioner to take credit for reimbursement to EDD, the applicant actually is made whole; 104 weeks of TTD and 52 additional weeks of his State Disability Indemnity.

Petitioner contends that they have now reimbursed EDD. However, at the time of trial, the issue presented to this WCJ is whether or not the petitioner is allowed to take credit for 52 weeks of payment from EDD against the 104 weeks [cap]. It is abundantly clear that at the time of the submission of this matter to the undersigned, EDD had NOT been reimbursed by the petitioner.

Whether or not there had been any agreement for reimbursement is irrelevant. At the time of submission, no payment had been made, such that the undersigned could not give credit for payments not received. Petitioner is disingenuous in their presentation that the petitioner had evidence, which he or she could not, with reasonable **[*11]** diligence, have produced at the hearing. The almost 4 years prior to the time trial is enough time to participate diligently in the administration of the claim. Petitioner had been informed that temporary total disability was an issue in which the matter was set for the MSC at the time of the Declaration of Readiness. This matter was not an Expedited hearing, such that at the time of the MSC, petitioner knew discovery would close. In addition, petitioner has improperly attached exhibits to their Petition for Reconsideration, a clear violation of *8 CCR § 10945(c)*.

However, if for some reason the Board allows documents not in evidence at the time of trial to be part of the record now, it should be noted that the Agreement entered into with EDD is with JULIUS Galliard, the agreement is executed the same day of the trial, but was not offered into evidence because either it was executed after the trial concluded or it was prior to the beginning of trial and not offered.

In addition, the date attorney for Petitioner signed the settlement on behalf of the petitioner was two years prior to the execution of EDD, thus again recognizing that the EDD lien existed in plenty of time prior to the trial but petitioner **[*12]** chose to do nothing about the lien.

Petitioner further contends that pursuant to *Salazar v. WTS Int'l, Inc.*, when a petitioner reimburses EDD for SDI, it is as if EDD never paid, First, this WCJ agrees that had petitioner reimbursed EDD at any time prior to trial, they would have been entitled to such credit. However, these were not the facts at the time of trial. No payment to EDD had been made and no proof of such payment had been submitted into evidence, In fact, the only evidence submitted on this issue indicates that no payment had been made. (See Board Exhibit A, the benefits **[**388]** printout) Second, the petitioner has failed to properly cite the case of *Salazar* such that no one reviewing the petition could look up such cite.[1] It is noted that such case was cited by this WCJ in the Opinion on Decision.

RECOMMENDATION

For the reasons discussed, it is respectfully recommended that the petition for reconsideration be denied.

Alicia Hawthorne

Workers' Compensation Administrative Law Judge

End of Document

[1] It should be noted that if petitioner is insistent that they are entitled to such credit for payments made by EDD, petitioner should refresh their memory on the requirements under *Labor Code § 4650(d)* wherein they were required to administer disputed disability payments within 14 days of acceptance of such claim to avoid a penalty.

Silva v. Inter-Con Security Systems, Inc., 2024 Cal. Wrk. Comp. P.D. LEXIS 24

Workers' Compensation Appeals Board (Board Panel Decision)

January 8, 2024 Opinion Filed

W.C.A.B. No. ADJ17366311—WCAB Panel: Commissioners Snellings, Capurro, Deputy Commissioner Sussman

Reporter
2024 Cal. Wrk. Comp. P.D. LEXIS 24 *

Jose Rivera Silva, Applicant v. Inter-Con Security Systems, Inc., insured by Hartford Fire and Casualty, administered by Sedgwick Claims Management Services, Defendants

Status:

Publication Status: **CAUTION:** This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: Applicant's Petition for Reconsideration is *granted*, and the October 27, 2023 F&O is *affirmed in part* and *amended in part*.

Core Terms

reconsideration, removal, orders, fax, workers' compensation, invalid

Headnotes

Medical-Legal Procedure—Panel Qualified Medical Evaluator Requests—WCAB, granting reconsideration and applying removal standard, rescinded WCJ's finding and held that orthopedic qualified medical evaluator (QME) panel requested by defendant was not properly procured and was, therefore, invalid, when

defendant served applicant's attorney with QME panel list via fax and email but failed to serve attorney with remaining documents required by *8 Cal. Code Reg. § 30(b)(1)(C)*, namely, paper copy of online panel request and any supporting documentation, and WCAB reasoned that where defendant failed to comply with required rules of service for panel QME requests and omitted required documents, procurement of QME panel was not valid, and absent removal, applicant would suffer substantial prejudice and irreparable harm. [See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 22.06[1][a]*, *22.11*; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.53[1].]

Counsel

[*1] For applicant—Pacific Workers

For defendants—Bradford & Barthel

Panel: Commissioner Craig Snellings; Commissioner Joseph V. Capurro; Deputy Commissioner Lisa A. Sussman

Opinion By: Commissioner Craig Snellings

Opinion

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant filed a Petition for Reconsideration of the Findings of Fact and Order (F&O) issued by a workers' compensation administrative law judge (WCJ) on October 27, 2023. By the F&O, the WCJ found that defendant's Qualified Medical Evaluator (QME) Panel #7578289 was the correct panel in this matter and ordered a medical-legal evaluation to take place pursuant to this panel.

Applicant contends that defendant improperly served applicant's attorney with the panel via fax, rather than by mail, as required by AD *Rule 30(b)(1)(C)* (*Cal. Code Regs., tit. 8, § 30(b)(1)(C)*) and that, as a result, Panel #7578289 is invalid.

We received an Answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report), recommending that reconsideration be denied.

We have considered the allegations of applicant's Petition for Reconsideration, the Answer, and the contents of the WCJ's Report with respect thereto. For the reasons discussed below, we will **[*2]** grant the petition for reconsideration. As our Decision After Reconsideration, we will affirm the F&O, except that we will amend it to find that Panel #7578289 is invalid and rescind the WCJ's order that the initial medical-legal evaluation take place pursuant to this panel.

BACKGROUND

On April 3, 2023, defendant issued an objection to the report of applicant's primary treating physician dated March 14, 2023. (Exh. A.) The objection was served upon applicant's attorney via fax. (Exh. B.) No response was received from applicant's attorney. On April 20, 2023, defendant requested a three-member panel of qualified medical evaluators in the specialty of orthopedics, resulting in the DWC Medical Unit issuing Panel #7578289. (Exh. 101.) Pursuant to the proof of service dated April 20, 2023, defendant served the QME panel upon applicant's attorney via fax. (Exhs. C, D.) Defendant then issued a panel strike, also via fax, on April 26, 2023. (Exh. 102.)

During a hearing on August 17, 2023, the parties set the validity of defendant's orthopedic QME panel as an issue for trial. (Minutes of Hearing (MOH), August 17, 2023, p. 1.) According to the MOH, this issue included not only

applicant's claim **[*3]** that defendant only served the QME panel by fax, rather than by mail, but also that applicant was seeking a chiropractic QME panel. (MOH, August 17, 2023, p. 2.)

On October 27, 2023, the WCJ issued the F&O, finding that defendant's orthopedic QME panel was the correct panel and ordering that the medical-legal evaluation take place pursuant to that panel. On November 8, 2023, applicant filed a petition seeking reconsideration of the F&O, disputing the validity of defendant's QME panel based upon defective service.

DISCUSSION

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (*Lab. Code, §§ 5900(a), 5902, 5903*.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler (1989) 211 Cal.App.3d 1171, 1180, 260 Cal. Rptr. 76*; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer) (1980) 104 Cal.App.3d 528, 534-535 [163 Cal. Rptr. 750, 45 Cal.Comp.Cases 410]*; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]*) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd. (Maranian) (2000) 81 Cal.App.4th 1068, 1070, 1075 [97 Cal. Rptr. 2d 418, 65 Cal.Comp.Cases 650]*.) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment (AOE/COE), jurisdiction, the existence of an employment relationship, and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona) (2016) 5 Cal.App.5th 658, 662 [210 Cal. Rptr. 3d 101, 81 Cal.Comp.Cases 1122]*.) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, **[*4]** are not considered "final" orders. (*Maranian, supra, at p. 1075* ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra, at p. 1180* ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra, at p. 45* ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, the WCJ's decision includes findings regarding employment and injury AOE/COE. These are threshold issues fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the WCJ's decision contains findings that are final, applicant only challenges the WCJ's finding of fact that Panel #7578289 is the correct panel and the WCJ's order that the medical-legal evaluation take place pursuant to that panel. This is an interlocutory decision regarding discovery. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd. (Cortez) (2006) 136 Cal.App.4th 596, 599, fn. 5, 38 Cal. Rptr. 3d 922 [71 Cal.Comp.Cases]*; *Kleemann v. Workers' Comp. Appeals Bd. (Kleemann) (2005) 127 Cal.App.4th 274, 280, fn. 2 [25 Cal. Rptr. 3d 448, 70 Cal.Comp.Cases 133]*.) The Appeals Board **[*5]** will grant removal only if the petitioner shows that significant 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, we are persuaded that significant prejudice or irreparable harm will result if removal is denied.

Applicant asserts that Panel #7578289 is invalid because it was not properly served upon applicant's attorney in accordance with AD *Rule 30(b)(1)(C)* (*Cal. Code Regs., tit. 8, § 30(b)(1)(C)*). AD *Rule 30* provides as follows in relevant part that when a represented party requests a QME panel:

> (b) … requests for an initial QME panel in a represented case, for all cases with a date of injury on or after January 1, 2005, shall be submitted electronically utilizing the Division of Workers' Compensation internet site. …

(1) The party requesting a QME panel online shall:

* * *

(C) Print and serve a paper copy of the online request, the panel list, and a copy of any supporting documentation that was submitted online, upon the opposing party with a proof of service, within 1 (one) working day after generating the QME panel list. Within 10 (ten) days **[*6]** of service of the panel, each party may strike one name from the panel.

(*Cal. Code Regs., tit. 8, § 30(b)(1)(C)*.)

In this case, the proof of service shows that defendant served applicant's attorney with the QME panel list via fax and email. However, by providing only the panel list, defendant failed to serve applicant's attorney with the remaining documents required by AD *Rule 30(b)(1)(C)*, namely, a paper copy of the online panel request and any supporting documentation.

In circumstances such as this, where a party has failed to comply with the required rules of service for panel QME requests *and* omitted required documents, we conclude that the procurement of Panel #7578289 was not proper and is therefore invalid, and that, absent removal, applicant will suffer substantial prejudice and irreparable harm. Thus, reconsideration is hereby granted and we find that Panel #7578289 is invalidated for failure to comply with *Rule 30(b)(1)(C)*. We will otherwise affirm the findings of fact determined by the WCJ.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the October 27, 2023 F&O is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the October 27, 2023 F&O **[*7]** is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, Jose Rivera Silva, while employed on January 26, 2023, as a security guard, at Pasadena, California, by Intercon Security Systems, sustained injury arising out of and in the course of employment to head trauma, left shoulder, and neck; and claims to have sustained injury arising out of and in the course of employment to the eye, right shoulder, and psyche.

2. At the time of injury, the employer was insured by Hartford Fire and Casualty, administered by Sedgwick Claims Management Services.

3. At the time of injury, the employee's earnings were $ 977.03, warranting indemnity rates of $ 651.35 for temporary disability, and pursuant to the statutory limits for permanent disability.

4. The carrier has paid temporary disability at $ 651.35 per week from February 8, 2023, through April 13, 2023.

5. QME Panel #7578289 was not properly procured and is not valid.

ORDER

IT IS ORDERED that QME Panel #7578289 is stricken.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Craig Snellings

I concur,

Commissioner Joseph V. Capurro

Deputy Commissioner Lisa A. Sussman

End of Document

Christen v. State Comp. Ins. Fund, 2024 Cal. Wrk. Comp. P.D. LEXIS 15

Workers' Compensation Appeals Board (Board Panel Decision)

January 22, 2024, Opinion Filed

W.C.A.B. Nos. ADJ2648786 (VNO 0291983), ADJ1382819 (VNO 0291977)—WCAB Panel: Chair Zalewski, Deputy Commissioner Schmitz, Commissioner Capurro

Reporter
2024 Cal. Wrk. Comp. P.D. LEXIS 15 *

Mirela Christen, Applicant v. State Compensation Insurance Fund, administered by AIMS, Defendants

Status:

Publication Status: CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425, fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: Applicant's Petition for Reconsideration is *granted*, the November 16, 2023 Joint Findings of Fact and Orders is *affirmed in part* and *amended in part*.

Core Terms

guardian ad litem, workers' compensation, collateral estoppel, appointed, misappropriation, Reconsideration, settlement, funds, proceeds, adjudicate, misappropriation of funds, former proceeding, preclusion, Approving, amend, alleged misappropriation, five year, parties, Orders, spouse

Headnotes

WCAB Jurisdiction—Collateral Estoppel—Misappropriation of Settlement Funds—WCAB, granting reconsideration and amending WCJ's decision, held that applicant's claim that her former husband and

guardian ad litem misappropriated proceeds from 1999 Compromise and Release (C&R) agreement settling applicant's workers' compensation case was not barred by doctrine of collateral estoppel, when WCAB found that although superior court judge made determination adverse to applicant on issue of claimed misappropriation in Addendum to Notice of Intended Decision issued in marital dissolution proceeding, record did not reflect judge's final decision or any subsequent entry of judgment, and, accordingly, there was no showing that issue of misappropriation of funds was *necessarily decided* in former proceedings, or that determination was *final and on merits*, and because necessary requirements of collateral estoppel were not met, applicant's misappropriation claim was not precluded; even though applicant's claim was not precluded, WCAB found that it was without authority to order disgorgement of funds guardian ad litem received pursuant to finalized C&R, as there is no statutory grant of authority for relief requested and no law supporting equitable basis for WCAB to undertake such action. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d *§ 21.08[2]*; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, § 13.10.]

Panel: **[*1]** Chair Katherine A. Zalewski; Deputy Commissioner Anne Schmitz; Commissioner Joseph V. Capurro

Opinion By: Chair Katherine A. Zalewski

Opinion

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the November 16, 2023 Joint Findings of Fact and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found that the Appeals Board lacks jurisdiction to adjudicate the issue of alleged misappropriation of funds by applicant's former guardian ad litem following the issuance of an Order Approving Compromise and Release on June 24, 1999. The WCJ further determined that applicant is barred by the rule of collateral estoppel from raising the issue of misappropriation of funds by the guardian ad litem because the factual issue was tried and adjudicated adversely to applicant in Superior Court.

Applicant contends that the guardian ad litem misappropriated the proceeds from her workers' compensation settlement.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, **[*2]** and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&O, except that we will amend the Findings of Fact to reflect that the date of appointment of the guardian ad litem was June 24, 1999, that applicant's claim of misappropriation of funds by the guardian ad litem is not barred by collateral estoppel, and that the Workers' Compensation Appeals Board is without authority to order disgorgement of funds the guardian ad litem received pursuant to a finalized Compromise and Release agreement.

FACTS

Applicant claimed injury to her psyche and spine while employed as an office assistant by defendant State Compensation Insurance Fund (SCIF) on May 15, 1994 (ADJ2648786) and from March, 1994 to April, 1995 (ADJ1382819).

On June 4, 1999, the parties submitted a Joint Compromise and Release for approval by the Workers' Compensation Appeals Board (WCAB). Applicant signed the Compromise and Release on June 8, 1999.

Also on June 8, 1999, applicant's spouse Robert Master filed a petition to be appointed as guardian ad litem.

On June 24, 1999, a WCJ issued an order approving the settlement.

Also on June 24, 1999, the WCJ issued **[*3]** an order appointing applicant's spouse, Robert Master, as applicant's guardian ad litem.

On June 25, 2020, applicant filed a Petition to Reopen, averring the guardian ad litem misappropriated the proceeds of the settlement.

On March 22, 2022, applicant filed a Declaration of Readiness to Proceed, requesting a status conference regarding her allegations of workers' compensation fraud, and that she was sent to the hospital under duress.

On September 8, 2022, the parties proceeded to trial, framing issues in relevant part of whether the Appeals Board retained jurisdiction over the dispute, and applicant's contentions regarding the misappropriation of funds. (Minutes of Hearing and Summary of Evidence (Minutes), dated September 8, 2022, at p. 2:10). The testimony of applicant and guardian ad litem Robert Master was adduced over multiple trial days, with the matter submitted for decision on October 19, 2023. (Minutes of Hearing (Further) and Notice of Intent to Submit, dated October 2, 2023, at p. 2:16.)

On November 16, 2023, the WCJ issued his decision, finding in relevant part that the Appeals Board "lacks jurisdiction to adjudicate an issue of alleged misappropriation of funds that were **[*4]** sent to the guardian ad litem by way of the Order Approving Compromise and Release dated 6/24/1999." (F&A, Finding of Fact No. 6.) The WCJ also found that "[a]pplicant is barred by the rule of collateral estoppel from raising the issue of misappropriation of funds by the guardian ad litem in that the factual issue was tried and adjudicated against the Applicant in Superior Court." (*Id.*, Finding of Fact No. 7.) The WCJ's Opinion on Decision explains that applicant's spouse was appointed as her guardian ad litem. However, in subsequent marital dissolution proceedings, the issue of alleged misappropriation of the proceeds of applicant's workers' compensation claim was adjudicated adversely to applicant. (Opinion on Decision, p. 2.) Because of the similarity in issues raised and determined, applicant could not relitigate the issue in a different forum pursuant to the doctrine of collateral estoppel. (*Ibid.*)

Applicant's Petition for Reconsideration (Petition) indicates her disagreement with the WCJ's findings, averring applicant was the only annuitant designated to receive the proceeds of her award. (Petition for Reconsideration, dated November 21, 2023, at p. 1.)

The WCJ's Report observes **[*5]** that defendant SCIF satisfied the terms of the Compromise and Release agreement reached in 1999. (Report, at p. 4.) The Report further explains that there is no statutory authority conferred on the Workers' Compensation Appeals Board "over a guardian ad litem's alleged breach of fiduciary duties after a compromise and release was approved and paid." (*Id.* at p. 5.) Accordingly, the WCJ recommends we deny applicant's Petition.

DISCUSSION

We begin our discussion with the issue of collateral estoppel. Applicant avers her former spouse and guardian ad litem misappropriated the proceeds from the Compromise and Release agreement settling her workers' compensation claim in 1999. The WCJ has determined that applicant is precluded from raising the issue of alleged misappropriation of the proceeds of her workers' compensation settlement under the doctrine of collateral estoppel.

Collateral estoppel falls under the rubric of res judicata, which refers to both claim preclusion and issue preclusion. "Claim preclusion, the 'primary aspect' of res judicata, acts to bar claims that were, or should have been, advanced in a previous suit involving the same parties. Issue preclusion, the 'secondary aspect' **[*6]** historically called collateral estoppel, describes the bar on relitigating issues that were argued and decided in the first suit." (*Hudson v. Foster (2021) 68 Cal. App. 5th 640, fn. 10 [283 Cal. Rptr. 3d 822]*.)

The requirements for collateral estoppel were discussed by the California Supreme Court in *Pacific Lumber Co. v. State Water Resources Control Bd. (2006) 37 Cal. 4th 921, 943 [38 Cal. Rptr. 3d 220, 126 P.3d 1040]* (*Pacific Lumber*) as follows:

> "Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court (1990) 51 Cal. 3d 335, 341 [272 Cal. Rptr. 767, 795 P.2d 1223]*.) The doctrine applies "only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.] The party asserting collateral estoppel bears the burden of establishing these requirements." (*Id. at p. 341*.)

Here, applicant's spouse Robert Master was appointed guardian ad litem on June 24, 1999. However, in marital dissolution proceedings initiated in 2000, applicant alleged the misappropriation of her workers' **[*7]** compensation settlement. A November 29, 2001 Notice of Intended Decision, issued by the superior court judge presiding over the dissolution proceedings stated:

> On the issue of claimed misappropriation of petitioner's workers compensation settlement, the court finds that no such misappropriation occurred. The testimony was that petitioner received a substantial settlement of a stress disability claim that she had filed against her employer. Some of the funds were deposited in petitioner's separate account, some were used to pay for a private duty nurse for petitioner, some were used to pay against the mountain of community credit card debt which the parties had accumulated, and some were used for other household/community expenses. At one point, respondent had himself appointed as petitioner's Guardian Ad Litem by the Worker's Compensation Appeals Board. Respondent's testimony is that the expenditures were all done by agreement of the parties. It was not until after the present dissolution proceedings commenced that petitioner made her claims of misappropriation both in this court and before the WCAB. The court finds that respondent's testimony on this issue is more credible, and that **[*8]** use of these funds was by mutual agreement and for the benefit of the community.
>
> (Ex. C, Declaration of Robert Master, dated December 10, 2019, Ex. E [Addendum to Notice of Intended Decision], at p. 17.)

Applicant's current claim before the Appeals Board also asserts misappropriation of the proceeds of her workers' compensation settlement. However, we observe that the findings quoted above were contained within the superior court judge's Addendum to Notice of Intended Decision. The evidentiary record before us does not reflect the final decision of the judge, or a subsequent entry of judgment. Accordingly, we cannot conclude that the issue of misappropriation of funds was *necessarily decided* in the former proceedings, or that the determination was *final and on the merits*. (*Pacific Lumber, supra, at p. 943*.) Because the requirements necessary to assert issue preclusion/collateral estoppel have not been met, we will amend the WCJ's Findings of Fact to reflect that applicant's claim of misappropriation of her worker's compensation settlement proceeds is not precluded under the doctrine of collateral estoppel.

The WCJ's Opinion on Decision also determined that the Appeals Board was without jurisdiction over the issue of **[*9]** alleged misappropriation of funds by the guardian ad litem. (Finding of Fact No. 6.)

Pursuant to *Labor Code section 5300*,[1] the WCAB has exclusive jurisdiction to adjudicate the "recovery of compensation, or concerning any right or liability arising out of or incidental thereto" of injuries that "arise out of and in the course" of employment," and that "[c]ompensation includes medical treatment, temporary disability indemnity, permanent disability indemnity, SJDB vouchers, and death benefits … In other words, the WCAB maintains exclusive jurisdiction pursuant to the California Constitution and *section 5300* to adjudicate workers' compensation disputes." (*Dennis v. State of California (2020) 85 Cal. Comp. Cases 28 [2020 Cal. Wrk. Comp. LEXIS 1*] (Appeals Board en banc).) The Appeals Board has continuing jurisdiction over all its orders, decisions, and awards made and entered. (*Lab. Code, § 5803*.) The Appeals Board may rescind, alter, or amend any order, decision, or award, for good cause. (*Lab. Code, § 5803*.)

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[1] All further statutory references are to the Labor Code unless otherwise stated.

However, section 5804 provides that "No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury." "An approved workers' compensation compromise and release rests 'upon a higher plane than a private contractual release; it is a judgment, with "the same force and effect as an award made after a full **[*10]** hearing."'" (*Smith v. Workers' Comp. Appeals Bd. (1985) 168 Cal. App. 3d 1160, 1169, 214 Cal. Rptr. 765*, quoting *Johnson v. Workmen's Comp. App. Bd. (1970) 2 Cal. 3d 964, 973*.) Consequently, after the five year period has expired, the Order Approving Compromise and Release constitutes a final judgement with the full effect of res judicata. (*Smith v. Workers' Comp. Appeals Bd., supra, 168 Cal. App. 3d at p. 1169*.) Therefore, after five years, an award may only be set aside on the showing of fraud or mistake. (*Id.*)

In contrast to the limitations imposed by the statute on the Appeals Board to *set aside* an entire award, the Appeals Board continues to have jurisdiction after five years to *enforce* its awards. (*Barnes v. Workers' Comp. Appeals Bd. (2000) 23 Cal. 4th 679, 687 [97 Cal. Rptr. 2d 638, 2 P.3d 1180, 65 Cal. Comp. Cases 780]*.) That is, the WCAB's jurisdiction to *enforce* an award extends beyond section 5804's five-year limitations period because an order ascertaining and fixing the exact amount of liability does not rescind, alter or amend any prior award in violation of section 5804. (*Id.*) Consequently, collateral changes may be made to an award so long as the merits of the basic decision determining the worker's right to benefits are not altered, and the amount of benefits remains unchanged. (*Hodge v. Workers' Comp. Appeals Bd. (1981) 123 Cal. App. 3d 501, 509, 176 Cal. Rptr. 675 (Hodge)*; see *Garcia v. Industrial Acci. Com. (1958) 162 Cal. App. 2d 761, 767*.)

Here, there is no dispute that applicant's injury occurred more than five years ago as she was injured in 1994 and 1995. The order approving the Compromise & Release issued in 1999, and the amount of compensation that applicant received was fixed. **[*11]** There is no dispute that defendant paid the amount of compensation awarded and paid applicant's guardian ad litem pursuant to the order appointing. Applicant does not seek to enforce the award against defendant, and based on the record before us, we do not see that defendant has any further liability.

Instead, applicant seeks an order against the guardian ad litem to return the monies that he received. As explained above, while we continue to have jurisdiction over our orders, here, the guardian ad litem was not a party to the Compromise & Release. Hence, the only other order at issue is the order appointing the guardian ad litem, and it did not refer to the payment of the Compromise & Release.

Insofar as the requested *remedy* for a breach of fiduciary duty or misappropriation of funds by the guardian ad litem would involve disgorgement of those funds, we discern no statutory grant of authority for the relief requested. Neither does our review of the relevant case law disclose a basis in equity that would permit the Appeals Board to undertake such action. (*Weiner v. Ralphs Co. (2009) 74 Cal. Comp. Cases 736, 753 [2009 Cal. Wrk. Comp. LEXIS 143*] ["[t]he WCAB is a judicial body of limited jurisdiction, with no powers beyond those conferred on it by the Constitution and the **[*12]** Labor Code"].) Accordingly, we will amend Finding of Fact No. 6 to reflect that the Appeals Board does not have authority to order that the guardian ad litem disgorge any funds he received pursuant to the Compromise and Release agreement.

Finally, we note clerical error in the Findings of Fact, in that the guardian ad litem was appointed on June 24, 1999, rather than June 8, 1999. We will amend Finding of Fact No. 2, accordingly.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the November 16, 2023 Joint Findings of Fact and Orders is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 16, 2023 Joint Findings of Fact and Orders is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

…

2. Mr. Robert Master was appointed guardian ad litem for the applicant on June 24, 1999.

…

6. The Appeals Board lacks the authority to order the guardian ad litem to disgorge funds he received by way of the Order Approving Compromise and Release dated June 24, 1999.

7. The doctrine of collateral estoppel is not applicable herein.

WORKERS' COMPENSATION APPEALS BOARD

Chair Katherine **[*13]** A. Zalewski

I concur,

Deputy Commissioner Anne Schmitz

Commissioner Joseph V. Capurro

Acosta v. State Dep't of Corr. & Rehab., 2023 Cal. Wrk. Comp. P.D. LEXIS 360

Workers' Compensation Appeals Board (Board Panel Decision)

December 4, 2023 Opinion Filed

W.C.A.B. No. ADJ17245720—WCAB Panel: Commissioner Snellings, Deputy Commissioner Sussman, Commissioner Capurro

Reporter
2023 Cal. Wrk. Comp. P.D. LEXIS 360 *

Julie Acosta, Applicant v. State of California Department of Corrections and Rehabilitation - California Men's Colony, administered by State Compensation Insurance Fund, Defendants

Status:

Publication Status: CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: State Compensation Insurance Fund's Petition for Reconsideration is *granted*, the September 15, 2023 Findings of Fact, Award and Orders is *affirmed in part* and *amended in part*, and the matter is *returned* to the trial level for further proceedings.

Core Terms

retirement, Reconsideration, temporary disability benefits, entitlement, modified, Orders, temporary disability, earning capacity, substantiation, eligible

Headnotes

Temporary Disability—Post-Retirement Period of Disability—WCAB, granting reconsideration, rescinded WCJ's finding that applicant who suffered industrial injury on 9/2/2021 while employed by defendant as material and store supervisor was entitled to temporary disability indemnity for post-retirement period of disability, and WCAB returned matter to trial level for further proceedings, when WCAB found that although applicant's retirement did not preclude her entitlement to temporary disability indemnity, where applicant's unrefuted testimony established that she took service retirement because she was experiencing too much pain from her industrial injury to continue working, applicant was still required to prove by preponderance of evidence intent to pursue other work following her convalescence from her industrial injury, and further proceedings were required on that issue. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.01[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.01[1].]

Counsel

[*1] For applicant—Spatafore & Grant

For defendants—State Compensation Insurance Fund

Panel: Commissioner Craig Snellings; Deputy Commissioner Lisa A. Sussman; Commissioner Joseph V. Capurro

Opinion By: Commissioner Craig Snellings

Opinion

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

State Compensation Insurance Fund (SCIF) seeks reconsideration of the September 15, 2023 Findings of Fact, Award and Orders, wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that applicant's service retirement as a result of the industrial injury did not relieve the employer from offering modified duty to the applicant (Finding no. 8) and that applicant is entitled to temporary disability benefits resuming July 5, 2023 and continuing as long as there is medical substantiation and statutory entitlement (Finding no. 9).

SCIF contends that applicant is not entitled to temporary disability benefits because she retired from the labor force and suffers no loss of income. SCIF further contends that applicant is not eligible for temporary disability benefits retroactively from July 5, 2023 to the present and continuing because there was no medical evidence substantiating **[*2]** it.

We have not received an answer from applicant. We received and reviewed SCIF's supplemental brief. *WCAB Rule 10964* (*Cal. Code Regs., tit. 8, § 10964*) states that supplemental petitions, pleadings, or responses shall be considered only when specifically requested or approved by the Appeals Board. We accept and review SCIF's supplemental brief.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the supplemental brief, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration, amend the Findings of Fact, Award and Orders, and return this matter to the trial level for further proceedings.

FACTS

As the WCJ stated in his Report:

The parties stipulated at the time of the Expedited Hearing on the issue of Temporary Disability to the following facts and agreed that these three (3) questions were at issue:

1. Julie Acosta [] while employed on September 2, 2021, as a material and store supervisor, at San Luis Obispo, California, by California Department of Corrections and Rehabilitation's Men's Colony, legally uninsured, sustained injury **[*3]** arising out of and in the course of employment.

2. At the time of the injury, the employer was legally uninsured with State Compensation Insurance Fund administering.

3. Parties have stipulated that the applicant received Industrial Disability Leave (IDL) during several periods, but specifically December 29th, December 30th, and December 31st of 2022.

4. The applicant was placed on Temporary Total Disability on January 1, 2023, and remained on the same through July 4, 2023.

5. The applicant also took a service-connected retirement on January 1, 2023.

Question 1: Did the Applicant become eligible for modified duty on June 20, 2023?

Question 2: Did the employer make a bona fide offer of modified duty at that time (circa June 20, 2023)?

Question 3: Was the employer relieved from liability to offer modified duty based on the applicant service retirement of January 1, 2023?

Following the decision that issued on September 15, 2023, the Defendants filed the instant Petition for Reconsideration and synthesized their issues into two (2) specific arguments:

1. The evidence shows that applicant retired from the labor force and not merely from her employment at CMC; since she presently suffers no loss [*4] of income due to the industrial injury, she is not entitled to TD benefits.

2. Applicant is not eligible for TD benefits retroactively from 7/5/2023 to the present and continuing because there was no evidence that applicant is now or has been since 7/5/2023 medically eligible for TD benefits. (Report, pp. 1-2; emphasis in original.)

DISCUSSION

In *Gonzales v. Workers' Compensation Appeals Bd. (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]*, the court set out the framework in analyzing whether a worker is entitled to temporary disability after retirement. It stated that the purpose of temporary disability benefits is to "primarily [] substitute for the worker's lost wages, in order to maintain a steady stream of income." (*Id. at p. 847*.) Earning capacity is the touchstone in determining the amount of temporary disability benefits. (*Id. at p. 846*.) The elements of earning capacity include the ability to work, willingness to work, and opportunity to work. (*Id. at p. 847*.)

That a worker retires after sustaining a job-related injury should not cause any radical departure from these general principles. Our touchstone is still earning capacity.

In our view, the decision to retire implicates the element of "willingness to work" in the earning capacity calculus, and the primary factual component of the analysis must be whether **[*5]** the worker is retiring for all purposes, or only from the particular employment. (See *Van Voorhis v. Workmen's Comp. Appeals Bd. (1974) 37 Cal. App. 3d 81, 90 [112 Cal. Rptr. 208]* ["matter of common knowledge" people often work at other jobs after retirement].) If the former, then the worker cannot be said to be willing to work, and earnings capacity would be zero. If the latter, then it would be necessary to determine an earning capacity from all the evidence available. A subsidiary question is whether the decision to retire is a function of the job-related injury. If the injury causes the worker to retire for all purposes or interferes with plans to continue working elsewhere, then

> the worker cannot be said to be unwilling to work and would have an earning capacity diminished by the injury. Thus, the worker may establish by preponderance of the evidence an intent to pursue other work interrupted by the job-related injury. (*§ 3202.5*, *5705*; cf. *West v. Industrial Acc. Com., supra*, 79 Cal. App. 2d at p. 726 [burden on worker to explain reason for periods of unemployment].) (*Id.* at pp. 847-848.)

Here, applicant testified at trial that she took a service connected retirement because she was experiencing too much pain as a result of her industrial injury and could not continue to work. (Minutes of Hearing/Summary of Evidence (MOH/SOE) dated September 14, 2023, p. 4:20-33.) **[*6]** There is nothing in evidence to refute this testimony. As such, per *Gonzales*, applicant's retirement does not preclude her entitlement to temporary disability. She must still, however, prove by a preponderance of the evidence an intent to pursue other work following her convalescence from her industrial injury.

With respect to Finding no. 9, the issue of whether applicant is entitled to temporary disability benefits following Michael J. Behrman, M.D.'s medical report dated June 19, 2023, where he found applicant eligible for modified duty, we conclude that this finding is premature. Finding no. 9 states that "Applicant is entitled to Temporary Disability benefits resuming July 5, 2023 and continuing as long as there is medical substantiation and statutory entitlement." A decision "must be based on admitted evidence in the record" (*Hamilton v. Lockheed Corporation (Hamilton) (2001) 66 Cal.Comp.Cases 473, 478* (Appeals Board en banc)), and must be supported by substantial evidence. (*Labor Code, §§ 5903*, *5952(d)*; *Lamb v. Workmen's Comp. Appeals Bd. (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases 310]*; *Garza v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]*; *LeVesque v. Workers' Comp. Appeals Bd. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]*.) Here, while the record reflects that Dr. Behrman released applicant to modified duty and her employer testified it did not offer her modified duty because of her retirement, there is no evidence to substantiate a perpetual temporary disability award subject to "medical substantiation **[*7]** and statutory entitlement." Applicant must prove her present entitlement to temporary disability. (*Lab. Code, § 3202.5*.)

Accordingly, we grant reconsideration, amend the Findings of Fact, Award and Orders to defer the issue of applicant's entitlement to temporary disability, and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED that State Compensation Insurance Fund's Petition for Reconsideration of the September 15, 2023 Findings of Fact, Award and Orders is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 15, 2023 Findings of Fact, Award and Orders is **AFFIRMED EXCEPT** that it is **AMENDED** as follows and that the matter is **RETURNED** to the trial level for further proceedings.

...

FINDINGS OF FACT BASED ON EVIDENCE

...

9. The issue of applicant's entitlement to temporary disability is deferred.

AWARD

There are no awards at this time.

ORDERS

There are no orders at this time.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Craig Snellings

I concur,

Deputy Commissioner Lisa A. Sussman

Commissioner Joseph V. Capurro

Vallejo v. Dep't of Developmental Servs., 2024 Cal. Wrk. Comp. P.D. LEXIS 7

Workers' Compensation Appeals Board (Board Panel Decision)

January 4, 2024 Opinion Filed

W.C.A.B. Nos. ADJ10691265, ADJ10691133, ADJ10691132—WCAB Panel: Commissioner Razo, Deputy Commissioners Garcia, Schmitz (concurring, but not signing)

Reporter
2024 Cal. Wrk. Comp. P.D. LEXIS 7 *

Cipriano Vallejo, Applicant v. Department of Developmental Services, legally uninsured, adjusted by State Compensation Insurance Fund, Defendants

Status:

Publication Status: **CAUTION:** This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: Reconsideration is *granted*, the June 1, 2022 Joint Findings and Orders is *rescinded*, and this matter is *returned* to the trial level for such further proceedings and decision by the WCJ as may be required, consistent with this opinion.

Core Terms

deposition, appeals board, discovery, adjuster, Removal, workers' compensation, reconsideration, witnesses, proceedings, parties, Orders, attendance, subpoena, records, notice, ex parte communication, deposition notice, threshold, contends

Headnotes

Discovery—Depositions—WCAB, granting reconsideration and applying removal standard, rescinded decision in which WCJ found that applicant established good cause to take deposition of claims adjuster as well as person most knowledgeable on topic of nature, extent and frequency of training of State Compensation Insurance Fund adjusters relative to communications described in *Labor Code § 4062.3* as interpreted by *Maxham v. California Department of Corrections and Rehabilitation (2017) 82 Cal. Comp. Cases 136* (Appeals Board en banc opinion), when WCAB found that in declining to issue either deposition notice or subpoena to deponents, and instead initiating proceedings by seeking to compel attendance of two witnesses at deposition, applicant failed to follow mandatory procedures for taking depositions pursuant to *Labor Code § 5710*, thus, depriving defendant of due process, and WCAB returned matter to trial level based on applicant's failure to observe mandatory procedural due process requirements. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d *§ 25.41*; Rassp & Herlick, California Workers' Compensation Law, Ch. 15, § 15.45[2].]

Counsel

[*1] For applicant—English Lloyd

For defendants—State Compensation Insurance Fund

Panel: Commissioner Jose H. Razo; Deputy Commissioner Patricia A. Garcia; Deputy Commissioner Anne Schmitz (concurring, but not signing)

Opinion By: Commissioner Jose H. Razo

Opinion

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Removal. Having completed our review, we now issue our Decision After Reconsideration.

Defendant seeks removal of the June 1, 2022 Joint Findings and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed by the Department of Developmental Services Canyon Springs, sustained industrial injury to "various body parts" on September 14, 2014 (ADJ10691265), April 14, 2015 (ADJ10691133), and August 26, 2016 (ADJ10691132). The WCJ found that applicant established good cause for the deposition of the claims adjuster as well as the person most knowledgeable on the topic of the nature, extent, and frequency of training of State Compensation Insurance Fund (SCIF) adjusters relative to communications as set forth in *Labor Code* [1] *Section 4062.3* as interpreted **[*2]** by *Maxham v. California Department of Corrections and Rehabilitation (2017) 82 Cal. Comp. Cases 136 [2017 Cal. Wrk. Comp. LEXIS 6*] (Appeals Board en banc) (*Maxham*). The WCJ ordered that the "[t]he Order of 1/26/2021 for the defendant to produce [claims adjuster] Zabrina Hampton for deposition and to produce the person most knowledgeable for the defendant for deposition on the topic of the nature, extent and frequency of training of defendant's adjusters relative to *Labor Code Section 4062.3* as interpreted by *Maxham*, is deemed final." (F&O, p. 2.)

Defendant contends that it has been denied due process because the claims examiner and person most knowledgeable are third parties; that the F&O orders third-party witnesses to submit to depositions before a proper record concerning the merits of the depositions has been created; that the WCJ's order issued without the necessary procedural due process safeguards; and that the order is inconsistent with applicable civil procedure statutes.

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

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied.

We have considered the Petition for Removal, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&O **[*3]** and return this matter to the trial level for further proceedings.

FACTS

Applicant has three pending claims relevant to these proceedings. In ADJ10691265, applicant sustained injury to "various body parts" on September 14, 2014 while employed by the Department of Developmental Services, legally uninsured and administered by State Compensation Insurance Fund. Applicant also sustained injury to "various body parts" while similarly employed by defendant on April 14, 2015 (ADJ10691133) and on August 26, 2016 (ADJ10691265).

The parties have selected Neil J. Halbridge, M.D., as the Agreed Medical Evaluator (AME) in orthopedic medicine. Dr. Halbridge has evaluated applicant and issued multiple reports.

On November 3, 2020, defendant's claims representative Zabrina Hampton issued a letter to Dr. Halbridge requesting clarification of applicant's dates of injury, including the AME's apportionment to an April 14, 2014 injury. (Ex. 7, Defense Letter to AME Dr. Halbridge, November 3, 2020, p. 1.) The letter attached a copy of applicant's Application for Adjudication with respect to a *September* 14, 2014 date of injury, and requested supplemental reporting to clarify the issue of the proper injury date. **[*4]** The letter was copied to applicant's counsel. (*Ibid.*)

On November 18, 2020, defense counsel issued a letter to Dr. Halbridge also requesting clarification as to the various dates of injury, including the dates of a claimed cumulative injury. (Ex. 2, Defense Letter to AME Dr. Halbridge, November 18, 2020, p. 1.) The letter appends diagnostic testing results from a December 19, 2019 MRI study, and requests the issuance of supplemental reporting. The letter was copied to applicant's counsel. (*Ibid.*)

On November 19, 2020, applicant filed a petition seeking an order "requiring SCIF to produce Zabrina Hampton for deposition as well as the person most knowledgeable for SCIF for deposition on the topic of the nature, extent and frequency of training of SCIF adjuster relative to LC 4062.3 and Maxham." (Petition for Discovery Orders, November 19, 2020, at p. 2:14.)

On January 26, 2021, the WCJ appended[2] the following statement to the end of applicant's petition:

> IT IS SO ORDERED. A timely objection filed within 15 days showing good cause will void this Order and may cause this matter to be set for hearing on this issue.

On February 10, 2021, defendant served its objection to the WCJ's order, averring **[*5]** that "written communication with the QME that is properly served to the opposing party is not Ex Parte communication." (Defense Objection, February 10, 2021, at p. 3:18.) Defendant further asserted that *section 4062.3* does not provide a specific remedy for violations of the section that are not otherwise ex parte communications, and that the Appeals Board has discretion in fashioning an appropriate remedy. (*Id.* at p. 4:1.) Defendant concluded that any violation was non-prejudicial, and that the depositions of the claims adjuster and a person most knowledgeable were unnecessary and unduly burdensome. (*Ibid.*)

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[2] The order contains a clause rendering the order null and void if an objection is received. The proof of service attached to the January 26, 2021 Order designates defendant State Compensation Insurance Fund to serve all parties listed on the official address record with the WCJ's order. However, *Appeals Board Rule 10832(e)* specifies that "[a]n order with a clause rendering the order null and void if an objection is received is not a Notice of Intention and must be served by the Workers' Compensation Appeals Board." (*Cal. Code Regs., tit. 8, § 10832(e)*.) In the future, we recommend that the WCJ consider the issuance of a Notice of Intention, as contemplated by *Appeals Board Rule 10832*.

On April 28, 2022, the parties proceeded to trial, framing the sole issue of "Discovery Order of 1/26/2021 to which defendant SCIF has objected." (Minutes of Hearing, April 28, 2022, at p. 2:20.) The parties submitted the matter for decision without testimony.

On June 1, 2022, the WCJ issued the F&O, determining in relevant part that applicant established good cause for the depositions of the claims adjuster and the person most knowledgeable. The WCJ ordered that "[t]he Order of 1/26/2021 … is deemed final."[3] (F&O, Order No. "b".)

Defendant's Petition for Removal contends that defendant will suffer **[*6]** irreparable harm and significant prejudice because the F&O compelled non-party witnesses to submit to deposition prior to the creation of a proper record regarding the merits of the depositions. Defendant further contends that the order issued without the appropriate due process safeguards afforded to the party seeking to resist the deposition and that the depositions are inconsistent with applicable civil procedure statutes.

Applicant's Answer contends that defendant has been afforded appropriate due process, that the WCJ possessed the appropriate jurisdiction and authority to issue rulings on discovery disputes, and that SCIF, as the claims administrator, is a party to the action.

DISCUSSION

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn (2006) 71 Cal. Comp. Cases 783, 784, fn. 2 (Appeals Board en banc)*.) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona) (2016) 5 Cal. App. 5th 658, 662 [210 Cal. Rptr. 3d 101, 81 Cal. Comp. Cases 1122]*.) Failure to timely petition for reconsideration of a final decision bars later challenge **[*7]** to the propriety of the decision before the WCAB or court of appeal. (See *Lab. Code, § 5904*.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions. Here, the WCJ's decision includes a finding regarding a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal. Although the decision contains a finding that is final, the petitioner is only challenging interlocutory findings/orders in the decision regarding the discovery dispute. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*)

Removal is an extraordinary remedy rarely exercised by the Appeals **[*8]** Board. (*Cortez v. Workers' Comp. Appeals Bd. (2006) 136 Cal. App. 4th 596, 599, fn. 5 [38 Cal. Rptr. 3d 922, 71 Cal. Comp. Cases 155]*; *Kleemann v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 274, 280, fn. 2 [25 Cal. Rptr. 3d 448, 70 Cal. Comp. Cases 133]*.) The Appeals Board will grant removal only if the petitioner shows that significant 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)*.)

We begin our discussion by noting that it is the stated public policy of the California workers' compensation system that, "liberal pre-trial discovery is desirable and beneficial for the purpose of … making available in a simple,

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[3] The January 26, 2021 order specifies that a timely objection voids the order. The parties do not dispute that defendant timely objected, thus voiding the order, and precluding the order from becoming "final."

convenient and inexpensive way facts which otherwise could not be proved except with great difficulty[,] educating the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlement expediting litigation safeguarding against surprise preventing delay, [and] simplifying and narrowing the issues and expediting and facilitating both pre-trial preparation and trial."[4] (*Hardesty v. Mccord & Holdren (1976) 41 Cal. Comp. Cases 111, 114 [1976 Cal. Wrk. Comp. LEXIS 2406] (Appeals Bd. panel decision) (Hardesty)*.)

Section 5710, subd. (a) provides:

> (a) The appeals board, a workers' compensation judge, or any party to the action or proceeding, may, in any investigation or hearing before the appeals board, cause the deposition of witnesses residing **[*9]** within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of this state under Title 4 (commencing with *Section 2016.010) of Part 4 of the Code of Civil Procedure.* To that end the attendance of witnesses and the production of records may be required. Depositions may be taken outside the state before any officer authorized to administer oaths. The appeals board or a workers' compensation judge in any proceeding before the appeals board may cause evidence to be taken in other jurisdictions before the agency authorized to hear workers' compensation matters in those other jurisdictions.
>
> (*Lab. Code, § 5710(a)*.)

Section 5710 thus authorizes depositions in workers' compensation proceedings, including "the attendance of witnesses and the production of records." (*Lab. Code, § 5710(a)*.)

Defendant contends that in declining to issue either a deposition notice or a subpoena to the deponents, applicant failed to follow the mandatory procedures required for the undertaking of a deposition pursuant to *section 5710*. Defendant avers:

> Defendant does not dispute that a party's right to discovery is important but it cannot take precedent (sic) over a party's due process rights or ensuring an accurate procedural record. But by ordering the depositions of **[*10]** Ms. Hampton and the Person Most Knowledgeable, the WCJ permits applicant to ignore the plain language of the California Code of Civil Procedure and, in doing so, deprives Defendant of its due process rights. Applicant did [not] make any attempt to properly serve a subpoena and/or deposition notice on either witness; instead, applicant moved immediately to seeking an order compelling a deposition and, in doing so, applicant prevented Defendant from creating a record concerning the merits of the depositions.
>
> (Petition for Removal, at p. 6:4.)

We agree. The current proceedings were initiated by applicant's November 19, 2020 petition seeking to compel the attendance of two witnesses at deposition. However, the record reflects neither deposition notice nor subpoena issued prior to the applicant's petition, thus depriving defendant of the attendant due process considerations of notice and the opportunity to object to the underlying depositions in the first instance. (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan) (1999) 74 Cal. App. 4th 928, 936 [64 Cal. Comp. Cases 986]* ["essence of due process is simply notice and the opportunity to be heard"].)

Moreover, to the extent that *section 5710* allows for depositions to be undertaken in workers' compensation proceedings, it also provides that the depositions must **[*11]** be undertaken "in the manner prescribed by law." (*Lab. Code, § 5710(a)*.) This includes the issuance of the appropriate notice of deposition or subpoena prior to

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[4] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See ***Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425, fn. 6 [118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]***.) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, 242, fn. 7* (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2 [257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*.) Here, we refer to *Hardesty* because it addresses and restates the broad approach to discovery utilized in the California workers' compensation system.

seeking the expenditure of the Appeals Board's time and resources via petition to compel the attendance of witnesses. (*Lab. Code, § 5710*; *Code Civ. Proc. §§ 2025.010*, *2025.220*.) Accordingly, the F&O was obtained without the mandatory procedural steps necessary to ensure due process is afforded to all parties, and we rescind the order compelling the attendance of the witnesses at deposition, accordingly.

However, while we return this matter to the trial level for failure to observe mandatory procedural due process requirements, we also observe that *section 5710* incorporates the provisions of *Code of Civil Procedure section 2016.010, et seq.* *Section 2017.010 of the Code of Civil Procedure* provides, in relevant part, "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (See also *Willis v. Superior Court (1980) 112 Cal. App. 3d 277, 289, 169 Cal. Rptr. 301*.)

We also note defendant's contention that the claims adjuster is not a party to this action. However, the Appeals Board has historically treated claims **[*12]** adjusters as parties to the case, and has, where substantively and procedurally appropriate, compelled their deposition. (See, e.g., *Yepez v. Denny's Restaurant (July 7, 2009, ADJ2542719) [2009 Cal. Wrk. Comp. P.D. LEXIS 333]*.) Here, the claims adjuster is an employee of the designated claims administrator on behalf of the State of California, legally uninsured. Accordingly, the claims adjuster is not a third party, and applicant may effectuate service of notice of a scheduled deposition either by deposition notice or by subpoena. (*Code Civ. Proc., § 2025.280*.)

We further observe that the underlying issue of whether there has been a violation of *section 4062.3*, which governs the exchange of information between the parties and medical-legal evaluators, remains undecided in this matter. In *Maxham v. California Department of Corrections and Rehabilitation (2017) 82 Cal. Comp. Cases 136* (Appeals Board en banc), the Appeals Board distinguished between "information" and "communication" under *section 4062.3* as follows:

> 1. 'Information,' as that term is used in *section 4062.3*, constitutes (1) records prepared or maintained by the employee's treating physician or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues.
>
> 2. A 'communication,' as that term is used in *section 4062.3*, can constitute 'information' if it contains, references, or encloses (1) records prepared or maintained by the employee's treating physician **[*13]** or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues.
>
> (*Maxham, at p. 138*.)

The *Maxham* decision also analyzed what constitutes an ex parte communication. Specifically, we noted that:

> Black's Law Dictionary defines 'ex parte' as, 'On or from one party only, usually without notice to or argument from the adverse party.' (Black's Law Dict. (7th ed. 1999) p. 597, col. 2.) Black's further states that an 'ex parte communication' is, 'A generally prohibited communication between counsel and the court when opposing counsel is not present.'
>
> (*Id. at p. 142*.)

Here, the WCJ states that "the underlying issue which has yet to be litigated is an impermissible ex parte communication[5] from the defendant to the AME Dr. Halbridge, and the resulting right by applicant to seek discovery on that issue." (Opinion on Decision, at p. 5.)

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[5] In *Suon v. California Dairies (2018) 83 Cal. Comp. Cases 1803 [2018 Cal. Wrk. Comp. LEXIS 100]* (Appeals Bd. en banc) we observed that "[i]f a party engages in ex parte communication with the QME in violation of *section 4062.3(e)*, *section 4062.3(g)* expressly provides that 'the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from

However, to the extent that the depositions of the adjuster and the person most knowledgeable are relevant to the "nature, extent and frequency of training of SCIF adjuster[s] relative to LC 4062.3 and Maxham," any evaluation of a request for compelled discovery in this regard should be preceded by a determination as to whether such a violation has occurred. **[*14]** (Petition for Discovery Orders, November 19, 2020, at p. 2:15.) This is because a determination on the issue would be directly relevant to the consideration of a motion for compelled discovery arising out alleged violations of *section 4062.3*.

In summary, *section 5710* provides for depositions of witnesses in workers' compensation proceedings in the manner prescribed by law, and generally requires the issuance of a deposition notice or subpoena (as is appropriate, depending on the deponent) as a condition precedent to seeking to compel such discovery. Accordingly, and to the extent that orders herein were obtained without substantive compliance with the notice requirements of *section 5710* and the Code of Civil Procedure, we will rescind the F&O and return the matter to the trial level for further proceedings. We further note that any evaluation of a request for compelled discovery relevant to alleged violations of *section 4062.3* should necessarily include a formal determination as to whether any such violation has occurred herein, and the corresponding relief afforded to the party alleging the violation.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, June 1, 2022 **[*15]** Joint Findings and Orders is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Jose H. Razo

I concur,

Deputy Commissioner Patricia A. Garcia

Deputy Commissioner Anne Schmitz (concurring, but not signing)

another qualified medical evaluator.'" We further noted that in the event of a violation of *section 4062.3(b)* that is not otherwise ex parte in nature, "the trier of fact … has wide discretion in fashioning an appropriate remedy for a violation of *section 4062.3(b)* pursuant to the Appeals Board's judicial powers to address discovery disputes … ." (*Suon, supra, at p. 1815*.) Here, there has not yet been a formal determination as to the existence, if any, of inappropriate communication or ex parte contact in violation of *section 4062.3*.

Ruiz v. City of Los Angeles, 2023 Cal. Wrk. Comp. P.D. LEXIS 313

Workers' Compensation Appeals Board (Board Panel Decision)

November 13, 2023 Opinion Filed

W.C.A.B. No. ADJ13624079—WCAB Panel: Chair Zalewski, Commissioners Palugyai, Capurro

Reporter
2023 Cal. Wrk. Comp. P.D. LEXIS 313 *

Joel Ruiz, Applicant v. City of Los Angeles, PSI, Defendant

Status:

Publication Status: CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: Applicant's Petition for Reconsideration of the Arbitrator's August 23, 2023 Findings and Order is *denied*.

Core Terms

training, off-duty, arbitrator, physical fitness, athletic activity, police officer, kickboxing, Reconsideration, cases, lines, jump, objectively reasonable, applicant's petition, encouraged, regimen, manual

Headnotes

Injury AOE/COE—Off-Duty Recreational/Athletic Activities—WCAB, denying reconsideration, affirmed arbitrator's decision that applicant police officer's workers' compensation claim was barred by *Labor Code § 3600(a)(9)*, when applicant suffered injury during kickboxing class at private gym while off-duty, and WCAB, applying two-part test in *Ezzy v. W.C.A.B. (1983) 146 Cal. App. 3d 252, 194 Cal. Rptr. 90, 48 Cal. Comp. Cases 611*, found that applicant's general need to maintain proper physical fitness was insufficient

to extend workers' compensation coverage to his employer absent evidence of employer's specific expectation, such as passing fitness examination, requiring him to engage in off-duty recreational activity. [See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.25*; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.03[6].]

Counsel

[*1] For applicant—Lewis, Marenstein, Wicke, Sherwin & Lee

For defendant—Los Angeles City Attorney's Office

Panel: Chair Katherine A. Zalewski; Commissioner Natalie Palugyai; Commissioner Joseph V. Capurro

Opinion By: Chair Katherine A. Zalewski

Opinion

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of an arbitrator's Findings and Order of August 23, 2023, wherein it was found that applicant's claim was barred by the provisions of *Labor Code section 3600(a)(9)*, which bars recovery for injuries which "arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment." Applicant was a police officer who was injured during a kickboxing class at a private gym while off-duty.

Applicant contends that the arbitrator erred in finding his claim non-compensable. We have received an Answer from defendant, and the arbitrator has filed a Report and Recommendation on Petition for Reconsideration (Report). We have also considered a supplemental pleading despite the fact that applicant did not seek leave to file the supplemental **[*2]** petition nor set forth good cause for doing so, as required by *Appeals Board Rule 10964(b) (Cal. Code Regs., tit. 8, § 10964, subd. (b)*.) Applicant is reminded to follow Appeals Board rules and procedures in future Appeals Board proceedings.

We will deny applicant's Petition for the reasons stated below and by the Arbitrator in the Report which we adopt, incorporate, and quote below.

Preliminarily, we note that both the arbitrator's Report and the defendant's Answer raise the issue of the timeliness of applicant's Petition. While the proof of service attached to the Petition does not reflect service on the arbitrator, as required by *Appeals Board Rule 10990(c)(5) (Cal. Code Regs., tit. 8, § 10990, subd. (c)(5)*), and the arbitrator states that he received the Petition late, the Petition was timely filed with the Appeals Board. Although the arbitrator received the petition after the statutory period, it is not clear whether it was served within the statutory period. In any case, since the case was timely filed with the Appeals Board, we will accept the Petition as timely. Applicant is again reminded to follow Appeals Board rules and procedures in future Appeals Board proceedings.

Turning to the merits, we will deny for the following reasons and for the reasons **[*3]** stated in the arbitrator's Report quoted below. In the seminal case of *Ezzy v. Workers' Comp. Appeals Bd. (1983) 146 Cal.App.3d 252 [194 Cal. Rptr. 90, 48 Cal.Comp.Cases 611]*, the court fashioned a two-part test to determine whether off-duty recreational, social, or athletic activity is compensable. According to the *Ezzy* test, "the test of 'reasonable expectancy of employment'… consists of two elements: (1) whether the employee subjectively believes his or her participation in an activity is expected by the employer, and (2) whether that belief is objectively reasonable." (*Ezzy, 146 Cal.App.3d at p. 260*.) The first part of the *Ezzy* test has been labeled a "lax standard" (*Wilson v. Workers' Comp. Appeals Bd. (1987) 196 Cal.App.3d 902, 906 [239 Cal. Rptr. 719, 52 Cal.Comp.Cases 369]*), and thus most

cases are decided on the second strand of the *Ezzy* test: whether the employee's belief that an activity is expected is objectively reasonable.

Since *Ezzy* was issued, a number of Court of Appeal decisions have applied *section 3600(a)(9)* and the *Ezzy* test in the context of a peace officer injured during off-duty athletic activity. (See *Wilson v. Workers' Comp. Appeals Bd. (1987) 196 Cal.App.3d 902 [239 Cal. Rptr. 719, 52 Cal.Comp.Cases 369]*; *Taylor v. Workers' Comp. Appeals Bd. (1988) 199 Cal.App.3d 211 [244 Cal. Rptr. 643, 53 Cal.Comp.Cases 115]*; *Kidwell v. Workers' Comp. Appeals Bd. (1995) 33 Cal.App.4th 1130 [39 Cal. Rptr. 2d 540, 60 Cal.Comp.Cases 296]*; *City of Stockton v. Workers' Comp. Appeals Bd. (Jenneiahn) (2006) 135 Cal.App.4th 1513 [38 Cal. Rptr. 3d 474, 71 Cal.Comp.Cases 5]*; *Tomlin v. Workers' Comp. Appeals Bd. (2008) 162 Cal.App.4th 1423 [76 Cal.Comp.Cases 672]*; *Young v. Workers' Comp. Appeals Bd. (2014) 227 Cal.App.4th 472 [173 Cal. Rptr. 3d 643, 79 Cal.Comp.Cases 751*.)

In *Jenneiahn, supra*, the Court of Appeal surveyed the prior cases applying the *Ezzy* rule and concluded that "The decisions that have allowed workers' compensation pursuant to *subdivision (a)(9)* have generally found the employer expected the employee to participate in the specific activity in which the employee was engaged **[*4]** at the time of injury." (*Jenneiahn, 135 Cal.App.4th at p. 1524*.) In *Wilson, supra*, for instance, the Court of Appeal found compensable an injury sustained by a police officer while running to train for a fitness test to remain part of his department's special emergency reaction team (SERT). SERT members had to pass four fitness tests per year, including one that required members over 35 to run 2 miles in 17 minutes or less.

Similarly, in *Kidwell*, the court found compensable an injury sustained by a highway patrol officer while performing a standing long jump at home. The officer in *Kidwell* was training for a mandatory physical performance program fitness test, which required the test taker to perform a standing long jump with a minimum clearance of 68 inches. In *Tomlin*, which was decided after *Jenneiahn*, a police officer, who was a member of the SWAT team, was injured running while training for a required annual examination which included running.

Thus, in most of the cases where the injury was found compensable, the injured worker was training for a fitness test, and was performing the specific physical activity he or she was to be tested on. In *Jenneiahn*, in contrast, the police officer applicant was injured while playing **[*5]** basketball to maintain his general fitness for duty, rather than training for any specific required test. The *Jenneiahn* court flatly held that "[t]he general, and reasonable expectation that a police officer will maintain sufficient physical fitness to perform his or her duties is not a sufficient basis to extend workers' compensation coverage to any and all off-duty recreational or athletic activities in which an officer voluntarily choses to participate." (*Jenneiahn, 135 Cal.App.4th at p. 1526*.)

In *Young, supra*, which was also decided after *Jenneiahn*, a correctional sergeant was injured while performing jumping jacks as part of a general fitness regimen. However, in *Young*, unlike the case at bar, there was a written departmental order requiring officers to maintain themselves in good physical condition. (*Young, 227 Cal.App.4th at p. 475*.) Additionally, contrary to here where applicant said that there was no physical training requirement, in *Young*, officers "were required to undergo periodic training exercises, many of which involved physical activity." (*Ibid.*) Finally, the *Young* decision states, "To allay any concerns law enforcement departments may have about potentially increased liability as a result of this decision, we note that departments have **[*6]** the ability to limit the scope of potential liability by designating and/or preapproving athletic activities or fitness regimens. …" (*Id. at p. 482*.) It appears that is exactly what defendant did in this case in the Department Manual, which lists only specified activities as being approved, with those activities only approved at specified locations.

We otherwise deny for the following reasons stated in the arbitrator's Report quoted below, much of which aligns with our views above. As noted, we do not incorporate the arbitrator's discussion of the timeliness of the Petition.

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

1. Applicants Occupation: Police Officer

2. Applicant's age at dates of injury: 48

3. Dates of injury: July 11, 2020

4. Parts of body injured: Left ankle, lower extremity

5. Identity of petitioner: Applicant

6. Timeliness: No

7. Verified: Yes

8. Answer Filed: Yes

9. Date of Action: August 23, 2023

10. The petitioner's contentions: The claim is not barred by *Labor Code Section 3600(a)(9)* as off-duty athletic activity.

II.

FACTS

Applicant filed a claim for an injury to his ankle. He sustained an injury while participating in an off-duty kickboxing class at a private gym in a city unaffiliated with **[*7]** the Los Angeles Police Department. The Defendant only became aware of this activity on receipt of the claim. Defendant denied the claim on the basis of *Labor Code Section 3600(a)(9)* as an off-duty athletic unapproved activity by the department.

After hearing and reviewing the testimonial and documentary evidence presented by the parties at the arbitration the undersigned found that the claim is barred by *Labor Code Section 3600(a)(9)* as it failed to meet the second prong of the *Ezzy vs. WCAB (1983) 48 CCC 611* standard. Applicant's subjective belief that his voluntary off-duty kickboxing activity was a requirement of his employment with the Los Angeles Police Department was found not to be objectively reasonable.

III.

DISCUSSION

Applicant's Petition for Reconsideration states that he was on duty when he was injured but his testimony at the arbitration on June 28, 2023, pg. 25 lines 1–12 states that he was in an on-call status. When that occurs, he is not engaged in law enforcement activities if he isn't called in by a supervisor, which he was not. Further his supervisors do not provide any instructions as to what activities he may or may not participate in while in this status. He was not on duty.

Applicant next argues that he was instructed verbally **[*8]** by Academy instructors twenty years ago to conduct off-duty training and encouraged and told to seek training outside of the department as they only taught basic self defense courses at the Academy. In addition, it is argued that his unrebutted testimony establishes that officers are still expressly instructed to perform their own off-duty training, and that to this day Academy instructors are still telling recruits to go and seek outside training on their own.

Applicant's unrebutted testimony is based entirely upon self-serving, uncorroborated, multiple hearsay verbal statements from unidentified training officers twenty years ago as well as multiple hearsay statements from a former partner.

I found Applicant's testimony credible as to his subjective belief that he was encouraged to maintain physical fitness training on his own if he so desired. I did not find that the multiple self-serving hearsay statements aforementioned were substantial evidence or objectively reasonable to prove that he was told he was required to perform outside training on his own in light of the entire testimonial and documentary evidence submitted.

In support of this finding the following designated portions **[*9]** of Applicant's testimony from the arbitration transcript of June 28, 2023 are as follows:

• Pg. 46 lines 12–15 there was no formal policy through the Academy once he graduated that he was required to take outside training.

• Pg. 28 lines 11–25 there were no physical fitness standards or requirements that were imposed on him nor any physical agility tests. There is encouragement to participate in a physical fitness regimen.

• Pg. 21 lines 17–21 the Los Angeles Police Department manual encourages officers to engage in some sort of physical fitness program to stay healthy.

• Pg. 28 lines 23–25 there is no requirement or policy that requires a certain level of physical fitness.

• Pg. 33 lines 1–11 there was nothing in his job description at any time that required him to perform outside training or kickboxing.

• Pg. 30 line 10—Pg. 31 line 6 he was never offered any incentives or threatened with any reprimands or disciplined if he did not take an outside training course. He was also unaware of any officer being taken off the job for not taking an outside training course.

• Pg. 35 line—Pg. 36 line 25 he was not required to know any techniques or tactics to perform his job except those that he **[*10]** was taught at the Academy.

• Pg. 47 line 22—Pg. 48 line 1 the Los Angeles Police Department provides some gym locations and equipment either at the Academy or various stations where officers can engage in a physical fitness regimen.

• Pg. 42 line 24—Pg. 43 line 2 he has received other training orders from the department.

DOCUMENTARY EVIDENCE:

The Los Angeles Police Department manual (exhibit B) delineates certain injuries sustained during athletic activities are deemed to arise out of and in the course of employment subject to specific requirements and kickboxing is not one of them. The manual does allow self-defense courses if taken under the supervision of a training officer if requested and authorized. Applicant did not request the kickboxing class and it was not taken under the supervision of a training officer. If additional training is deemed necessary, the department can issue a performance order which they did not do for this activity.

Based upon the foregoing, it was found that the testimonial and documentary evidence was more credible than the multiple self-serving hearsay statements from unidentified, uncorroborated individuals.

CASE LAW CITED BY APPLICANT:

Applicant argues **[*11]** that numerous Court of Appeals cases uphold A.O.E. / C.O.E. coverage for physical fitness and training. The case law he cites does not support his arguments. In *Young v. W.C.A.B. (2014) 79 CCC 751* the department required its correctional officers to undergo periodic training exercises, many of which required physical activity. The court found that the jumping jacks he was performing at home when injured were objectively reasonable for him to believe the department expected him to perform in order to maintain sufficient cardiovascular health to pass the training exercises not because he needed to stay in good physical shape generally. In fact, the case states why the Los Angeles Police Department manual deserves great weight. The

court further stated that law enforcement departments could limit the scope of potential liability by designating or pre-approving athletic activities of fitness regimens.

Similarly in *Kidwell v. W.C.A.B. (1995) 33 Cal.App.4th 1130* off-duty long jump deemed A.O.E. / C.O.E. because a standing long jump was part of her annual fitness test and there was no evidence the employer offered its employees practice facilities, supervision, or on-duty time to practice. It also found failure to pass would adversely affect her salary, opportunity for **[*12]** promotion, and ability to participate in special programs.

In *Wilson v. W.C.A.B. (1987) 52 CCC 369* an off-duty police officer injury while exercising was found A.O.E. / C.O.E. because the officer's exercising was in order to pass tests required by the city to remain a member of a special tactical unit and that off-duty exercise was necessary to qualify for the test.

In *Tomlin v. W.C.A.B. (2008) 73 CCC 593* the court found that an off-duty SWAT officer's injury while jogging in preparation for a physical fitness exam was A.O.E. / C.O.E. despite the fact that the injury occurred while he was on vacation.

The case law clearly demonstrates that the activity undertaken in the cases cited by Applicant were all directly related to a physical fitness test that was required by the employer. Applicant's argument that his being in good physical shape to help him to de-escalate altercations involves techniques and methods which has already been shown to be irrelevant other than what he was taught at the Academy. Further the purpose of de-escalation in a physical altercation is to only use a reasonable amount of force appropriate to the specific circumstance. De-escalation policy applies to all police officers and requires judgement as to the amount of force used in a **[*13]** specific circumstance and not any specific tactic or technique utilized. It is a general policy which cannot be objectively measured except in a specific circumstance. Kickboxing is capable of escalating as well as de-escalating an altercation.

The case law in *Taylor v. Workers' Comp. Appeals Bd. (1988) 199 Cal.App.3d 211, 244 Cal. Rptr. 643* and in *City of Stockton v. W.C.A.B. (Jennieiahn) (2006) 71 CCC 5* clearly shows that a substantial nexus between an employer's expectations and a specific off-duty activity in which the employee engaged is required otherwise the scope of coverage becomes virtually limitless and contrary to the legislative intent subdivision (a)(9). That sufficient nexus was found to be lacking in this case. These cases also rejected the benefit to the employer and an employer's expectations that an employee stay in good physical condition arguments is insufficient to extend workers compensation coverage to any and all off-duty recreational or athletic activities in which an officer voluntarily chooses to participate.

This case falls squarely into the *Peterson McCranie-Peterson v. W.C.A.B. (2012) 77 CCC 907 (writ denied)* kickboxing case where it was found that a general physical fitness encouragement is insufficient to create a requirement for outside training.

[Discussion of timeliness of Petition and propriety of supplemental proceeding omitted.]

RECOMMENDATION

Based upon **[*14]** the foregoing it is respectfully recommended that Applicant's Petition for Reconsideration be denied [...] on the merits as discussed herein.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Arbitrator's Findings and Order of August 23, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

Chair Katherine A. Zalewski

I concur,

Commissioner Natalie Palugyai

Commissioner Joseph V. Capurro

Burnett (Andrew) v. High Desert Juvenile Detention and Assessment Center, 2023 Cal. Wrk. Comp. P.D. LEXIS 350; 89 Cal. Comp. Cases 498

Workers' Compensation Appeals Board (Board Panel Decision)

November 27, 2023 Opinion Filed

W.C.A.B. No. ADJ11250045

Reporter
2023 Cal. Wrk. Comp. P.D. LEXIS 350 *; 89 Cal. Comp. Cases 498 **

Andrew Burnett, Applicant v. High Desert Juvenile Detention and Assessment Center, PSI, administered by County of San Bernardino, Defendants

Status:

CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425, fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Prior History:

W.C.A.B. No. ADJ11250045—WCJ Myrle R. Petty (SBR); WCAB Panel: Commissioners Snellings, Razo, Deputy Commissioner Schmitz (dissenting)

Disposition: The Petition for Reconsideration is *denied*.

Core Terms

youth, violent act, psychiatric injury, juvenile, corrections officer, hit, Reconsideration, psychiatric, impairment, teacher, rating, fight, physical injury, fingers, pounds, combative, dropped, grader, psyche, red, permanent disability, physical force, knock down, passionately, threatening, disability, vehemently, probation, intense, elbow

Headnotes

CALIFORNIA COMPENSATION CASES HEADNOTES

Psychiatric Injury—Violent Acts—WCAB, denying reconsideration in split panel opinion, affirmed WCJ's decision that applicant's psychiatric injury was compensable consequence of orthopedic injury and did not result from "violent act" within meaning of *Labor Code §§ 4660.1(c)(2)(A)* and *3208.3(b)(2)*, and, therefore, applicant was not entitled to increased permanent disability for psychiatric injury, when applicant, while working as probation correctional officer on 10/26/2017, injured his left wrist and elbow during struggle with 16-year-old youth in juvenile detention facility after another officer dropped youth on applicant's wrist, and WCAB panel majority found that psychiatric injury resulted from applicant's inability to continue working as correctional officer due to his orthopedic disability, not from orthopedic injury itself, and, with respect to whether injury resulted from "violent act," WCAB panel majority reasoned that *Wilson v. State of CA Cal Fire (2019) 84 Cal. Comp. Cases 393* (Appeals Board en banc opinion), describes violent act as one characterized by either strong physical force, extreme or intense force, or act that is vehemently or passionately threating, and in this matter, mechanism of applicant's injury, *i.e.*, officer dropping youth on applicant's wrist, could not be construed as "violent act" under *Labor Code § 4660.1(c)(2)(A)* or *Wilson* because requisite level of force did not exist; Deputy Commissioner Schmitz, dissenting, disagreed with WCJ's comparison of facts in this case to those in *Smith v. Calistoga Elementary School, 2023 Cal. Wrk. Comp. P.D. LEXIS 202* (Appeals Board noteworthy panel decision), where WCAB concluded that elementary school teacher being [500] knocked to ground by student was not "violent act," noting that here, applicant was not knocked down by second grade student, but rather was struck on wrist by combative teenager during struggle, that when considering force, object causing collision and part of body enduring collision must be considered, and that here, evidence suggested there was strong, extreme or intense physical force involved in injury and that circumstances were vehemently or passionately threatening.**

[See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d *§ 4.02[3][a]*; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.05[3][b][ii], 7.06[6].]

Counsel

[*1] For applicant—Moore & Associates

For defendants—Michael Sullivan & Associates, LLP

Panel: Commissioner Craig Snellings; Commissioner Jose H. Razo; Deputy Commissioner Anne Schmitz

Opinion By: Commissioner Craig Snellings

Opinion

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report 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 report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Craig Snellings

I concur,

Commissioner Jose H. Razo

I dissent,

Deputy Commissioner Anne Schmitz

DISSENTING OPINION OF DEPUTY COMMISSIONER ANNE SCHMITZ

I write specifically to take issue with the WCJ's interpretation of *Smith v. Calistoga Elementary School, 2023 Cal. Wrk. Comp. P.D. Lexis 202* (ADJ10945733), *a case where I was a panel member*.

In her Report, the WCJ states that:

> In *Smith v. Calistoga Elementary School, (2023) Cal. Wrk. Comp. P.D. Lexis 202*, the WCAB held that a teacher who had suffered a fracture to her elbow after she was unexpectedly knocked down by a student did not suffer a violent act for the purposes of *LC 4660.1(c)(2)(a)*. The **[**501]** WCAB noted that although most injury-causing accidents are surprising, not all injury-causing accidents are the result of violent acts as contemplated by *LC 4660.1(c)(2)(a)*.

However, according to the evidentiary record in *Smith*, applicant testified over two days of trial, and defendant offered Bailey Tucker, a teacher at the elementary school in rebuttal as follows:

> Debra Smith was injured on September 23, 2015. **[*2]** At the end of the school day, she was coming out of a teachers' bathroom and was knocked down by a student. The student hit her from the right. She was not expecting it. She ended up landing on the ground three feet away. Her body impacted the concrete, and the student landed on her. The student was in second or third grade. At the time, she weighed 130 pounds. Her feet left the ground. She hit the concrete and fractured her elbow. The first to hit the ground were her knees. (Minutes of Hearing, Summary of Evidence (MOH) December 14, 2020, pp. 5–6.)
>
> ***
>
> She testified that the children that knocked her down were coming from the classrooms and not from the playground, and that made the collision unexpected. There were two children running. One was being chased, and witnesses said that one of the children was pushed … She was hit near the ankles. Her feet left the ground, and she traveled about three feet. (MOH, March 1, 2021, pp. 3–4.)

Defendant's witness Bailey Tucker testified as follows:

> He assumed that her injury took place at one of the staff bathrooms, which is close to the playgrounds but did not know where the accident occurred. It would not be unusual for students to be running in that area, but they're not supposed to. He estimated the size of an average second grader at three to three-and-a-half feet tall and 50 to 60 pounds. He agreed that at that age they are learning to control their body as that is developing. **[*3]** He stated that second graders are generally very active and that it would not be unusual for a second grader to bump into a PE teacher. Part of his job as a PE teacher is to help students learn how to control their movements. (MOH, March 1, 2021, p. 3.)
>
> ***
>
> He did not observe the collision between a student and Ms. Smith. He agreed that at that age, students are not always mindful of their body and are not always in control. He would not be surprised if students were running in the area where he assumed the accident took place, and that they would not be paying attention to where

they were going. It was conceivable that students would collide with the teacher in that area. He stated that if a 60-pound kid collided with him, he would not be knocked down. It is conceivable that a teacher could be knocked down, but it would be relative to the individual teacher. (MOH, March 1, 2021, p. 3.)
[502]**

In contrast, in this case, defendant offered no witness testimony to rebut applicant's testimony, and applicant testified as follows:

… [W]itness stated that he did train as a peace officer for four months for correctional officer training and peace officer status. At the end of this training, he was sworn **[*4]** at a ceremony as a peace officer and he was moved to a facility as a correctional officer. (MOH, June 28, 2023, p. 4.)

***

As a probation correctional officer, he was assigned to work initially for the first couple of days at the Juvenile Detention and Assessment Center in San Bernardino. He then was assigned to the High Desert Juvenile Detention and Assessment Center. (MOH, June 28, 2023, p. 5.)

***

He worked at the High Desert Juvenile Detention and Assessment Center. His job duties were to assess, to watch the youth, assess his case loads and there were so many things he did. He put down any issues between youths or any issues happening in the facility, be prepared to be hands on or to use pepper spray if necessary. (MOH, June 28, 2023, p. 5.)

***

They managed the youth through restraints and control holds, managing them in and out of cells, managing them if they were combative. They were the ones who went in and out, and that was their job. (MOH, June 28, 2023, p. 5.)

***

His unit was the maximum unit, so his unit had guys who were on trial for murder, sex offenses, all the max offenses you can think of. The ages of the juveniles were from age 14, the youngest he saw, to as old as 19, **[*5]** if they were a juvenile at the time of the offense.

He injured his left wrist and his hand. … He sustained this injury when responding to a code red on his unit. A youth had a bad day in court after finding out he would get two years at Youth Authority. Then it was the end of the day and time for him to go into his room, everyone else went into their rooms, except this youth and so witness went to speak with this youth, and finally had him so that he would voluntarily go to his room, but another officer came in and said something to the youth that made him angry and at that point, the youth refused to go into his room. They tried to talk him into the room, but he refused, and the moment he refused, their supervisor told them to put him in and go hands on, they called the code red and they went hands on. He was upset and was angry and it was a fight at that point. Witness was uncramping his hands to take him in another area, so he wouldn‘t cause **[**503]** commotion in the maximum area, but he had to have cuffs on. Two other officers were holding the youth up while the youth was laying stomach down on his hand and then swinging his elbows back and forth holding his hands close to his body. Witness **[*6]** was trying to unlock his fingers, which were locked, and as witness was trying to get his hands apart, one of the officers dropped the youth on witness’ left hand.

A code red is an incident that involves a violent act, a fight, or some type of throwing incident. It is a violent act that needs the attention of the other officers. There were about 35 officers who responded to this code red, which went on for about an hour-and-a-half. Witness cannot say the height the drop of the youth was when the youth landed on witness' hand. When he was dropped on witness' hand, witness' hand was in between the

youth's body and the floor, because he was uncramping the youth's right fingers from being tied into the left. If he could get the right hand away from the left hand, they would be able to restrain him, put handcuffs on him and remove him from this unit to an empty unit at the time.

This encounter with this juvenile, the juvenile was fighting back, being physical, pushing and being combative. Witness knew he sustained an injury that evening, because his wrist was hurting … . The next day, he told the watch commander about it and he was told to put his name on the list of things that happened **[*7]** on the previous day during the code. (MOH, June 28, 2023, pp. 5–6.)

***

Witness confirmed that he worked with youths who were combative. He confirmed these youths had committed maximum offenses. Combative means physical fights and altercations, argumentative, and anything to do with combative. The physical fights didn't occur in his unit every day, but there was every day some type of physical event in the facility. Witness is 5′ 9″.

When he last worked at the Juvenile Assessment Center, he weighed 200 pounds. He now weighs 220 pounds, if he is not mistaken. (MOH, June 28, 2023, p. 11.)

***

The youth was fighting back. The youth was resisting when they were trying to get him into his unit. He was uncrimping interlocked fingers. The right hand fingers were interlocked with the left hand fingers, and the hands were held close to the youth's chest area. He called the code red because he was refusing to go up into his room and the supervisor requested them to go hands on, which meant no pepper spray. That meant forcefully taking the youth into the unit. Witness was involved in forcefully trying to take the youth. He took a stance as if to throw a punch. He got into a fighting stance.
[504]**

Later on, **[*8]** as the code went on, the. youth laid on his hands with his fingers locked and every time they would try to uncramp the youth's fingers, he would move around and fight back. Witness was hit in the shoulders with the youth's elbows when he swung back and forth resisting.

There were approximately 35 officers who responded, but he doesn't know for sure. When the youth started moving his body around, it was just witness, his partner and the supervisor went in hands on. The moment they went hands on, they grabbed him and tried to gain control through control holds, techniques they use to gain control, but they were not successful. This youth was 16 years old. It was just witness and his co-worker who tried to use control holds.

Another officer told the youth something that upset him. Witness heard what the officer told the youth, but he doesn't recall it exactly, but it had to do with the youth's court case that day, but it made the youth upset. The rest of the officers showed up in the midst of the combat. Witness didn't see what was going on at the time because he was in the midst of the combat. They would rotate back in to get the youth to calm down and comply. Witness never punched this **[*9]** youth. Witness doesn't recall if any other officer punched this youth. Witness was trying to restrain the youth and get him in his room. The co-workers dropped the youth on witness' wrist. (MOH, June 28, 2023, pp. 11–12.)

Even without an opportunity to observe the witnesses as they testified, the summaries of testimony reveal the following. In *Smith*, a 130 pound teacher was knocked down by a second grader. The child was never identified, so no details exist as to what the weight of the child was. Defendant's witness speculated that a child of that age would be about three and a half feet tall and weigh about 50 to 60 pounds, and applicant submitted no evidence to dispute that assertion. According to applicant, “witnesses” said a child was chasing another child, and one child was pushed, however, applicant presented *no testimony as to how the incident actually occurred*. In contrast, here, applicant was not injured by frolicking second graders. Applicant was injured by an angry and combative sixteen year old, who was being held in a maximum security area of the facility for those accused of murder, sex offenses,

etc. Applicant was equipped with pepper spray and trained to use control **[*10]** holds. Applicant weighed about 200 pounds at the time of the injury. The injury occurred during a Code Red, which lasted for about an hour and a half, where about 35 officers responded. As applicant and two other officers were attempting to restrain the youth, the two other officers dropped the youth on applicant's left hand, and as they struggled, applicant's hand was trapped under the youth's body on the cement floor.

An employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark) (2015) 61 Cal. 4th 291, 297–298, 302 [188 Cal. Rptr. 3d 46, 349 P.3d 141, 80 Cal. Comp. Cases 489]*; *Lab. Code, §§ 3600(a)*; *3202.5*.) *Labor Code section 4660.1* governs how to determine permanent disability for injuries occurring on or after **[**505]** January 1, 2013. (*Lab. Code, § 4660.1*.) *Section 4660.1* bars an increase in the employee's permanent impairment rating for a psychiatric disorder arising out of a compensable physical injury occurring on or after January 1, 2013 unless the injury falls under one of the statutory exceptions. As pertinent herein, *section 4660.1(c)* provides in relevant part as follows:

> *(c) (2)* An increased impairment rating for psychiatric disorder shall not be subject to *paragraph (1)* if the compensable psychiatric injury resulted from either of the following:
>
> *(A)* Being a victim of a violent act or direct exposure to a significant violent act within the meaning **[*11]** of *Section 3208.3*.

(*Lab. Code, § 4660.1(c)(2)*.)

In *Larsen v. Securitas Security Services (2016) 81 Cal. Comp. Cases 770 [2016 Cal. Wrk. Comp. P.D. LEXIS 237]*, a security guard was struck by a car from behind while on a walking patrol causing her to fall, hit her head and lose consciousness. The applicant reported hitting her head so hard when she was hit by the car that she thought she was going to die. She was taken by ambulance to the emergency room. The panel in *Larsen* defined a "violent act" for purposes of *section 4660.1* as an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening. (*Id. at pp. 774–775*.)

Applying this definition, the panel concluded that "[b]eing hit by a car under these circumstances constitutes a violent act" and thus, applicant was entitled to additional permanent disability for her psyche injury as an exception to *section 4660.1(c)*. (*Larsen, supra, 81 Cal. Comp. Cases at p. 775*; see also *Madson v. Michael J. Cavaletto Ranches (February 22, 2017, ADJ9914916) [2017 Cal. Wrk. Comp. P.D. LEXIS 95]* [a truck driver pinned and crushed in his vehicle for approximately 35–40 minutes with a fractured neck while fearing that the truck would catch fire before he was extricated qualified as a violent act outlined in *Larsen*].)

Subsequent decisions since *Larsen* and *Madson* have followed the definition of a "violent act" for purposes of *section 4660.1* as an act that is characterized by **[*12]** either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening. (See *Lopez v. General Wax Co., Inc. (June 19, 2017, ADJ9365173) [2017 Cal. Wrk. Comp. P.D. LEXIS 291]* [candle maker's partial finger amputation in a machine was a violent act]; *Allen v. Carmax (July 10, 2017, ADJ9487575) [2017 Cal. Wrk. Comp. P.D. LEXIS 303]* [accident after car brakes failed when the applicant attempted to avoid hitting a pedestrian resulting in collision with a cement pillar was a violent act]; *Greenbrae Mgmt. v. Workers' Comp. Appeals Bd. (Torres) (2017) 82 Cal. Comp. Cases 1494 (writ den.)]* [landscaper's fall from a tree hitting his head multiple times and losing consciousness was a violent act].)

In *Smith*, applicant simply did not meet her burden to show that her injury was caused by either a strong physical force, extreme or intense force, or an act that is **[**506]** vehemently or passionately threatening. That is, there was no evidence presented about how the incident actually occurred or how fast the child was running so as to prove that the second grader was a strong, extreme or intense physical force. Moreover, based on the evidence presented, it appears that the children were acting as would be expected by second graders, and there is nothing inherent in the circumstances to indicate that the act was vehemently or passionately threatening.

In contrast, here, the youth was struggling and angry and sixteen years of age, rather **[*13]** than seven years of age and 50 to 60 pounds, and the youth made contact with applicant's left hand, not applicant's body while

standing. That is, when considering the "force," the object causing the collision and the object that is subject to the collision must be taken into account, and here the evidence suggests a strong, extreme or intense physical force. More significantly, the circumstances here were clearly ***vehemently or passionately threatening***. That is, the injury occurred during a Code Red emergency, lasting an hour and a half and requiring 35 officers to respond, and where applicant and two other officers were attempting to control a combative angry youth, housed in the maximum security area of the facility.

Accordingly, I would find that applicant met his burden to show that he was a victim of a violent act.

WORKERS' COMPENSATION APPEALS BOARD

Deputy Commissioner Anne Schmitz

* * * *

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

By timely, **[*14]** verified Petition for Reconsideration, filed 9/27/2023, Petitioner, Andrew Burnett (hereafter applicant), by and through his attorney of record, Olaleye O. Moore of Moore and Associates, seeks reconsideration of the Findings, Award and Order issued herein on 9/14/2023.

Respondent, County of San Bernardino (hereafter defendant), by and through its attorney of record Juan Naranjo of Michael Sullivan & Associates, filed a timely and verified Answer to the Petition for Reconsideration on 10/6/2023.

ISSUES PRESENTED

1.

Was it error not to award applicant psychiatric permanent disability?

INTRODUCTION

Applicant, Andrew Burnett, a Probation Correctional Officer, sustained an orthopedic injury to his left wrist and elbow on 10/26/2017. As a result of that **[**507]** physical injury, applicant was determined after trial to have also sustained an injury arising out of and in the course of employment to his psyche.

In the decision complained of, pertaining to the issues raised on reconsideration, the undersigned Workers' Compensation Administrative Law Judge found as follows:

> The psychiatric permanent and stationary report of treating psychiatrist, E. Richard Dorsey, M.D., dated 2/27/2023, while finding that applicant sustained a psychiatric injury due 100% to occupational physical injury of the left wrist, found that applicant had sustained no ratable psychiatric impairment. Dr. Dorsey determined that he did not find any need for future medical treatment to the psyche at this **[*15]** time. Dr. Dorsey's 2/27/2023 report (Exhibit G), is silent as to whether or not applicant sustained any temporary total or temporary partial disability as a result of the injury to his psyche, but did indicate that applicant was mentally able to resume is former job (probation correctional officer) or to continue with his current job (delivery truck driver for a different employer), without any restrictions. The only of Dr. Dorsey's earlier reports, specifically Exhibit 2-M, dated 7/24/2020, that actually addresses applicant's disability status, indicates that Dr. Dorsey did determine applicant was temporarily partially psychiatrically disabled, but he made no mention of whether applicant could or could not perform his work duties with the County of San Bernardino, either with or without restrictions, so Dr. Dorsey's reporting is not helpful on the issue of temporary disability.
>
> The Panel QME in psychiatry, Allen H. Lee, M.D., in his 4/7/2022 report (Exhibit 3), found that applicant sustained an industrial psychiatric injury due to the impact of the orthopedic industrial injury. He found applicant to have reached MMI as of the date of the examination (4/7/2022), and that from a psychiatric **[*16]** standpoint,

applicant was likely temporarily partially disabled since he stopped work in May of 2018 until 4/7/2022. Dr. Lee estimates applicant's GAF score to be a 66, a 6% whole person impairment, if applicant was entitled to psychiatric impairment. Dr. Lee apportions 85% of the psychiatric impairment to the orthopedic industrial injury and 15% to non-industrial factors. However, permanent disability to the psyche is precluded based on LC *Section 4660.1(c)(1)*, insofar as it is predominantly caused by a physical injury. Therefore, applicant is not entitled to an increased rating by reason of injury to the psyche. Dr. Lee opines that applicant's psychiatric treatment has been reasonable and necessary, and he should be afforded psychiatric follow-up care with Dr. Dorsey.

I find that applicant did sustain a psychiatric injury and is entitled to future treatment for it, but he is not entitled to an increase in rating by reason of the fact that his psychiatric injury was predominantly caused by the orthopedic injury, and the Labor Code precludes a rating for **[**508]** psychiatric injury caused by the physical injury to the left wrist. I find both Dr. Dorsey's and Dr. Lee's opinions as to industrial psychiatric injury **[*17]** to be adequately supported and substantial in regard to causation, but I find Dr. Lee's report to be more persuasive on the need for further medical treatment. Neither report supports a rating for disability impairment by reason of the psychiatric injury, insofar as the psyche injury was predominantly caused by a physical injury, and thus a rating is precluded per *LC 4660.1(c)(1)*.

DISCUSSION

1.

Was it error not to award applicant psychiatric permanent disability?

LC 4660.1(c) states: "*(1)* Except as provided in *paragraph (2)*, the impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase. This section does not limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury. *(2)* An increased impairment rating for psychiatric disorder is not subject to *paragraph (1)* if the compensable psychiatric injury resulted from either of the following: (A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of *Section 3208.3* …"

LC **[*18]** *3208.3(b)(1)* and *(2)* states: "*(b)(1)*In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury. *(2)* Notwithstanding paragraph *(1)*, in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury."

The applicant never asserted at trial that the incident that resulted in his left wrist injury was the cause of his psychiatric injury. It was the loss of his position as a Probation Correctional Officer due to his physical limitations and inability to continue in his career as a corrections officer that caused his psychiatric injury. It is not at all unusual for correctional officers at a juvenile detention center to encounter resistant juvenile inmates requiring applicant and other correctional officers to subdue an unruly juvenile Correctional officers are trained to deal with unruly and resistant **[*19]** juvenile offenders, and it is part of their usual work duties.

Applicant testified that physical fights didn't occur in his unit every day, but there was every day some type of physical event in the facility where he worked. It was in one such encounter with a resistant youth when applicant was trying to restrain the youth and get him in his room that one of applicant's colleagues **[**509]** dropped the juvenile on applicant's wrist. I would not interpret the encounter resulting in applicant's wrist injury as applicant being a victim of a violent act.

As pointed out by defendant in their Answer, the WCAB, in the en banc decision in *Wilson v. State of CA Cal Fire (2019) 84 CCC 393*, explained that a violent act focuses on the mechanism of the injury rather than the injury itself,

indicating that a violent act would be characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening.

In Smith v. Calistoga Elementary School (2023) Cal. Wrk. Comp. P.D. Lexis 202, the WCAB held that a teacher who had suffered a fracture to her elbow after she was unexpectedly knocked down by a student did not suffer a violent act for the purposes of *LC 4660.1(c)(2)(a)*. The WCAB noted that although most **[*20]** injury-causing accidents are surprising, not all injury-causing accidents are the result of violent acts as contemplated by *LC 4660.1(c)(2)(a)*.

The mechanism of applicant's psychiatric injury was not the physical act of his colleague dropping the juvenile on applicant's wrist, which certainly cannot be construed as a violent act within the meaning of the labor code section. The psychiatric injury was caused by applicant's loss of his career as a probation correction officer due to the impairments from the orthopedic injury he sustained. Applicant's testimony was that when he realized he couldn‘t go back to work as a probation correctional officer, it devastated him. It was not the work incident that caused the psychiatric injury, but it was his inability to return to work as a correctional officer.

It was not error to determine that applicant's psychiatric injury warranted no increase in permanent disability insofar as it arose from a compensable physical injury and the exceptions do not apply insofar as the psychiatric injury was not caused by a violent act within the meaning of the statute.

RECOMMENDATION

I recommend the Petition for Reconsideration, filed by applicant on 9/27/2023 be **[*21] DENIED** on the merits.

Myrle R. Petty

Workers' Compensation Administrative Law Judge

Vasquez v. Sabert Corp., 2023 Cal. Wrk. Comp. P.D. LEXIS 330

Workers' Compensation Appeals Board (Board Panel Decision)

November 6, 2023 Opinion Filed

W.C.A.B. No. ADJ10677338—WCJ Jeffrey Wilson (RIV); WCAB Panel: Commissioner Capurro, Chair Zalewski, Commissioner Palugyai

Reporter
2023 Cal. Wrk. Comp. P.D. LEXIS 330 *

Cynthia Vasquez, Applicant v. Sabert Corporation, Defendant

Subsequent History:

Review denied by *Sabert Corporation, Petitioner v. Workers' Compensation Appeals Board, Cynthia Vasquez, Respondents, 2024 Cal. Wrk. Comp. LEXIS 14 (Mar. 8, 2024)*

Status:

Publication Status: CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: The Petition for Reconsideration is *denied*.

Core Terms

rolls, cleaning, rollers, machine, lines, extruder, opening and closing, witnesses, Exhibits, willful, safety order, manufacturer, witness testimony, violations, serious and wilful misconduct, disengaged, injuries, warning, pulled, time of injury, complaints, policies, serious injury, own policy, shutdown, Reconsideration, Hazardous, hearings, rotating, energy

Headnotes

Serious and Willful Misconduct of Employer—WCAB, denying reconsideration, affirmed WCJ's finding that applicant machine operator established amputation injuries she incurred to her arm and fingers on 10/24/2016 while cleaning rollers on extruder machine resulted from employer's serious and willful misconduct under *Labor Code §§ 4553* and *4553.1*, when applicant was cleaning extruder machine with rollers running in open position instead of with machine shut down and rollers disengaged, resulting in roller dropping on applicant, and WCAB found, based on evidence, that Cal/OSHA safety regulations, manufacturer's safety warnings, and employer's own safety directives in effect at time of applicant's injury required machine to be shut down and rollers disengaged during cleaning process, that employer was aware of these safety protocols but stopped following them years before applicant's injury, that employer was previously advised of mechanical problems with rollers and took no corrective action, that employer's failure to adhere to safety requirements was willful and predicably would result in serious injury, and that employer's willful violation of safety procedures proximately caused applicant's injuries. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 10.01; Rassp & Herlick,California Workers' Compensation Law, Ch. 11, § 11.14.]

Counsel

[*1] For applicant—Law Offices of Rene Pimentel

For defendant—Foley & Lardner

Panel: Commissioner Joseph V. Capurro; Chair Katherine A. Zalewski; Commissioner Natalie Palugyai

Opinion By: Commissioner Joseph V. Capurro

Opinion

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion, which are both adopted and incorporated herein, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Joseph V. Capurro

I concur,

Chair Katherine A. Zalewski

Commissioner Natalie Palugyai

* * * * *

REPORT & RECOMMENDATION FOR PETITION FOR RECONSIDERATION

I

INTRODUCTION

Identity of Petitioner: Defendant Sabert Corporation

Timeliness: The petition was filed timely.

Verification: The petition was properly verified.

Date of Issuance of the Award: August 8, 2023

II

CONTENTIONS [*2]

1. The evidence does not justify the Award.

III

FACTS

Cynthia Vasquez, a 54 year old machine operator, sustained injury arising out of and in the course of her employment to her arm, fingers and nervous system while employed by Sabert Corporation on October 24, 2016. The case in chief was resolved by way of a Joint Compromise and Release (including ADJ10753054) with Order Approving Compromise and Release issuing on August 17, 2021. The issues now before the Board are whether the injured worker is entitled to additional benefits against Sabert Corporation with allegations of serious and willful misconduct under *Labor Code Section 4553* and attorney fees. The matter proceeded to hearing before this Administrative Law Judge (WCJ) Jeffrey Wilson on November 2, 2022, December 13, 2022, March 21, 2023, May 1, 2023, and May 31, 2023, with witness testimony provided on behalf of applicant to include Jorge Loaiza, Frances Kingston, Anna Stebbens, and Lisa Phillian. Defendant produced testimony of witness Stewart Gallaher. Ultimately, this WCJ issued Findings and Award on August 8, 2023, finding injury resulting from serious and willful misconduct of the employer and with applicant entitled to additional benefits under **[*3]** *Labor Code Section 4553*.

In addressing the issue of serious and willful misconduct of the employer there are certain facts which must be considered. Firstly, applicant sustained very serious admitted injury on October 24, 2016, resulting in loss of her right upper extremity and partial amputation of the left hand/fingers. At the time of injury applicant was in the process of cleaning rolls or rollers on an extruder machine identified as CA3. The machine in question contains three rollers.

Purportedly the rollers were running in an open position during the cleaning process, and with a roll closing on applicant's cleaning rag and jacket and further pulling applicant inwards through her right side and with applicant caught inside the rollers. The machine contains safety warnings and devices (E-Stop) which applicant maintains she attempted to engage, and yet which did not function at the time of injury. Eventually CAL/OSHA performed an inspection including interviewing various witnesses and cited Sabert for several safety violations including, but not limited to, T*8CCR3203(a)(4)*, T*8CCR3314(c)*, and T*8CCR4187(a)*. Violations of T*8CCR3314(c)* and T*8CCR4187(a)* were termed or described by CAL/OSHA as being "serious". **[*4]** Generally, CAL/OSHA determined that Sabert Corporation had not effectively implemented its own injury/illness prevention plan or properly identified or evaluated potential hazards (*CCR3203(a)(4)*, failed to provided disengagement, de-energization of mechanically block or stop inadvertent movement of CA3 rolls during cleaning (*CCR3314(c)*, and failure to provide guards or protection of exposed sides of moving chrome rolls (*CCR4187(a)*). Ultimately the charges were resolved by stipulation and Order March 21, 2017.

Considering allegations of serious and willful misconduct of the employer under *Labor Code Sections 4553* and *4553.1*, this WCJ took note of requirements necessary to meet applicant's burden of proof including establishing the

employe's knowledge of a dangerous condition, knowledge of a probable consequence of serious injury, and failure to take corrective action (*Johns-Mansville Sales Corp. v. WCAB (Horenberger) (1979) 44 CCC 878, 883*). Moreover, when alleging violation of safety order to support serious and willful misconduct under *Labor Code Section 4553.1*, there must be showing of specific manner in which the safety order was violated, that such violation proximately caused the injury, the manner of such causation, that the safety order/conditions were known to the employer or conditions were obvious, **[*5]** and that the failure of the employer to correct the condition constituted a reckless disregard for the probable consequence.

IV

DISCUSSION

In the present matter, the parties offered testimony of witnesses raising question as to whether there were prior mechanical issues with extruder machine CA3, and whether the employer/supervisors/management were aware of these issues. Specifically, applicant was injured when cleaning rollers which were moving during the cleaning process and with a roller closing or dropping on applicant resulting in her injury. Applicant produced testimony of witnesses at hearings maintaining that there were episodes of rollers both opening and closing prior to applicant being injured and with management and supervisors having been placed on notice of such issues. Witness, Jorge Loaiza, testified at hearing on November 2, 2022, that back in 2016, and prior to applicant's injury, there were issues pertaining to hydraulics with rollers opening and closing on there own ranging from 15-20 occasions with hydraulics and censors failing (MOH 11/2/2022 page 4, lines 22-25). Witness Loaiza further maintained that supervisors were aware of the problem including manager, Ed, **[*6]** and with discussions regarding resolving the problem and yet with no resolution (MOH 11/2/2022, page 5, lines 1-3). The opening and closing of rolls were discussed at general meetings attended by other supervisors or managers including Tim Rowels (technical manager), Doug Nguyen and safety coordinator Edgar, and with advice that maintenance would be working on the issue (MOH 11/2/2022 page 8, lines 11-16), and again with no resolution. Applicant, Cynthia Vasquez, testified at hearing on December 13, 2022, that she complained of rollers opening and closing anywhere from 4-7 occasions and with complaints directed specifically to Alex in the maintenance department, and again with the problem never resolved (MOH 12/13/2022, page 8, lines 18-21). She further testified that she discussed the problem with the production manager, Ed Griffith and Tim Rowles (MOH 12/13/2022, page 9, lines 1-3). This testimony is further supported by testimony of witness and co-worker Anna Stebbens who recalls prior incidents of rollers opening and closing without being shut off, and Ms. Stebbens complaining to her supervisor Lubia (Alonso), to Tim (Rowles), Ed Griffith (production manager) and Dung Nguyen, and **[*7]** again with nothing being done to correct the ongoing problem (MOH 3/21/2023 page 13, lines 9-13). Defendant petitioner has questioned the credibility particularly of witnesses Loaiza and Stebbens noting that each individual had been terminated by Sabert for cause. To the contrary, this WCJ found such witnesses to be credible notwithstanding such termination. This WCJ takes note that petitioner did not offer testimony of any of the individuals noted above including Tim Rowles, Doug Nguyen, Ed Griffith or Lubia Alonzo who purportedly received prior complaints or warnings opening and closing of rollers on CA3. This WCJ takes further note of testimony of Ms. Stebbens regarding her termination which ironically was alleged to occur on the same day that CAL/OSHA was interviewing witnesses (MOH 3/21/2023, page 14, lines 6-7). To rebut applicant's allegations of prior roller opening and closing complaints without resolution, petitioner has offered documents including work orders not reflecting roller closing re: CA3 and testimony of plant manager, Stewart Gallaher who was unaware of such prior complaints of CA3 rollers closing by themselves, and if such complaints were communicated they would **[*8]** be reflected in work orders (MOH 3/21/2023 page 4, lines 17-20). Notwithstanding testimony of Mr. Gallaher, this WCJ took further note of deposition testimony of "safety lead" Edgar Torres dated April 13, 2022 (Defendant's Exhibit F) further supporting a history of rolls opening and closing on one side only based on information provided by Dung (Nguyen) (pages 47-48) and further prior malfunction of the E-Stop (pages 51-52).

To further address the serious and willful issue, history of Sabert's policies leading up to applicant's injuries and subsequent to the injury has particular impact as to whether Sabert acted in a willful manner. The record established that at the time of applicant's injury on October 24, 2016, rollers were running on the extruder CA3 during cleaning process. Subsequent to the injury and CAL/OSHA investigation, procedures were changed with

rolls to be stopped and open during cleaning, blocks to be placed between rolls, and with a supervisor to be present during the cleaning procedure. In review of the extruder manufacturer (Reifenhauser) handbook (contained in Joint Exhibits A & C) and Section 4.3, there is clear warning in the extrusion line of danger of being **[*9]** pulled in by rotating polishing rolls, rotating post-cooling rolls, haul off rolls, and rotating rolls (Joint Exhibit A, page 0270). Further, and in reference to electrical notes of the same page, repair and maintenance work may be performed when machinery is switched off (voltage free) and by a qualified electrician. In reference to the polishing stack and specifically referring to "Dangerous Spots and Safety Devices", warning is provided in Section 1.1 of handbook of dangers of getting burnt on heated rolls, being pulled in the rolls, and being crushed. (Joint Exhibit A page 0311; Joint Exhibit C, page 3). Further instruction directs "The cleaning of the rolls may be carried out only when the machine is not in operation." Importantly, Sabert's own Environmental Health and Safety Procedure further titled Control of Hazardous Energy (Lockout Tagout) Procedure (Joint Exhibit A, pages 0206-0216) sets forth guidance to Sabert employees to protect themselves from serious injury or death that could result from unexpected release of energy while servicing or maintaining equipment or machinery. The policy clearly establishes an origin date of 01/01/2010 and which apparently was in effect **[*10]** at the time of injury. In reference to sections 1.3, 1.4 and 1.5 of Sabert's policy (Joint Exhibit A, page 0206), the procedure was to be followed to ensure that machine or equipment is stopped, isolated from hazardous energy sources or locked out during servicing or maintenance of machines or equipment. Based on manufacturer Reifenhauser's instructions and Sabert's own safety policies, extruder CA3 should have been stopped or disengaged during the roller cleaning process.

Notwithstanding polices noted above, in review of the exhibits and testimony offered at hearings, it became apparent that Sabert did not follow instructions of the extruder manufacturer Reifenhauser or even its own policies. Testimony of witness Anna Stebbens at hearing on March 21, 2023, suggested a change in Sabert policy over the years, and prior to applicant's injuries. In noting that she was employed by petitioner from 2004 to 2017, in her early years of employment she was trained and would clean extruder rollers when they were stopped and not running, and which appeared to be in compliance with safety measures in place and noted above. She testified that approximately in 2010 procedures were changed to where **[*11]** she was instructed to clean rollers while running. She was advised of this change for reasons that the extruder took too long to heat up (MOH 3/21/2023 page 12, lines 11-19). Witness Lisa Phillian, a hired expert testifying on behalf of applicant, similarly testified that she understood that prior to 2010 such equipment was shut down during cleaning, and that after 2010 rollers were to be running during cleaning to reflect a faster recovery time. She based her testimony on both testimony of applicant and conversations she had with witness Edgar Torres (MOH 5/1/2023, page 7, lines 11-13). Clearly, Sabert's own policy in effect at the time of injury reflect cleaning while the chrome rollers were moving. In this regard, this WCJ took note of further documentary evidence including Sabert Extrusion-Cleaning Chrome Rolls WIEX-204, 4/24/2012 (Joint Exhibit A, page 0103). In reference to this document, the extruder is initially shut down with top and bottom rolls to be opened with pull roll opened and then rolls to be started at maximum speed with cleaning to commence. This procedure appears contrary to instructions provided by the manufacturer Reifenhauser instruction that cleaning of roller **[*12]** is to be performed when machine is not in operation and to Sabert's own safety directives dating back to 2010. While this WCJ recognizes testimony of petitioner witness Stewart Gallaher that cleaning was to be performed when machine is not in operation, the witness maintained that "in operation" is in reference to actual process of product being manufactured (MOH 3/21/2023, page 3, lines 14-17) as opposed to the machine being shut down or disengaged while cleaning. Giving due consideration to all exhibits and evidence noted above, this WCJ accepts applicant's argument that not "in operation" goes beyond manufacturing and to include shutting down and disengagement of extruder CA3 during cleaning of extruder rolls or rollers.

Giving due consideration to the above, this WCJ determined applicant's witnesses' testimony to be credible and notwithstanding any basis for witnesses' employment being terminated by Sabert. While acknowledging that Sabert's extruder maintenance work order records (Defendant's Exhibit C & D) do not reflect specific reporting of or repair/maintenance of rolls dropping, witnesses identified above did maintain that such events were reported to specific supervisory or **[*13]** management individuals noted above, and with the problem of opening and closing rollers while cleaning remaining either unaddressed or unresolved. Clearly both Reifenhauser's handbook and Sabert's own environmental health and safety policies in existence, and discussed above, acknowledged risks of either injury or even death in violating protocols. The record appears to establish that years prior to applicant's injury petitioner did follow its own safety procedures with cleaning of extruder rolls when rolls were stopped and not

running. Prior to applicant's injury the procedure apparently was changed with cleaning to proceed when rolls were started at "maximum speed". Petitioner argues that notwithstanding such procedures, there was no evidence of prior injury, and therefor such injury would be unpredictable, and therefore petitioner's conduct/procedures should not be considered "willful" as contemplated under the labor code. This WCJ disagrees with this argument. To the contrary, and based on the safety policies and procedures discussed above, departure from such procedures quite predictably would result in serious injury and as further evidenced by injury sustained by applicant. **[*14]** At very least petitioner, Sabert, apparently ignored safety policies and safety codes. This is further emphasized in CAL/OSHA's investigation and determination of safety violations, two of which were determined "serious". While CAL/OSHA did not label those violations as being "willful", this WCJ determined that petitioner's choice to either not adhere to or depart from safety standards and precautions detailed above as being "willful". The record established petitioner's knowledge of danger with deliberate failure to protect its employees by changing policy and requiring cleaning of tolls while running. This WCJ determined that petitioner's disregard went beyond negligence (see *Mercer v. Fraser Co. v. IAC (Soden) (1953) 18 CCC 3, 11-12*). Petitioner's departure or change of cleaning policy is willful. Violation of safety orders noted by CAL/OSHA by failing to block or stop movement of the rolls during cleaning process proximately resulted in applicant's injury. Such safety orders noted above were certainly known to petitioner as such knowledge was incorporated by the original safety guidelines encompassed in Sabert's own policies and guidelines set forth by Reifenhauser. Petitioner argues that applicant's attention was distracted during the **[*15]** cleaning procedure leading up to time of injury or contributing to the injury. While this WCJ questions whether there is actual evidence of distraction, had the safety standards been followed and the machine been mechanically stopped or disengaged the incident and injury would not have occurred and regardless of applicant having turned her head or looking to one side during cleaning procedure (MOH 12/13/2022 page 8, lines 3-5).

V

RECOMMENDATION

For reasons set forth above it is recommended that petitioner's Petition for Reconsideration be denied.

Jeffrey Wilson

Workers' Compensation Administrative Law Judge

Dated: September 18, 2023

* * * * *

OPINION ON DECISION

Cynthis Vasquez, a 54 year old machine operator, sustained injury arising out of and in the course of her employment to her arm, fingers and nervous system while employed by Saebert Corporation on October 24,2016. The case in chief was resolved by way of a Joint Compromise and Release (including ADJ10753054) with Order Approving Compromise and Release on August 17, 2021. The issues now before the Board are whether the injured worker is entitled to additional benefits against Saebert Corporation alleging serious and willful misconduct of the **[*16]** employer under *Labor Code Section 4553* and attorney fees.

The matter proceeded to hearings before Administrative Law Judge (WCJ) Jeffrey Wilson on November 2, 2022, December 13, 2022, March 21, 2023, May 1, 2023 and May 31, 2023, Testimony was offered on behalf of applicant to include applicant, Jorge Loaiza, Frances Kingston, Anna Stebbens, and Lisa Phillian. Defendant produced testimony of witness Stewart Gallaher.

Preliminarily, and at hearing on November 2, 2022, defense counsel objected to admissibility of applicant's Exhibits 1 through 7 arguing generally that Exhibits 1-4 were not previously disclosed and lack authenticity. Review of pre-trial conference statement does reflect prior disclosure of these exhibits and with this WCJ now admitting such exhibits into evidence. Regarding signed declarations of witnesses (Exhibits 5, 6, and 7), such witnesses did testify

at hearings and with such testimony relevant, and with witnesses subject to cross-examination. As defendant did not participate in the signed declarations, these exhibits are not accepted into evidence. At hearing on December 13, 2022 applicant's counsel objected to admissibility of Defendant's Exhibit D (maintenance work orders) pertaining **[*17]** to a machine unrelated to applicant's injuries. This exhibit is now admitted into evidence. Notwithstanding question as to the relevancy, there was testimony at hearing referring to this machine as well as the machine at which applicant was injured. Further, at hearing on May 1, 2023 defendant offered disciplinary records of witness Ana Stebbins which had been objected to arguing non-disclosure. As the witness did testify and admit to discipline, this WCJ will now allow the records into evidence as Defendant's Exhibit G.

In addressing the issue of alleged serious and willful misconduct of the employer, there are certain facts which are considered. Firstly, applicant sustained very serious admitted injury on October 24, 2016, resulting in loss of her right upper extremity and partial amputation of left hand fingers. At that time applicant was in the process of cleaning rolls or rollers in an extruder machine identified as CA3. The machine contains three rollers. Purportedly the rollers were running and open during the cleaning process and with a roll closing on applicant's cleaning rag, jacket, and eventually pulling applicant inwards through her right side and with applicant caught **[*18]** inside the rollers. Apparently, the machine contains safety warnings and devices (E-stop) which applicant maintains she attempted to engage, and yet which did not function at that time. Eventually CAL/OSHA performed an inspection including interviewing various witnesses and cited the employer Sabert Corporation with several safety violations including, but not limited to, T*8CCR 3203(a)(4)*, T*8CCR 3314(c)*, T*8CCR 4187*. Importantly, violations of T*8CCR 3314(c)* and T*8CCR 4187* were termed or described by CAL/OSHA as being "serious". Generally, CAL/OSHA determined that the employer had not effectively implemented its own injury/illness prevention plan or properly identified or evaluated potential hazards (*CCR 3203(a)(4)*, failed to provide disengagement, de-energization, of mechanically block or stop inadvertent movement of CA3 rolls during cleaning (*CCR 3314(c)*, and failure to provide guards or protection of exposed sides of moving chrome rolls (*CCR 4187(a)*. Ultimately the charges were resolved by stipulation and Order 3/21/2017.

Considering allegations of serious and willful misconduct of the employer under *Labor Code sections 4553* and *4553.1*, this WCJ takes note of requirements necessary to meet applicant's burden of **[*19]** proof including establishing the employer's knowledge of a dangerous condition, knowledge of a probable consequence of serious injury, and failure to take corrective action (*Johns-Manville Sales Corp. v. WCAB (Horenberger) (1979) 44 CCC 878, 883*). Moreover, when alleging violation of safety order to support serious and willful misconduct under *Labor Code Section 4553.1*, there must be a showing of specific manner in which the safety order was violated, that such violation proximately caused injury and the manner of such causation, and that the safety order/conditions were known by the employer or the condition was obvious, and that the failure of the employer to correct the condition constituted a reckless disregard for the probable consequences.

In the present matter, the parties offered testimony of witnesses raising question as to whether there were prior mechanical issues with the extruder machine CA3 and whether the employer/supervisors/management was aware of these issues. Specifically, applicant was injured when cleaning rolls which were moving and with a roller closing or dropping on applicant during the cleaning process. Applicant produced testimony of witnesses at hearings maintaining that there were prior episodes of both opening and closing of rolls before the injury **[*20]** and with the employer representatives placed on notice. Jorge Loaiza testified at hearing on November 2, 2022 that back in 2016 there were issues pertaining to the hydraulics with rollers opening and closing on their own ranging from 15-20 occasions with hydraulics and censors failing (MOH 11/2/2022 page 4, lines 22-25) Witness Loaiza further maintained that supervisors were aware of the problem including a manager, Ed and with discussions regarding resolving the problem, and yet with no resolution (MOH 11/2/2022 page 5, lines 1-3). The opening and closing of rolls were purportedly discussed at general meetings attended by other supervisors or managers including Tim Rowels (technical manager), Dung Nguyen and safety coordinator Edgar, and with advice that maintenance would be working on it (MOH 11/2/2022 page 8, lines 11-16), and again with no resolution. Applicant, Cynthia Vasquez, testified at hearing on December 13, 2022, that she complained of rolls opening and closing anywhere from 4-7 times, and with complaints directed specifically to Alex in the maintenance department, and with the problem never resolved. (MOH 12/13/2022, page 8, lines 18-21). She maintains that she further **[*21]** discussed the problem with the production manager, Ed Griffith and Tim Rowles (MOH 12/13/2022, page 9, lines 1-3). This testimony is further

supported by testimony of co-worker Anna Stebbins who recalls prior incidents of rolls opening and closing without being shut off, and with the witness complaining to her supervisor Lubia and to Tim, Ed Griffith and Dung Nguyen, and again with nothing being done to correct the problem (MOH 3/21/23, page 13, lines 9-13). Deposition testimony of then "safety lead" Edgar Torres dated April 13, 2022 (Defendant's Exhibit F) further supports a history of rolls opening and closing on one side only and based on information provided by Dung (pages 47-48) and further malfunction or non-function of the E-stop (pages 51-52). This WCJ takes note that defendant did not offer testimony of witnesses mentioned above including Tim Rowels (extrusion manager), Dung Nguyen, Ed Griffith (production manager) or Lubia Alonzo. Defendant did present testimony of the then plant manager Stewart Gallaher who was unaware of any prior complaints re CA3 rolls closing by themselves, and if such complaints were made, they would be reflected in work order (MOH 3/21/2023, page 4, **[*22]** lines 17-20). Exhibits offered into evidence by defendant including various work orders do not reflect closing of rolls re: CA3.

To further address the serious and willful issue, this WCJ takes note of Sabert policies and procedures in effect prior to applicant's injuries and history of such policy. Generally, the record establishes that at the time of applicant's injury on October 24, 2016, rolls or rollers were running on the extruder CA3 during the cleaning process. Subsequent to applicant's injuries and CAL/OSHA investigation, procedures were changed with rolls to be stopped and open during cleaning, blocks to be placed between rolls, and with a supervisor present during the cleaning procedure. In review of the extruder manufacturer (Reifenhouser) handbook (Joint Exhibits A & C), there is clear warning in the extrusion line of danger of being pulled in by the rotating polishing rolls, rotating post-cooling rolls, haul off rolls, and rotating rolls (Section 4.3). Further, and in reference to electrical notes, repair and maintenance work may be performed when machinery is switched off (voltage free) and by a qualified electrician In reference to the polishing stack and specially referring **[*23]** to "Dangerous Spots and Safety Devices" warning is provided re: dangers of getting burnt on the heated rolls, being pulled in the rolls, and being crushed (1.1). Further instruction directs "The cleaning of the rolls may be carried out only when the machine is not in operation." This WCJ takes further note of Sabert's own Environmental Health and Safety Procedure further titled Control of Hazardous Energy (Lockout Tagout) Procedure (Origin Date 01/01/2010) in effect at time of injury. Section 1.1 sets forth guidance to Sabert employees to protect themselves from serious injury or death that could result from unexpected release of energy while servicing or maintaining equipment or machinery. In reference to sections 1.3, 1.4 and 1.5, the procedure is used to ensure that machine or equipment is stopped, isolated from hazardous energy sources or locked out during servicing or maintenance of machines or equipment. Clearly, and based on Reifenhouser's instructions and Sabert's own safety policies, the machine in question should have been stopped or disengaged during the cleaning process.

In further review of the exhibits and testimony offered at hearings, it is apparent that Sabert did not **[*24]** follow instructions of the manufacturer or even its own policies. Testimony of witness Anna Stebbens at hearing on March 21, 2023, suggests a change in policy over the years. Ms. Stebbens testified that she was employed by defendant from 2004 to 2017. Early in her employment she would clean rolls when they were stopped and not running, and which appears in compliance with safety measures in place. Approximately in 2010 procedures changed to where she was instructed to clean rollers while running. She was advised of this change as the extruder took too long to heat up (MOH 3/21/2023, page 12, lines 11-19). Witness Lisa Phillian, a hired expert testifying on behalf of applicant, similarly testified that she understood that prior to 2010 such equipment was shut down during cleaning, and that after 2010 rollers were running during cleaning to reflect a faster recovery time. She based her testimony on testimony of applicant and conversations that she had with witness Edgar Torres (MOH 5/1/2023, page 7, lines 11-13). Clearly, Sabert's own policies in effect at the time of applicant's injuries reflect cleaning while the chrome rolls are moving. In reference to WIEX- 204 dated 4/24/2012 (contained **[*25]** in Joint Exhibit A), the extruder is initially shut down with top and bottom rolls to be opened with pull roll opened and then rolls to be started at maximum speed with cleaning to commence. This procedure appears contrary to instructions provided by Reifenhouser and to Sabert's own directives dating back to 2010. Defense witness, Stewart Gallaher (plant manager at time of injury) did acknowledge Reifenhouser's warning that "work on the rolls, in particular the cleaning of the rolls, may be carried out only when the machine is not in operation". However, the witness testified that non-operation refers to when a product is not actually in the process of being manufactured (MOH 3/21/2023, page 3, lines 14-17) as opposed to the machine being shut down or disengaged.

Giving due consideration to the above, this WCJ does find applicant's witnesses' testimony to be credible and notwithstanding any basis for witnesses termination of employment by Sabert. Clearly, and as noted above, both Reifenhouser's handbook and Sabert's own environmental health and safety policies in existence acknowledged risks of either injury or even death. It appears that early on defendant did follow its own safety **[*26]** procedures with cleaning of extruder rolls when the rolls were stopped and not running. Prior to applicant's injury the procedure apparently was changed, with cleaning to proceed when the rolls were started at maximum speed. Whereas defendant may argue that notwithstanding these procedures there was no evidence of prior injury during this process and therefore applicant's injury would be unpredictable, and therefore Sabert's conduct/procedures should not be determined to be serious and willful as contemplated under the Labor Code. To the contrary, and based on policies and procedures set forth above, this WCJ determines that departure from such procedures quite predictably would result in serious injury and as further evidenced by injuries sustained by applicant. Further, the policies and procedures noted above would be created to avoid such injury occurring. At very least defendant apparently ignored safety policies and safety codes. Additionally, CAL/OSHA performed its own investigation and determining safety violations, two of which were determined "serious". While not labeling those violations as being "willful", this WCJ does determine defendant's choice to either not adhere to **[*27]** or depart from safety standards and precaution as being willful. Sabert's departure or change of cleaning policy is considered willful. Violation of safety orders noted above by failing to mechanically block or stop movement of the rolls during cleaning proximately resulted in applicant's injury. Such safety orders noted above were certainly known to the employer, as such knowledge was incorporated by the original safety guidelines encompassed in Sabert's own policies and guidelines set forth by manufacturer Reifenhouser.

Based on the above, this WCJ finds Sabert's conduct as being serious and willful resulting in applicants injuries, and with applicant entitled to 50% of all compensation and benefits including all indemnity benefits, medical treatment payments, medical legal fees and any further sums contemplated under the original compromise and release. Further applicant's attorney has provided reasonable services and is entitled to 15% of applicant's recovery.

Jeffrey Wilson

Workers' Compensation Administrative Law Judge

Dated: August 8, 2023

Ruiz v. Carrara Marble Co. of Am., 2023 Cal. Wrk. Comp. P.D. LEXIS 332

Workers' Compensation Appeals Board (Board Panel Decision)

November 6, 2023 Opinion Filed

W.C.A.B. Nos. ADJ13792318, ADJ14477369

Reporter
2023 Cal. Wrk. Comp. P.D. LEXIS 332 *

Aurelio Ruiz, Applicant v. Carrara Marble Company of America, Everest National Insurance Company, adjusted by Sedgwick, Defendants

Status:

CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425, fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Prior History:

W.C.A.B. Nos. ADJ13792318, ADJ14477369—WCJ Alison Howell (OAK); WCAB Panel: Chair Zalewski, Commissioner Palugyai, Deputy Commissioner Garcia

Disposition: The Petition for Reconsideration/Removal is *denied*.

Core Terms

film, ladder, wearing, walks, truck, climbs, video, garage, appears, jumps, shirt, tee shirt, stairs, top, descends, athletic shoes, white stripe, removal, thick, door, minutes, bed, carrying, bends, places, bin, light colored, shovel, front, right hand

Headnotes

Discovery—*Sub Rosa* Video—WCAB, denying reconsideration based on removal standard, affirmed WCJ's finding that agreed medical examiner (AME) was permitted to review *sub rosa* film taken of applicant who sustained industrial injury to his right knee and back while employed as marble mason on 6/6/2019 and alleged injury to multiple body parts ending on 1/20/2020, when WCAB found that films taken inside of applicant's garage did not violate applicant's constitutional right to privacy, as applicant asserted, because garage door was open when films were taken and applicant's activities in garage were occurring in plain sight of anyone passing his house, such that applicant did not have reasonable expectation of privacy while in garage during those hours, and WCAB further determined that various technical problems with films should not prevent AME from reviewing them, where films clearly depicted applicant performing various activities in garage, probative value of films outweighed technical issues, there was no evidence film was forgery or that applicant did not actually perform activities depicted, and AME should be provided opportunity to review films because some activities applicant was filmed performing appeared inconsistent with what applicant reported to AME. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 25.29[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.65.]

Counsel

[*1] For applicant—Peninsula Injured Workers Center

For defendants—Laughlin, Falbo, Levy & Moresi

Panel: Chair Katherine A. Zalewski; Commissioner Natalie Palugyai; Deputy Commissioner Patricia A. Garcia

Opinion By: Chair Katherine A. Zalewski

Opinion

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration/Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto.[1] 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 deny the Petition as one seeking reconsideration.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn (2006) 71 Cal. Comp. Cases 783, 784, fn. 2 (Appeals Board en banc)*.) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona) (2016) 5 Cal. App. 5th 658, 662 [210 Cal. Rptr. 3d 101, 81 Cal. Comp. Cases 1122]*.) Failure to timely petition for reconsideration of a final decision bars later **[*2]** challenge to the propriety of the decision before the WCAB or court of appeal. (See *Lab. Code, § 5904*.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

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[1] Commissioner Sweeney and Commissioner Dodd, who were on the panel that issued a prior decision in this matter, are unavailable to participate further in this case. Other panel members have been assigned in their place.

Here, the WCJ's decision includes a finding regarding a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

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 [38 Cal. Rptr. 3d 922, 71 Cal. Comp. Cases 155]*; **[*3]** *Kleemann v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 274, 280, fn. 2 [25 Cal. Rptr. 3d 448, 70 Cal. Comp. Cases 133]*.) The Appeals Board will grant removal only if the petitioner shows that significant 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 the petitioner's arguments, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

Therefore, we will deny the Petition as one seeking reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration/Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

Chair Katherine A. Zalewski

I concur,

Commissioner Natalie Palugyai

Deputy Commissioner Patricia A. Garcia

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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

1. Applicant's Occupation: Marble Mason

Applicant's Age: 62

Dates of Injury: June 6, 2019 (ADJ14477369) and through January 20, 2020 (ADJ13792318)

Parts of Body Injured: In ADJ14477369, defendant accepts the right knee and back and **[*4]** applicant claims injury to multiple body parts.

In ADJ13792318, applicant claims injury to multiple body parts

2. Identity of Petitioner: Applicant

Timeliness: Yes

Verification: Yes

3. Date of Findings and Award August 28, 2023

4. Applicant's Contentions The agreed medical evaluator (AME), should not be permitted to view the subrosa films taken of applicant because the films are unreliable and prejudicial, and because the films taken on May 27, 2021 violate his constitutional rights as he was filed with a telephoto lens while inside of his garage.

II.

STATEMENT OF THE CASE AND FACTS

On June 6, 2019, applicant sustained an injury arising out of and in the course of employment for defendant as a marble mason to his right knee and back (ADJ14477369). Applicant also claims an injury arising out of and in the course of employment to multiple body parts during the period ending on January 20, 2020[1] (ADJ13792318).

On January 26, 2021, Steven Feinberg, M.D., the agreed medical evaluator (AME), issued a report stating in relevant part that: Applicant claimed to have a hard time driving because of an inability to turn his head (Exhibit 9, Report of Steven Feinberg, M.D., January 26, 2021, p. 6.) Applicant **[*5]** also claimed that he struggled to reach his back, that he had trouble with gripping, grasping, and opening jars, and that he constantly moved his hands to keep them limber. (*Id.* at p. 7.) Applicant also stated that he had constant mid and low back pain, that he could not walk down stairs without a safety rail, that he would call his son to watch him go down stairs, and that his son held his hand while he was going up stairs. (*Ibid.*) Applicant also stated that he was no longer able to care for his yard, and that he had trouble bending down. (*Ibid.*) It was difficult to examine applicant because of hesitancy and a suggestion of chronic pain behavior. (*Id.* at p. 10.) Applicant had a “slight tremor with intention” and the tremor “was not consistent.” (*Ibid.*) Measuring applicant's range of motion was “problematic in the sense that [applicant was] fearful and self-limiting.” (*Ibid.*) Applicant's gait was antalgic. (*Id.* at p. 11.)

On April 2, 2021, Dr. Feinberg issued a supplemental report stating in relevant part that it was “always problematic when examining even the most credible individual when there is evidence of symptom magnification or emotional distress preventing a full response.” **[*6]** (Exhibit 5, Report of Steven Feinberg, M.D,, March 11, 2021, p. 7.)

On May 26, 2021, defendant obtained surveillance footage of applicant. (Exhibit N.) Exhibit N, which is the film taken on this date, does not have a date or time stamp. As relevant herein, the film taken on that date depict the following:

- Approximately 28 seconds into the film, applicant leaves the house dressed in black athletic shoes with thick white soles and a white stripe, black athletic clothing, and a yellow shirt. Applicant is holding a cup by its handle in his right hand, and he walks down three steps in front of the house. Applicant swings the arm holding the cup and keeps his left hand his left front pants pocket. Applicant walks with a slight limp and stops to kick something off the sidewalk. Applicant continues walking, and later he removes his left hand from its pocket and swings that arm while walking. IAt approximately two minutes and 37 seconds, he returns to the house, climbs the three steps without assistance, and enters the residence. (*Id.*)

- Approximately three minutes and 53 seconds into the film, the door of the residence opens and applicant leaves it dressed in a knit hat, a black hoodie reading **[*7]** “Union City,” a bright green or yellow tee shirt, black pants, and athletic shoes. Applicant is holding a cell phone in the open palm of his left hand and using his right hand to operate it. He descends the three steps and walks towards a pickup truck. He stands still, then bends over to look at the left front tire of the truck while reaching towards the tire with his right arm extended. He then goes to the left rear tire, bends slightly at the waist, reaches towards it with his right arm, while slightly pending his right leg and keeping his right leg straight behind him. He then walks to the right rear tire and bends over to examine it. The view is partially obstructed by the truck, but he appears to also inspect the last tire. Applicant then goes for another walk, and again, he is slightly limping. During the walk, applicant is carrying a water bottle and he stops to talk to an unknown man. Applicant stands while talking, and during that time, he moves his neck, gestures with his arms, and shrugs. Applicant then resumes his walk. Approximately 23 minutes and

[1] After the F&A issued, applicant amended the Application for this injury to allege that the period of injurious exposure ended on this date.

23 seconds into the film, applicant jogs, and at 24 minutes and 31 seconds, applicant is walking. At approximately 27 minutes **[*8]** and four seconds applicant is either jogging or walking quickly, but by 27 minutes and 11 seconds, he is walking. (*Id.*)

• At 32 minutes and five seconds, applicant is outside of the residence. He is wearing the same hoodie, and shirt, but now appears to be wearing jeans. He is holding a shovel in his left hand and holding a green compost bin that appears to be waist high with his right hand. He bends over and uses the shovel to prod at the driveway and some gravel. He then rolls the compost bin while holding the shovel to the side of a pickup truck. Applicant is partially obscured, but appears to be bending over and using the shovel. At times, applicant bends fully at the waist and rises with a shovel full of soil and rocks which he holds with both hands. Applicant then moves to the front of the pickup truck, bends at the waist and moves the tip of the shovel across the driveway in a sweeping motion. He does have bent knees and is able to reach his fingertips to the driveway. He appears to use his hands to place small objects onto the shovel, which he empties into the compost bin. Applicant pulls the compost bin behind him using his right hand and then shovels soil into the bin. Applicant **[*9]** is frequently bending over, holding the shovel, and using it to place full shovels of soil into the bin. Applicant also sweeps his driveway, and bends over to pull weeds with his hands and by means of a small hand tool. At least ones, he holds and empties the full with one arm while apparently supporting it against his chest. At approximately one hour, 43 minutes and six seconds, he stops to use his phone, but then resumes sweeping, and continues to bend over to use his hand tool on the ground. Applicant sweeps debris onto the shovel and uses it as a dustpan. To do so, he bends at the waist. Applicant pulls the bin behind him using his left hand towards another area of the house and then uses the shovel to sweep and dispose of debris, which appears to consist of dead grass and some soil. At 2 hours and 16 minutes, the bin appears to be filled to the top with soil and applicant uses his shovel to press it down. Applicant then closes the bin, uses a leg to position it onto its wheels and walks backward while pulling it towards the truck. Applicant continues to shovel debris into the bin. Applicant bends over to pick up a broom that fell on the ground and resumes sweeping and begins to **[*10]** place debris into a black garbage bin, which appears to be the same size as the green compost bin. The film ends at approximately two hours, 32 minutes and 17 seconds. (*Id.*)

On May 27, 2021, defendant obtained surveillance footage of applicant. (Exhibit N1.) These films have a date stamp and a continuous time stamp. As relevant herein, the film taken on that date depict the following:

• 7:01 a.m., applicant is walking in the driveway wearing a grey tee shirt, black pants, and black athletic shoes with a thick white soles and a white stripe. He is holding a cup in his right hand and swinging the hand. His left hand is in his left front pants pocket. Applicant walks away from the camera.

• 7:38 a.m., applicant is walking back to the house in the same attire, and in his right hand, applicant is carrying the cup and a white plastic shopping bag that appears to contain several items. Applicant is walking with a slight limp. Applicant climbs the steps to his home and goes inside.

• 8:03 a.m., applicant is wearing a black hoodie in addition to the same clothing he was previously wearing. Applicant leaves the house while holding what appears to be a full white kitchen trash bag, walks down the **[*11]** steps, and then walks to the other side of the house. While doing so, he holds the trash bag in his right hand. He then emerges a few seconds later without the bag.

• 8:08 a.m., applicant is now also wearing a knit cap. He leaves the house through the front door holding a bottle in his right hand and walks off camera.

• 8:18 a.m.–8:56 a.m., applicant is walking. At 8:27 a.m., he unscrews the lid of the bottle, takes a drink, and screws the lid back on. He walks with a slight limp and it appears that his left shoulder may be slightly higher than the right shoulder. Applicant jogs from 8:45 a.m., to 8:48 a.m., and then resumes walking.

• 10:57 a.m., applicant is at the house and wearing a loose fitting light grey tee shirt that reads “USC,” jeans, and black athletic shoes with white soles and a white stripe. He is partially obstructed by a wall and appears to

be near the trash bins. He appears to be slightly bent over and moving his hands. Applicant appears to be shoving soil from a wheelbarrow into the bins. At 11:00 a.m., he moves the wheelbarrow.

• 11:02 a.m., applicant, who is still wearing the loose fitting light grey tee shirt bearing the letters “USC” is reaching into the bed of **[*12]** a maroon pickup truck in the driveway. The truck's bed is full of boxes and buckets[2]. He walks past the truck, and bends over to pick something up and straightens. Applicant is partially obstructed, but it appears that he may have been supporting himself by holding the trash bin or a wall with his left hand. At 11:04 a.m., another man wearing a black tank top and grey pants walks to applicant while carrying items in each hand. A wall partially obstructs applicant, who appears to be using a shovel as a dustpan. He is bending over with the shovel and then stands and appears to empty it in a bin. At 11:08 applicant is carrying what appears to be a flowerpot in his hand and at 11:11, he places a small item in the bed of the truck.

• 11:20, the door to the garage is open. The interior of the garage is dark, but partially visible. An erect ladder is inside of the garage. A man wearing a loose fitting light grey tee shirt is carrying a full white bag in his right hand, and he walks to the bins, where he disposes of the bag and its contents. This man is seen bending over, and he returns to the garage where he moves a bicycle away from the ladder by twisting while holding its handle bar and seat. **[*13]** This man reaches up, then gestures with his arm, and then holds onto the sides of the ladder and climbs partially up it. The person's head is obstructed by the garage door, but their pants and shoes can be seen. The shoes are dark with thick white soles and a white stripe. A door inside of the garage opens and another person enters the garage. The man on the ladder begins to climb it and the other person stands near the ladder. The man on the ladder climbs down it. Lettering reading “USC” can be seen on his shirt. The other person in the garage then climbs the ladder. The other person also appears to be wearing a loose fitting light colored tee shirt, but this person is wearing shoes that do not appear to have any white on them. The man wearing the USC shirt points upwards with his right hand, walks away from the ladder, then walks back to it and climbs it while holding a tool box in his right hand. There is no film of other person descending the ladder. The man wearing the USC shirt and shoes with white detailing, places the toolbox out of sight, then climbs to the very top of the ladder, and then turns around so that his toes are facing the opposite direction. The person in the shoes **[*14]** with white trim spends some time standing on the top of the ladder in this position and at 11:26 a.m., this person climbs down the ladder while facing away from the ladder. The person does reach behind him to grab the ladder while going down.

• 11:48 a.m., A person wearing a loose light colored shirt reading USC briefly exits the garage, then returns inside and faces the ladder. At 11:49, this person climbs up the ladder again. At 11:50, while climbing the ladder, this person turns his feet so that they are parallel to the ladder steps and then places one foot on the top of the ladder while the other foot is on the top step. The person then places both feet on the top of the ladder and again turns so that both feet are facing away from the ladder and at 11:53:00, the person climbs down the ladder. . When the time stamp reaches 11:51:02, it jumps forward to 11:52:55 and the person appears to still be standing on the top of the ladder in the same position. At 11:53, the person descends the ladder while facing away from it. The person is reaching behind him to hold onto the ladder while going down. The film then jumps to 12:00 p.m., and the person wearing the USC shirt is standing in the **[*15]** garage.

• The film then jumps back to 11:57 a.m., Another person wearing a black shirt or vest with bright yellow stripes is briefly seen outdoors near the pickup truck bed, another person wearing a baseball cap crosses in front of the camera, and a person wearing a loose fighting light colored shirt is seen climbing the ladder. The person on the ladder is wearing dark athletic shoes with a white stripe and thick white soles. Another person wearing a light colored shirt briefly walks past the ladder. At 11:58, the person on the ladder climbs to its top and an undefined person runs past the camera twice. At 11:58:36, the person places one foot on the top step while keeping the other on top of the ladder. Several cars drive past the camera. At 11:59, another person wearing a light colored tee shirt is briefly seen in front of the ladder and the other person is still on the ladder. The person on the ladder then descends. Two men wearing light colored tee shirts are in the garage. At 12:02 p.m., the man wearing the black shoes with the white soles climbs the ladder, stands at the top for approximately 10

[2] It is unknown from the film how these items got into the truck.

minutes, and at 12:12, the man steps at least one foot down to the top step. At 12:16, **[*16]** the man is standing approximately half way up the ladder, and then he climbs up one step. At 12:18, the man descends the ladder and walks away from it. Various cars pass in front of the garage.

• 12:20 p.m., the man with the white soles is standing approximately half way up the ladder, then begins to descend it and walks away. At 12:19 pm., he climbs the ladder to its top step, and at 12:22, he brings one foot to the top of the ladder while keeping the other on the top step. At 12:24, the person begins to descend the ladder, and the film jumps to 12:27. There is a person on the ladder and that person is wearing dark athletic shoes with white soles and a white stripe. The person descends the ladder.

• The film then jumps back to 12:26 p.m., and someone in a light colored tee shirt is coming down the ladder. However, the person then climbs up the ladder and their feet are no longer visible by 12:27. At 12:28, feet can be seen on top of the ladder, and then can no longer be seen. AT 12:29, a person wearing a light colored tee shirt, black shoes with a white stripe climbs to the top step of the ladder. At 12:31, an unknown person walks past the camera. At 12:32, one of the men in the garage **[*17]** places one foot on top of the ladder. When the counter reaches 12:33:05, it jumps forward a little more than seven minutes.

• 12:40:18, A person wearing black shoes with a white sole is standing on the top step of the ladder and climbs to the top. When the film reaches 12:41:38, it jumps forward.

• 12:45:44—the feet are still on top of the ladder. At 12:49:013 the video jumps forward.

• 12:52:01—one foot is on top of the ladder and the other is on the top step. The person descends the ladder and the letters USC are seen on their shirt.

• 12:54:37, a person in a light colored tee shirt and dark colored athletic shoes with a thick white sole and white stripe climbs the ladder and at 12:55, that person descends the ladder. At 12:55:56, someone wearing dark colored athletic shoes with a thick white sole and white stripe climbs the ladder, and descends it at 13:02.

• 13:03, a person in a light colored tee shirt and dark colored athletic shoes with a thick white sole and white stripe climbs the ladder to its top. At 13:03:40, the film jumps forward.

• 13:08:56, someone wearing dark colored athletic shoes with a thick white sole and white stripe is on the ladder. At 13:09:56, the film jumps **[*18]** forward.

• 13:13:05, someone wearing dark colored athletic shoes with a thick white sole and white stripe is on the ladder and they descend it while facing away from the ladder. The letters USC are seen on the person's light colored shirt.

• 13:13:56, someone wearing dark colored athletic shoes with a thick white sole and white stripe climbs the ladder at 13:14:53 the video jumps forward.

• 13:18:57 someone wearing dark colored athletic shoes with a thick white sole and white stripe is on the ladder. At 13:19:51, the film jumps forward.

• 13:23:22—someone in a light colored tee shirt is standing in the garage. The door between the house and the garage opens and closes. This is captured twice. The film jumps backwards.

• 13:23:17, the door between the garage and the house is closing. Someone in a light colored tee shirt is climbing the ladder. At 13:24:18, the film jumps forward.

• 13:27:13 someone wearing dark colored athletic shoes with a thick white sole and white stripe is on the ladder. At 13:27:36, the person descends the ladder and the letters USC can be seen on the tee shirt. That person emerges from the garage carrying a wooden plank and places it in the truck bed. While outdoors, **[*19]** the person can be seen with some clarity and bears a strong resemblance to applicant. That person then climbs the ladder, shortly thereafter descends one step, and then climbs back up. At 13:33, the person

descends the ladder, then turns, and climbs it to its top. The person turns around while on top of the ladder. At 13:34:24, the film jumps forward.

• 13:39:50, someone wearing dark colored athletic shoes with a thick white sole and white stripe is on top of the ladder. At 13:40:50, the film jumps forward.

• 13:52:01, someone wearing dark colored athletic shoes with a thick white sole and white stripe is on top of the ladder. At 13:53, the film jumps forward.

• 13:59:36, someone wearing dark colored athletic shoes with a thick white sole and white stripe is on top of the ladder. A few seconds later, the film jumps forward.

• 14:06:29, someone in a loose fitting light colored tee shirt and athletic shoes with a thick white sole and white stripe climbs the ladder. Shortly thereafter, the film jumps forward.

• 14:19:28, someone wearing athletic shoes with a thick white sole and white stripe descends the ladder while holding a thin white pole in one hand. The person faces towards the garage, **[*20]** is obscured, and then climbs the ladder again at 14:19:44. The film jumps back to 14:19:41 and someone wearing a grey tee shirt and athletic shoes with a thick white sole and white stripe is descending the ladder.

• 14:20:25, someone wearing a loose fitting lightly colored tee shirt and athletic shoes with a thick white sole and white stripe climbs the ladder. After a few seconds, the film jumps and at 14:23:13, the person descends the ladder, and at 14:23:18, the person climbs the ladder. A little over one minute later, the film jumps.

• 14:28:46, someone wearing a loose fitting lightly colored tee shirt and athletic shoes with a thick white sole and white stripe descends the ladder. A few seconds later, the person exits the garage carrying several pieces of wood. The letters “USC” can be seen on the person's tee shirt and the person appears to be applicant. The person places the wood in the bed of the pickup truck. At 14:29:22, the person climbs the ladder while carrying an object.

• 13:31:06, someone wearing a loose fitting lightly colored tee shirt and athletic shoes with a thick white sole and white stripe approaches the ladder, then walks away from it revealing a shirt that reads **[*21]** “USC.” The person is carrying two pieces of wood in his right hand, which are placed into the truck's bed. The person was also carrying tools in his left hand, and he switches one of them into his right hand after discarding the wood. The person goes back into the garage, and climbs the ladder at 14:31:53, less than a minute later, they descend the steps.

• 14:32:55, a man wearing safety googles, an elbow brace, and a loose fitting light colored shirt is using a saw to cut the pieces of wood in the truck. This man's shirt has large sweat stains. At 14:32:50, a man appearing to be applicant emerges from the garage wearing a loose fitting tee shirt bearing the letters “USC.” The man in the USC shirt is carrying two water bottles, which he places on another pickup truck and gestures. The man with the saw walks towards him, and the one in the USC shirt gets into the driver's seat of the loaded truck and reaches across to the passenger side of the truck. He exits the truck, opens the passenger door, and removes two boxes, which he carries into the garage. He is accompanied by the man in the sweat stained shirt.

• 14:33:53, applicant is carrying the boxes and the film jumps. At 14:34:38, someone **[*22]** is bending over.

• 14:34, the man in the light USC shirt, who appears to be applicant, walks to passenger side of the loaded pickup truck while carrying a piece of paper, and then begins to get into the driver's seat, but walks back to the garage. The man in the USC shirt walks back to the truck, places something in it, and walks back to the house. The garage door is now closed and a man wearing a bright green shirt is briefly seen in front of the house. Applicant comes back out of the house and walks around the house. The man in the green shirt is again seen. Applicant reemerges carrying a broom, which he places into the truck of the loaded pickup truck. Applicant ties down the cargo with rope. While doing so, applicant bends at the waist. At 14:45, a man with a mustache, an elbow brace, and a dark colored shirt emerges from the passenger side of the loaded truck.

• 14:49:55, applicant gets into the driver's seat of the loaded pickup truck. Applicant is wearing dark athletic shoes with a thick white sole and white stripe, and he drives the truck away.

• 15:04:02, applicant is filling up his truck a gas station. Applicant gets back into the truck and the film ends.

On August 23, 2021, **[*23]** defendant obtained surveillance footage of applicant (Exhibit O). These films did contain a date and time stamp that vanishes after a few seconds and reappears when a new segment of film begins. As relevant herein, the films taken on that date depict the following:

• 6:57 a.m.—The sun has risen and applicant seen wearing what appear to be jeans, a white tee shirt, a knit cap, and a black hoodie. Applicant is carrying a travel cup in each hand and walking with a slight limp. Applicant shakes his right hand a few times. At 7:00 a.m., applicant returns to the house and enters it. Other people are seen in the neighborhood. (*Id.*)

• 7:06 a.m., the exterior of the house. A man wearing grey pants and a black tee shirt is seen entering the house, but his face cannot be seen. A few moments later applicant exits the house wearing what appear to be the same clothing that he wore in the films that started at 6:57 am. Applicant is holding a cell phone in his open palm and waves at an unknown person. Applicant then goes down two steps and walks through the neighborhood with a water bottle in his hand. At times, applicant walks while looking at his cell phone. (*Id.*)

• 8:21 a.m., the exterior of the **[*24]** house. Applicant is seen walking up the stairs while wearing the same clothing that he wore earlier. When standing upright and still, applicant appears to have his hips pushed further forward than his shoulders and he almost appears to be leaning backwards. Applicant climbs the steps without assistance and enters the house. (*Id.*)

• At approximately 18 minutes and 29 seconds into the video, there appears to be a new film without a timestamp. Applicant is wearing a bright orange shirt and seen walking. The sky is not as bright as it was in the other films. (*Id.*)

On August 24, 2021, defendant obtained surveillance footage of applicant. (Exhibit O.) These films did contain a date and time stamp that vanishes after a few seconds and reappears when a new segment of film begins. As relevant herein, the films taken on that date depict the following:

• 6:35 a.m., applicant is wearing what appears to be the same bright orange tee shirt as in the last video, dark pants and black athletic shoes and talking to another person who is holding some papers. The sky appears to be a similar color as it was in the film that started 18 minutes and 29 seconds into the video. (*Id.*)

• 6:39 a.m. and 6:41 a.m., **[*25]** applicant is wearing the same clothing and walking while holding some papers. He appears to have a slight limp. (*Id.*)

• 7:29 a.m. the exterior of the house and applicant, who is still wearing the same orange shirt, is seen walking with a limp. (*Id.*)

. 11:21 a.m., applicant and an unknown person walk to the entrance of Dr. Feinberg's office. Applicant later walks through a parking lot and enters the passenger side of a car. (*Id.*)

On August 24, 2021, Dr. Feinberg issued a report after re-evaluating applicant. (Exhibit 4, Report of Steven Feinberg, M.D., August 24, 2021.) As relevant herein, Dr. Feinberg stated that, Applicant received medical treatment between the January 26, 2021 medical evaluation and the August 24, 2021 evaluation. (*Id.* at pp. 9–13.) Applicant claimed to “have a hard time driving” because he could not turn his head, right to the greater than the left.“ (*Id.* at p. 14.) Applicant claimed he could not close his hands all the way, and that he had no strength in his arms or legs, that he had a hard time opening anything that required twisting, that he struggled with gripping and grasping. (*Ibid.*) Applicant further claimed he could not use the stairs without assistance, that **[*26]** he had to stand up slowing and wait before walking, that when his knees became swollen, he had a hard time walking, that he tried to do small things at home, and that he could not ”do anything at home.“ (*Id.* at pp. 14–15.) Applicant remained

”quite hesitant with motion“ during the physical examination and continued to be distressed over his overall level of comfort, but there was no atrophy of the extremity musculature.” (*Id.* at p. 16.) Applicant's range of motion was “problematic in the sense that [applicant was] fearful and self-limiting,” and it was “difficult to assess.”

On October 30, 2021, defendant obtained surveillance footage of applicant. (Exhibit P.) The films taken on this date have a date stamp and a continuous time stamp. As relevant herein, the films taken on that date depict the following:

• 10:54 a.m., applicant is seen entering the house and removing mail from a mailbox. Applicant is wearing what appear to be jeans, a knit cap, a yellow shirt and a hoodie.

• 12:26 p.m., the exterior of the house.

• 12:48 p.m., applicant is seen wearing jeans and a maroon tee shirt. He is walking around a pickup truck. Applicant reaches into the truck bed over the wall on the driver's **[*27]** side with both arms. Applicant removes a broom from the truck bed with his right hand while removing a bucket with his left hand and takes them into a garage. Applicant then opens the back door on the driver's side of the car and removes two black boxes, which are also placed in the garage.

• 1:00 p.m., applicant gets into the driver's seat of the pickup truck and pulls the door closed. Applicant backs the truck out of the driveway, drinks from a reusable bottle, and screws the lid onto the bottle. (*Id.*)

• 1:30 p.m., applicant is out of the truck whose door is open. Applicant is leaning into the vehicle and appears to remove a small item. Applicant then opens the back door and leans into the vehicle. Applicant removes a yellow lid for a storage bin. The lid appears to be approximately one foot by two feet. Applicant's truck is near a sign advertising that property is available for purchase. The sign is near the top of wooden stairs that go down a slight incline. The stairs have a wooden rail, and the bottom of the stairs cannot be seen. It is unknown how many steps are in the staircase. Applicant is seen at the door of a pickup truck and a younger man wearing a white tee shirt and glasses **[*28]** and a woman wearing a black shirt are at the top of the stairs. (*Id.*)

• 1:38 p.m., applicant drives his truck so that it is near the top of the stairs. Applicant exits the truck while the young man opens the truck bed revealing some rope in the bed. (*Id.*) Applicant exits the truck and helps the woman place a rectangular wooden object into the truck bed. The object a appears to be a few inches across and a few feet long. The young man is seen loading a headboard into the truck bed and applicant helps him position it once it is in the truck. Applicant reaches over the side of the truck to remove the rope, and then descends the stairs while holding onto the railing. A few minutes later, the young man climbs the stairs holding long thin pieces of metal and places them into the truck bed. (*Id.*) Applicant climbs the stairs while holding a few long then pieces of wood that appear to be slats for a bed frame and a piece of metal. Applicant places these in the truck, which requires him to bend. The woman also carries some of the wood pieces to the truck. Applicant then opens the back door of the truck, places a small item in the truck, closes the truck door and then descends the stairs while **[*29]** holding the railing. Applicant then climbs the stairs while holding two levels in his left hand, and he places them in the back seat of his truck. (*Id.*) Applicant then descends the stairs while holding the railing. (*Id.*) Applicant carries a dry erase board up the stairs, which he climbed holding the rail. (*Id.*) Applicant places the dry erase board in the truck and goes back down the stairs while holding the rail. (*Id.*) Applicant carries a box fan up the stairs and places it in the truck bed. (*Id.*) Applicant stands at the top of the stairs and gestures with his hands while talking to another man wearing glasses and a black shirt. Eventually applicant leans against the truck bed while talking to him, then enters the truck and moves it to a slightly different position. (*Id.*) Applicant then gets out of the truck and descends the stairs while holding the railing. (*Id.*) The woman and the young man carry a floor lamp up the stairs and place it by the truck. (*Id.*) Applicant climbs the stairs carrying two small objects, places them in the truck, then reaches forward to move the fan, and helps the young man place a shelving unit in the truck. (*Id.*) He then takes an object from the woman and **[*30]** places it in the truck. (*Id.*) They close the truck bed, and applicant goes to the lamp and pulls of its top segment, which he hands to the young man standing in the truck bed. Applicant then bend over and appears to be attempting to disassemble the bottom half of the lamp by twisting it from the base. (*Id.*) The woman comes

to assist him. Applicant bends over and hands an item to the young man, and then hands him what appears to be another lamp base. (*Id.*) Applicant reaches into the truck over its side and moves the top of the first lamp. (*Id.*) The young man exits the truck and the three of them go down the stairs. Applicant holds a pole to descend, but does not use the railing. (*Id.*) He climbs the stairs with two apparently empty buckets, and then checks the time. (*Id.*) Applicant goes down the stairs while holding the railing. (*Id.*) The film then jumps. (*Id.*) There is a large round object[3] in the back of the truck, but no film of the object being placed there. Applicant and the couple are talking. (*Id.*) The couple goes down the stairs, and applicant reaches into the truck bed and pulls out rope that he throws over the object. (*Id.*) Applicant then pulls the rope, moves the box fan, and **[*31]** ties the rope. (*Id.*) Applicant leans on the truck, and then continues tying the rope around the object. (*Id.*) This requires him to move his arms, bend, and climb onto the truck's rear bumper. (*Id.*) Applicant steps off the bumper. At 2:40, applicant gets into the driver's seat of the car. (*Id.*)

• 3:23 p.m. and 4:02 p.m., the exterior of the house. (*Id.*) At 4:03 p.m., applicant is seen getting out of the pickup truck and walking up the steps to the house. (*Id.*) Applicant is then seen walking to and from the garage and the pickup. (*Id.*)

On November 2, 2021, defendant obtained surveillance footage of applicant. (Exhibit P.) These films have a date stamp and a continuous time stamp. As relevant herein, the films taken on that date depict the following:

• 9:55 a.m., applicant is wearing a white tee shirt and jeans. He gets into the pickup and backs it out of the driveway. (*Id.*)

On December 13, 2021, Dr. Feinberg was deposed, and in relevant part, he testified that: He believed that applicant sustained some degree of cumulative trauma while working as a stonemason. (Exhibit W, Deposition of Steven Feinberg, M.D,, December 13, 2021, p. 10:21–10:25.) The following exchanges occurred during Dr. **[*32]** Feinberg's deposition,

Q. … you say, has difficulty doing household duties. He tries not to do anything at all. Is his description of his limitations consistent with how he presented to you in connection with that evaluation?

A. I'm looking at the one in January. Let me take a look at it. Well, once again, I wasn't critical of him, but I think there's an element of chronic pain in his presentation with emotional distress that is coloring his perception. Once again, that's not a criticism.

Q. On page 10 of that January report, you say that he has slight tremor with intention, particularly with the right upper extremity. Do you mean that he's pretending to have a tremor; he's causing that?

A. Well, pretending suggests malingering which I'm not suggesting. It does not appear to be physiological but emotionally based.

Q. Okay. And also, you discuss how range of motion, I believe, for all limbs is problematic, and he's self-limiting. Is that also indicative perhaps of malingering?

A. I don't think he's malingering, unless you have films to subject otherwise. He's got a lot wrong with him. He's just not doing very well with it. So I'm—short of someone proving otherwise, I'm just using the **[*33]** term—I didn't do it in this report—but a somatoform pain disorder, somatoform symptom disorder.

(*Id.* at pp. 17:21–19:2.)

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Q. Okay. All right. Now, if there were evidence that suggested or showed that he was not quite as functionally limited as he has reported to you, would that be important for you to see?

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[3] It appears to be a large beanbag type of chair, but this is not certain.

A. Of course.

Q. Okay. And depending upon what that revealed, that might be something that would cause you to reevaluate whether this was a malingering situation or just a chronic pain somatoform?

MS. BURGESS: I'm going to object as calling for speculation and being overbroad. …

THE WITNESS: May I answer?

MS. LINDQUIST: Yes.

THE WITNESS: Yes.

(*Id.* at pp. 19:13–20:4)

On June 20, 2022, Efrain Ramirez testified as follows during deposition: In October of 2021, he conducted an investigation of applicant. (Exhibit 103, Deposition transcript of Efrain Ramirez, June 20, 2022, p. 5:13–5:16.) He has his own equipment. (*Id.* at p. 13:5–13:25.) He personally created a November 4, 2021 investigative report, and he did not edit the video that was attached to that report. (*Id.* at p. 19:5–19:13.) He used his Sony to camera to film applicant, and he physically operated it. (*Id.* at p. 21:23–22:22.) **[*34]** He had an independent recollection of taking video of applicant over two days. (*Id.* at p. 51:16–51:18.) The following exchanges occurred during his deposition,

Q. 1:37:54, did you see that?

A. Yeah.

Q. 1:37:54 and it jumped to 1:37:04 and he's on the other side of the street. How do you explain that?

A. When he gets out of view and he walked downstairs, my video—when he doesn't come back up right away, my video stopped and either wherever I was parked at — because if you see the street, it's a very narrow street, and wherever I was at, either the person came out and said, hey, I don't want you parking here, I had to reposition myself.

Q. I understand repositioning of yourself, but do you see the time? Let me back it up. Now we're going to go through—it's at 1:37:43, 1:37:45. It goes on. It's the actual speed. 1:37:50—in the 50s, up to 1:37:54 and then it goes to 1:37:04. How do you explain the discrepancy of going back in time on the film, if you've uploaded as a single loop as you took it?

A. If they put in the video that when he first got there, at that angle that I was at, all I could testify is that the video that you show on there is the video that I took.

Q. But it's been cut, **[*35]** correct?

MS. LINDQUIST: I'm going to object.

THE WITNESS: I can't testify if it was cut because here they are providing clips, so …

BY MS. BURGESS: Q. Let me state that again.

A. I know, but I'm not sure if the office put one clip ahead of the other one, when this one should have been first and then the other one.

Q. So it's your testimony that the office takes your video, makes clips of it and puts it together into the film; is that correct?

because—

MS. LINDQUIST: I'm going to object.

THE WITNESS: I can't testify to that

MS. LINDQUIST: Hold on. Hold on. You have to give me an opportunity to make an objection. Okay? My objection is that he did not testify that the office cuts his film or makes clips. He films the clips. I believe that's the testimony. Mr. Ramirez, if that's not correct, please clarify.

THE WITNESS: I videotape and I send in my full video in order. I have nothing to do with how they prepare for the client, as far as the clips, where they put it, how they put it.

BY MS. BURGESS: Q. When you take your full video, it's in time-stamped order, correct?

A. Correct.

Q. And this is not—as you are seeing it on the video I've been provided, it's not in time-stamped order, correct?

[*36] A. That's what it appears, but I don't recall exactly. I know that that's video that I took and then the time frames are correct. Now, how they went ahead and took each clip out and where they put it, I have no idea because I didn't prepare that myself.

(*Id.* at pp. 36:17–39:2)

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Q. … My question to you is: Is this video that you have reviewed in your report the entirety of the video you took that day?

MS. LINDQUIST: I'm going to object that you haven't shown him the entire video so how can he possibly answer that question?

BY MS. BURGESS:

Q. I'm not trying to trick you, Mr. Ramirez. I believe that you testified that you prepared for this deposition by looking at your report and the video, and I asked if you reviewed the video that was attached to your report and you said yes. Is that correct?

A. Yes, I did view what you are viewing, but, again, the office it appears to be the office prepared clips for the client to view actual claimant video. So the whole video, yes, is not on there. Because pan shots are missing and maybe other stuff that had nothing to do with the claimant is not on there.

Q. Thank you. We'll go forward. Sorry, this is my machine. I'm going to note that we went from **[*37]** 1:37 when he's packing up the car, which was out of order, now to 1:41:47. Do you know what occurred? And before we had gotten to 1:37:49, so now we're four minutes ahead. Do you know what occurred in between?

A. I'm not understanding.

Q. Okay. So they are out of order, so it's a little hard for me to go through the whole thing. We watched video together that went from—that stopped at 1:37:49. Then it jumped to 1:37:09, back. And we watched through—I'll back it up slowly—until it got to 1:37:46. But now we have jumped ahead to 1:41. I'm asking you what happened in between, if you know?

A. I don't know. I don't know if the order was incorrect. The video is correct.

(*Id.* at p. 40:9–41:19.)

***

Q. Let me go forward. Get to—let me go back. 2:19:56. It goes to 2:20. Sorry. I'm missing the part where it Jumps. There. So we go to 2:29:36. Keep going through. There's some sort of a large fabric-looking object in the back of the truck. Now, the video jumps to 2:19, ten minutes back. No fabric. I just want to confirm, Mr. Ramirez, you did not take the video in this order, correct?

A. I'm not watching it in the order that I took it, so yes.

Q. So the order that I'm seeing is not the order that **[*38]** you took the videos? A. No. But the video that's showing the time frames, it is the video that I obtained. How they did the clips for the client to view, I can't testify to that.

(*Id.* at pp. 48:18–49:7)

On June 20, 2022, Iveanna Hill was deposed, and in relevant part, she testified that: She manually used her own Canon Vixiz HFR 800 to film applicant during the period August 23 to August 25. (Exhibit 102, Deposition of Iveanna Hill, June 20, 2022, pp. 14:6–15:5, 17:15–17:18.) Investigators upload their videos and retain copies for 30 to 90 days, and she no longer has the video she took of applicant. (*Id.* at p. 16:13–16:18.) Her camera timestamps film. (*Id.* at pp. 16:25–17:1.) Shen she submitted her video, there was a timestamp. (*Id.* at pp. 17:24–18:21, 19:15–19:18.)

On June 20, 2022, Jay Goomany was deposed, and in relevant part, he testified that: He used his Canon Vixia, HD camera to film applicant, and he manually operated it. (Exhibit 101, Deposition of Jay Goomany, June 20, 2022, p. 16:3–16:16.) He filmed applicant on May 26. (*Id.* at p. 18:9–18:20.) The following exchanges occurred during his deposition,

Q. Okay. I'll just let it go for a minute. I think we'll see that it's 12:28. **[*39]** Somebody leaves the door, 12 o'clock and 28 seconds, 29 seconds. And there's a yellow vehicle there. Now it's gone back to 11:57. that the way you filmed it?

A. Well, no, no, no.

Q. So when you filmed it with the timestamp, the timestamp was sequential; is that correct?

A. Yeah, yeah, I don't see—just to start filming and the timestamps runs on. I don't know how it jumped backwards there.

(*Id.* at p. 19:17–20:2.)

On August 1, 2022, the matter proceeded to a mandatory settlement conference. During that hearing, the issue of whether defendant could send the subrosa to the AME was discussed, and the parties were ordered to meet and confer regarding the issue of metadata on the surveillance films. (Minutes of Hearing (MOH), August 7, 2022. at p. 2.)

On August 18, 2022, Dr. Feinberg issued a report after re-evaluating applicant. Exhibit X, Report of Steven Feinberg, M.D,, August 18, 2022.) In that report, Dr. Feinberg stated in relevant part that: Applicant claimed that he could drive, but that while driving, he had to turn his whole body to change lanes, that he had weakness in his arms and a loss of strength, and that applicant could no longer open jars. (*Id.* at pp. 15–16.) Applicant reported **[*40]** "difficulties with household duties" and with putting on his underwear because he could not bend his knees. (*Id.* at p. 16.) Applicant also stated that on most days he was "fairly sedentary" and that he did not "do much." (*Ibid.*) Applicant's physical examination did not reflect atrophy of the extremity musculature, and applicant's range of motion was self-limited/reduced. (*Id.* at pp. 17–18.) Applicant's gait was antalgic. (*Id.* at p. 18.) Applicant was not permanent and stationary. (*Id.* at p. 24.)

On May 1, 2023, the matters were set for trial on the issue of whether defendant could send the surveillance to Dr. Feinberg. (PTCS, May 1, 2023.)

On June 18, 2023, the undersigned sent an email to the parties stating in relevant part that,

> I have reviewed the footage and am concerned that it is not the latest version that was provided to Ms. Burgess. This is because in Exhibit A (May 26, 2021–May 27, 2021), there are no time stamps at all on the videos. Accordingly, I cannot analyze Ms. Burgess's concerns about timestamps. Also, Exhibit B (August 23, 2021–August 24, 2021) has some time stamps, but they vanish after a few seconds.

On August 16, 2023, the matter proceeded to trial, and applicant **[*41]** stipulated that the films depicted his actions except for the portions of the films in Exhibit N1 taken inside of his attached garage. Applicant testified that he recalled being evaluated by Dr. Feinberg and that he was honest with Dr. Feinberg about his symptoms. Applicant's objections to the remainder of defendant's questions about whether applicant was honest and forthright with Dr. Feinberg were upheld.

On August 28, 2023, the Findings of Fact issued, and as relevant herein, it was found that applicant worked for defendant and that the film could be sent to Dr. Feinberg.

On September 7, 2023, applicant filed his Petition for Reconsideration.

III.

DISCUSSION

Applicant's Petition Should Be Analyzed Pursuant to the Removal Standard

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn (2006) 71 Cal. Comp. Cases 783, 784, fn. 2 (Appeals Board en banc)*.) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona) (2016) 5 Cal. App. 5th 658, 662 [210 Cal. Rptr. 3d 101, 81 Cal. Comp. Cases 1122]*.) Failure to timely petition for reconsideration of a **[*42]** final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See *Lab. Code, § 5904*.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

As in this matter, a decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the Findings addressed a hybrid of threshold issues, including employment, and interlocutory issues, including whether the surveillance films could be sent to Dr. Feinberg. Accordingly, applicant correctly filed a Petition for Reconsideration. However, applicant only challenges the Findings pertaining to discovery issues, these are interlocutory decisions that are subject to the removal standard. (See *Gaona, supra **[*43]*** .)

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 [38 Cal. Rptr. 3d 922, 71 Cal. Comp. Cases 155]*; *Kleemann v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 274, 280, fn. 2 [25 Cal. Rptr. 3d 448, 70 Cal. Comp. Cases 133]*.) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (*Cal. Code Regs., tit. 8, § 10843(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, § 10843(a)*.) Here, as will be discussed below, applicant has not established that he will suffer significant prejudice or irreparable harm and/or that reconsideration will not be an adequate remedy, and therefore, his Petition should be denied.

The Expectation of Privacy

The Appeals Board issued a persuasive panel decision discussing surveillance films and an injured worker's right to privacy. In that decision, it stated in relevant part that that,

> applicant retains a constitutionally protected right to privacy. … However, the constitutional right to privacy is not absolute. The Supreme Court has defined the elements of a cause of action for violation of the constitutional right to privacy: "[A] plaintiff alleging an invasion of privacy in violation of the state constitutional **[*44]** right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." [Citations] Moreover, even if the three elements are met, "no constitutional violation occurs, i.e., a 'defense' exists, if the intrusion on privacy is justified by one or more competing interests." [Citations]
>
> Generally, there is no reasonable expectation of privacy in settings where activities are conducted in an open and accessible space, within the sight and hearing of the general public or of customers or visitors to that open and accessible space. [Citations] The right to privacy in the front yard of a person's home is subject to the same considerations, including whether the activities are within the sight and hearing of the general public. The Court of Appeal discussed those privacy expectations in *People v. Mendoza (1981) 122 Cal. App. 3d Supp. 12 [176 Cal. Rptr. 293]*, a case involving an assertion of right to privacy in a yard enclosed by chain-link fence:
>
> > In applying the principles of law to the cases which come before us, we should not lose sight of the everyday facts of life. Fencing around the front yard of a residence **[*45]** is a common situation and ordinarily includes a gate at the point where a sidewalk leads to the front door. Such fences have obvious purposes other than excluding the public, such as discouraging dogs, children, handbill deliverymen and others from walking across the front lawn and flower beds. In the absence of a locked gate, a high solid fence blocking the front yard from view, a written notice to keep out or "beware of dog," or perhaps a doorbell at the front gate, anyone having reason to talk to the residents would be expected to open the front gate, walk up to the house and knock on the door. Likewise, if a resident was in the front yard too far away from the fence to talk with easily, it would be entirely natural and appropriate to open the gate without asking permission and to approach the person in order to converse in normal tones. At least, this would be the case in the absence of a warning from the occupant that the visitor was unwelcome.
> >
> > There is simply no reasonable expectation of privacy in the front yard of a residence under such conditions. It is no more closed off to the public, expressly or impliedly, than any other front yard with a sidewalk to the front door. Even **[*46]** without a fence the public is not expected nor encouraged to walk wherever desired through the front yard; that's why a sidewalk is provided. The fact that a chain-link fence is installed is not commonly considered a deterrent to entering a front yard to the same extent as if unfenced, in the absence of other evidence to the contrary. [Citations]Thus, there is no reasonable expectation of privacy in the front yard of a residence that is plainly visible from the street, absent additional indicia such as a high wall or a doorbell at the front gate.
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> *(Licea (Juan) v. Screwmatic, 2022 Cal. Wrk. Comp. P.D. LEXIS 12*[4]*, *14–17* (citations omitted).)

Here, applicant contends that the films taken inside of his garage on May 27, 2021 violate his *fourth amendment* rights. However, applicant had his garage door open, and it was a sunny day. As a result, the interior of his garage and any activities occurring therein, was in the plain sight of anyone walking or driving past his home. Despite the fact that several people either walked or drove past his home, applicant did not close the garage door or take steps to ensure that the its interior could not be observed by people in public spaces. Therefore, applicant did not have a "reasonable expectation" of privacy while in his garage during **[*47]** those hours. Further, the investigator's

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[4] Although panel decisions are not binding, they may be considered to the extent that their reasoning is persuasive. (See Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc).)

potential use of a zoom lens does not change this analysis. Since, applicant did not have a reasonable expectation of privacy, there is no violation of applicant's *fourth amendment* rights. (*Licea (Juan) v. Screwmatic, 2022 Cal. Wrk. Comp. P.D. LEXIS 12*; *People v. Mendoza (1981) 122 Cal. App. 3d Supp. 12, 176 Cal. Rptr. 293*.)

Whether the Films Can Be Provided to Dr. Feinberg

In a persuasive panel decision, discussing the admissibility of surveillance films, the Appeals Board stated that,

> … *Labor Code § 5708* makes clear that the WCAB "shall not be bound by the common law or statutory rules of evidence and procedure … ." Thus, we are not bound by *Evidence Code §§ 1400* and *1401*. Our research reveals no published workers' compensation case requiring formal 'authentication' of writings. In fact, it is routine in workers' compensation matters to allow almost all documents into evidence without formal authentication. For instance, medical evaluators are not called at trial to authenticate their reports. Thus, in the absence of a genuine question regarding whether writings sought to be introduced into evidence are forgeries, there is no need in workers' compensation proceedings for formal authentication of documents.
>
> In any case, we note that even in criminal and civil cases, a chain of custody is not necessary to establish the authenticity **[*48]** of a video. *'[T]he reliability and accuracy of the motion picture need not necessarily rest upon the validity of the process used in its creation, but rather may be established by testimony that the motion picture accurately reproduces phenomena actually perceived by the witness*. Under this theory, though the requisite foundation may, and usually will, be laid by the photographer, it may also be provided by any witness who perceived the events filmed. Of course, if the foundation testimony reveals the film to be distorted in some material particular, exclusion is the proper result.' (*Jones v. City of Los Angeles (1993) 20 Cal. App. 4th 436, 440, 24 Cal. Rptr. 2d 528*, quoting McCormick on Evidence (3d ed. 1984) § 214, pp. 673–674.) 'A video recording is authenticated by testimony or other evidence 'that it accurately depicts what it purports to show.' (*People v. Gonzalez (2006) 38 Cal. 4th 932, 952, 44 Cal. Rptr. 3d 237, 135 P.3d 649*.)
>
> (*Johnson v. Tennant Co., 2009 Cal. Wrk. Comp. P.D. LEXIS 234 *6–8*[5], emphasis added.)

In 2021, the Appeals Board another persuasive panel decision relying upon *Johnson v. Tennant Co.* in which it set forth the analysis to determine the admissibility of dashcam films. (*Johnson (Christopher) v. Lexmar Distribution, 2021 Cal. Wrk. Comp. P.D. LEXIS 289*.) The injured worker in that matter objected to the dashcam videos on the grounds of lack of foundation, lack of authentication, and because the films had been cut into four different segments. (*Id.* *6.) The Appeals **[*49]** Board began its explanation by quoting the above language in *Johnson v. Tennant Co.*, and then stated that,

> The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case. (2 *McCormick, supra*, § 221, pp. 82–83.) The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered.
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> …
>
> A photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. (*People v. Gonzalez (2006) 38 Cal. 4th 932, 952 [44 Cal. Rptr. 3d 237, 135 P.3d 649]*; *People v. Cheary (1957) 48 Cal. 2d 301, 311–312 [309 P.2d 431]*.) This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. (*People v. Mehaffey (1948) 32 Cal. 2d 535, 555 [197 P.2d 12]*; *People v. Doggett (1948) 83 Cal. App. 2d 405, 409 [188 P.2d 792]*; 2 Witkin, Cal. Evidence (5th ed. 2012) Documentary Evidence, § 7, pp. 154–156 (Witkin).)
>
> (*Johnson (Christopher) v. Lexmar Distribution, 2021 Cal. Wrk. Comp. P.D. LEXIS 289, *8–9*.)

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[5] Although panel decisions are not binding, they may be considered to the extent that their reasoning is persuasive. (See Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc).)

Here, applicant contended that the surveillance films are outdated, unreliable and prejudicial. In support, he argued that the date stamps for the films taken on May 26 “jump back and forth many times.” However, the copies of the May 26 films submitted into evidence do not contain a date or time stamp. Similarly, the films taken on August 23, 2021 only briefly display a date and **[*50]** time stamp. Both parties were aware of the missing time stamps, but neither moved to introduce a copy with a continuous time stamp for the films taken on May 26, 2021 or August 23, 2021. As there is no evidence reflecting that the time stamp on the films taken on these date, jumps back and forth, applicant's argument is unsupported, and it must fail. (*Hamilton, supra, at p. 475*.) Further, it is true that the investigators testified that there were discrepancies with the date stamps for some of the films taken on May 26, 2021, August 23, 2021, August 24, 2021, and August 25, 2021, and that the order of the films may be incorrect, (Exhibit 103 at pp. 36:17–39:2; 40:9–41:19; 48:19–49:7; Exhibit 102 at pp. 7:24–18:21, 19:15–19:18.) However, Mr. Ramirez testified that the “video is correct,” and the activities depicted in the video correspond to the investigator's reports. (Exhibit 103 at p. 41:19; Exhibit Q, Exhibit R, Exhibit S.) Moreover, applicant does not contend that he did not perform the activities depicted on the films taken on May 26, 2021, August 23, 2021, August 24, 2021, October 3, 2021, and November 2, 2021.

The films submitted for May 27, 2021 require a different analysis. First, applicant did not **[*51]** stipulate that he was the person filmed in the garage. Next, as noted above, there are various times that the film jumps backwards and different activities occur at purportedly the same time. Further, the film is problematic because there are two men wearing loose fitting light colored tee shirts inside of the garage, the interior of the garage was darker than the outdoors, and often the only body parts that could be seen were legs and feet.

However, these issues should not prevent Dr. Feinberg from review of these films. First, applicant can be identified performing some of the activities captured in the garage. This is because applicant is the only person wearing a USC shirt, and there are multiple times when the shirt is visible while someone is climbing or descending the ladder. Also, someone wearing what appear to be applicant's shoes is seen climbing and descending the ladder, and there is no evidence reflecting that anyone else was wearing the same pair of shoes during the time in question. Secondly, the probative value of the films taken on this date, and the other dates, far outweighs this issue. It is true that the film is poorly edited, but there is no evidence reflecting **[*52]** that the film is a forgery or that applicant did not actually perform the activities depicted. Third, Dr. Feinberg should be provided the opportunity to review the films because some the activities that the applicant was filmed performing do not appear to be consistent with what applicant reported to Dr. Feinberg. For example, applicant claimed he could no longer care for his yard and that he had trouble bending down, but he performed both activities in the May 26, 2021 films. Similarly, applicant claimed he had a hard time driving, that he could not close his hands, that he had no strength in his arms and legs, and that he could not use stairs without assistance, and that he had a hard time walking. (Exhibit 4 at p. 14.) In contrast, the films document applicant going for walks, carrying items up stairs, climbing ladders, and more. Further, Dr. Feinberg stated that “measuring applicant's range of motion was problematic,” and applicant's range of motion for certain activities such as bending and reaching overhead is also documented in the films. (Exhibit 9 at p. 10; see also Exhibit 5 at p. 7; see also Exhibit 4 at pp. 16–17.) Moreover, Dr. Feinberg stated that it would be important **[*53]** for him to review evidence that would suggest or show that applicant was “not quite as functionally limited” as reported to him. (Exhibit W at p. 19:13–20:4.) It is true that the films may be moot as a result of applicant's surgeries and the passage of time, but this determination should be made by Dr. Feinberg. (*Peter Kiewit Sons v. Industrial Acc. Com. (1965) 234 Cal.App.2d 831, 838–839* [“Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential … Expert testimony is necessary where the truth is occult and can be found only by resorting to the sciences.”] If the films are moot, applicant will not be irreparably harmed if Dr. Feinberg views them.

Based upon the above, applicant has not established that he will suffer irreparable harm and/or that reconsideration will not be an adequate remedy. I therefore recommend denial of the Petition.

Alison Howell

Workers' Compensation Administrative Law Judge

Dated: September 14, 2023

End of Document

Christina Mauser, Dec'd v. Mamba Sports Academy, 2023 Cal. Wrk. Comp. P.D. LEXIS 279

Workers' Compensation Appeals Board (Board Panel Decision)

October 20, 2023 Opinion Filed

W.C.A.B. No. ADJ13092614—WCJ Oliver Cathey (ANA); WCAB Panel: Chair Zalewski, Deputy Commissioners Schmitz, Garcia

Reporter
2023 Cal. Wrk. Comp. P.D. LEXIS 279 *

Christina Mauser (Dec'd), Applicant v. Mamba Sports Academy dba Mamba, Sports Academy Foundation, LLC, Mamba & Mambacita Sports Foundation, LLC, Hartford Casualty Insurance Company, administered by The Hartford, Defendants

Subsequent History:

Review denied by, Costs and fees proceeding at, Request denied by *Hartford Casualty Insurance Company v. W.C.A.B. (Mauser, Christina), 2024 Cal. Wrk. Comp. LEXIS 2 (Cal. App. 4th Dist., Jan. 25, 2024)*

Status:

Publication Status: CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Prior History:

Mauser v. Island Express Helicopters, Inc., 2021 U.S. Dist. LEXIS 84382 (C.D. Cal., May 3, 2021)

Disposition: The Petition for Reconsideration is *denied*.

Core Terms

Undersigned, deposition, settlement, deferred, workers' compensation, death benefit, termination, third-party, benefits, unreasonable delay, no evidence, compensation payment, double recovery, appeals board, reconsideration, REDACTED, employer negligence, Notice, good cause, asserts

Headnotes

Penalties—Unreasonable Delay in Payment of Death Benefits—WCAB, denying reconsideration, affirmed WCJ's finding that defendant improperly terminated payments of death benefits awarded under Stipulated Award to husband and children (applicants) of decedent basketball coach who was killed in helicopter crash on 1/26/2020, and WCAB ordered defendant to resume payments and also imposed penalty for unreasonable delay, when, prior to terminating payments, defendant filed Petition for Credit under *Labor Code §§ 3858* and *3861*, asserting that applicant's third-party settlement recovery absolved defendant of further liability for payment of death benefits in workers' compensation case, and although applicants objected to Petition for Credit and WCJ issued order deferring determination on Petition for Credit pending evidentiary hearing, defendant unilaterally stopped payments, and WCAB reasoned that without evidentiary hearing on issues of nature and amount of third-party settlement and defendant's right to credit against workers' compensation death benefits owed to applicants, termination of payments under Stipulated Award was unreasonable and justified imposition of penalty under *Labor Code § 5814*. [See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 10.40[1]*, *[3]*, *27.12[2]*; Rassp & Herlick, California Workers' Compensation Law, Ch. 11, § 11.11[2], [3].]

Counsel

[*1] For applicant—Bentley & More LLP

For defendants—England, Ponticello & St. Clair

Panel: Chair Katherine A. Zalewski; Deputy Commissioner Anne Schmitz; Deputy Commissioner Patricia A. Garcia

Opinion By: Chair Katherine A. Zalewski

Opinion

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report 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 report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

Chair Katherine A. Zalewski

I concur,

Deputy Commissioner Anne Schmitz

Deputy Commissioner Patricia A. Garcia

* * * * *

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

1. Applicant's occupation: Basketball Coach

Applicant's Age: 39

Date of Injury: January 26, 2020

Parts of Body Injured: Death.

Manner in which it occurred: Specific Incident

2. Identity of Petitioner: Defendant Sports **[*2]** Academy Foundation LLC, Mamba Sports Academy, Mamba & Mambacita Sports Foundation, and Sports Academy Thousand Oaks

Timeliness: Petition is timely

Verification Petition is verified

3. Date of Order: July 27, 2023

4. Petitioner contends that the WCJ erred in:

a) Finding the defendant unreasonably terminated payment of death benefits.

b) Ordering the defendant to reinstate payment of Death benefits and pay penalties and interest.

c) Granting the applicant's Petition to Compel the Deposition of Vanessa Bryant as the alleged CEO of Sports Academy Foundation LLC, Mamba Sports Academy, Mamba & Mambacita Sports Foundation, and Sports Academy Thousand Oaks.

II.

FACTS

On March 23, 2020, An Application for Adjudication was filed on behalf of Matthew Mauser, the husband, Penelope Mauser, Thomas Mauser, and Ivy Mauser, the children of Christina Mauser, who died in a helicopter crash on January 26, 2020, while in the course and scope of her employment with Granity Studios LLC.[1] Subsequently, the Application for Adjudication was amended on May 1, 2020, to correct the name of her employer to Mamba Sports Academy DBA Mamba.[2]

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[1] EAMS Doc ID: 32770531; APPLICATION FOR ADJUDICATION OF CLAIM-DEATH

[2] EAMS Doc ID: 32313950; Mauser-Amended Letter, DWC Claim Form and POS

On March 12, 2021, the matter was resolved by Stipulation with Request for Award identifying **[*3]** the employer as Sports Academy Foundation, LLC; Mamba Sports Academy DBA by Mamba Sports Academy, LLC; Sports Academy Thousand Oaks.[3]

The Stipulation with Request for Award was approved on March 25, 2021, awarding Death benefits in the amount of $563,076.36, payable at $769.23 a week. The Award was in favor of Ivy Mauser, Thomas Mauser, Penelope Mauser, and Matthew Mauser against Mamba Sports Academy Dba Mamba; Sports Academy Foundation, LLC, and The Hartford.[4]

The applicant noticed the deposition of Vanessa Bryant on September 3, 2022.[5] The defendant filed a motion to quash the notice of the deposition[6], and Counsel for Vanessa Bryant issued an objection thereto.[7]

The matter proceeded to trial on March 14, 2022, on the issue of whether or not the applicant was entitled to take the deposition of Vanessa Bryant.

The Undersigned Judge issued a Findings and Order dated June 17, 2022, finding that there was (1) no pending issues within the jurisdiction of the workers' compensation appeals board to which an employer's waiver of a subrogation right would be relevant; (2) that The deposition of Vanessa Bryant will not provide admissible evidence or is reasonably calculated to lead to the discovery **[*4]** of admissible evidence relevant to any issue currently pending before the Workers' Compensation Appeals Board; and (3) The applicant was not entitled to take the deposition of Vanessa Bryant at that time.[8']

Subsequently, the defendant filed a [Redacted] Petition for Credit, which requested the Court allow the defendant to take a credit towards liability for any and all workers' compensation liability in an undisclosed amount from a third-party lawsuit.[9]

An Objection to the Petition for credit was filed by the applicant alleging that there was a mutually released in the Civil Action as well as employer negligence that could reduce and/or negate the defendant's rights to a credit for the third-party lawsuit settlement.[10]

On July 6, 2022, the undersigned Judge issued an Order Deferring Determination On Petition For Credit Pending Evidentiary Hearing, which ORDERED "that all action upon said Petition is deferred pending completion of trial on those issues, at which time a judge may rule upon the evidence then presented. No action will be taken toward that end until a party files a declaration of readiness to proceed, when appropriate."[11]

On September 29, 2022, the applicant issued a Notice Of Taking **[*5]** Remote Video Conference Deposition Of Vanessa Bryant As An Employer Representative/CEO Of Sports Academy Foundation, LLC, Mamba & Mambacita Sports Foundation, LLC, and as a Witness to Any Employer Negligence; Request for Production And Notice Of Intent To Videotape Said Deposition; Subpoena.[12]

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[3] EAMS Doc ID: 35901850; Signed SWRA

[4] EAMS Doc ID: 74002261; AWARD & GAL

[5] APPLICANT'S 5: Notice of Deposition, dated September 3, 2021

[6] APPLICANT'S 6: Joint Motion to Quash Deposition, dated September 30, 2021

[7] DEFENSE C: Objection to the deposition of Vanessa Bryant, dated January 18, 2022

[8] EAMS Doc ID: 75622549, F&O AND OPINION-MAUSER, C

[9] EAMS Doc ID: 41989368, 06-22-22-MausCh-Redacted Pet. for Credit

[10] EAMS Doc ID: 42004173, Applicant's Obj to Def's Pet for Credit

[11] EAMS Doc ID: 75679894, ORDER DEFERRING ACTION ON PETITION FOR CREDIT-MAUSER, C

[12] APPLICANT'S EXHIBIT 15: Notice of deposition, dated 9/29/2022

Again, Counsel for Vanessa Bryant issued an Objection to the Notice of Deposition.[13]

On November 8, 2022, the defendant sent notice that it was terminating payment of Death benefits effective October 22, 2022, on the grounds that the defendant had filed a petition for credit.[14]

On February 9, 2023, the applicant filed a Petition to Enforce the Court Order Dated July 6, 2022, Deferring Determination on Petition For Credit, Request For Reinstatement Of Death Benefits; Request For Penalties, Interest And Attorney's Fees.[15]

The matter proceeded to trial on May 17, 2023, on the issues of (1) attorney's fees, (2) motion to compel the deposition of Vanessa Bryant, (3) penalties and interest for failure to pay benefits per the Stipulation and Award. and (4) costs and sanctions for 5814 and 5814.5.[16]

On July 27, 2023, the Undersigned Judge issued a Findings, Award, And Order finding that the deposition of Vanessa Bryant **[*6]** may produce admissible evidence, or was it reasonably likely to lead to the discovery of admissible evidence relevant to the issues currently pending before the Workers' Compensation Appeals Board; and that the applicant was entitled to take the deposition of Vanessa Bryant[.];

The Undersigned Judge found that there was no good cause to allow the defendant to withdraw from the stipulation that Sports Academy Foundation LLC, Mamba Sports Academy, Mamba & Mambacita Sports Foundation, and Sports Academy Thousand Oaks employed Christina Mauser; that the language in the Order Deferring Determination On Petition For Credit Pending Evidentiary Hearing was unambiguous and ordered all action upon said Petition deferred; that the defendant violated the Court's Order to deferrer action when it terminated benefits on October 22, 2022; and that the defendant unreasonably delayed payment of compensation[.];

The Undersigned Judge ordered that the applicant was entitled to compensation payments per the March 25, 2021, Award on Stipulations with Request for Award from the date of termination of payments, October 22, 2022, through the present and continuing until such time the Award is paid in full or **[*7]** by Order of the Court; that the applicant was entitled to an increase in compensation totaling $6,337.77 for the defendant's unreasonable delay in payment of compensation; that the applicant was entitled to interest on each delayed payment of compensation from the day it was due through the date of payment at the same rate as judgments in civil actions; and that the applicant was entitled to an attorney fee of $2,020.00 for having to file a petition to enforce the Award and Court's Order.

The defendant filed a petition for reconsideration to the July 27, 2023 Findings, Award, And Order asserting that the Undersigned Judge acted in excess of his powers in light of the mandatory language of labor code *§§ 3858* and *3861* and that the findings of fact do not support the Order requiring Hartford to produce a non-employer representative witness, who has previously declared a lack of relevant knowledge, for deposition.

III.

DISCUSSION

CALIFORNIA LABOR CODES SECTIONS 3858 AND *3861*

The defendant has asserted that *California Labor Codes Sections 3858* and *3861* are a mandatory relief from the obligation to pay further compensation "as a result of an employee's third-party recovery and that this credit is mandatory except in unusual circumstances.["]

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[13] APPLICANT'S EXHIBIT 17: Objection to deposition, dated 10/28/2022

[14] APPLICANT'S EXHIBIT 19: Death benefit termination, dated 11/8/2022

[15] EAMS Doc ID: 45022412, Pet to Enforce Court Order dated 7.6.22

[16] EAMS Doc ID: 76768230, Minutes of Hearing, 5-17-23

However, it has been held that a defendant **[*8]** may not take unilateral credit for a third-party settlement unless not doing so would be "financially foolhardy.[17]

In this matter, the Award was for $563,076.36, payable at $769.23 a week. This is not an insignificant amount.

The defendant's Petition for credit was for an undisclosed amount, the numbers having been redacted, and there was no indication of the nature of the settlement proceeds.[18]

The defendant's Petition provides, "The total amounts netted from the third-party civil suit are as follows: (1) [REDACTED]; (2) [REDACTED]; (3) [REDACTED]; (4) [REDACTED] (Id.) Based on this June 2022 provision of third-party settlement information, defendant now files this Petition for Credit."[19]

To get credit, a defendant must show an overlap between benefits owed in the workers' compensation system and the damages awarded or settled for in the civil arena. No evidence has been submitted regarding the nature and amount of the third-party settlement and if it included any loss of consortium and/or pain and suffering.

With the assertion of employer negligence that could reduce or negate the employer's right to a credit, the amount of death benefits due to the applicants, there is no evidence that continuing **[*9]** payment of death benefits to the decedent's surviving children and spouse would be financially foolhardy.

As such, the undersigned Judge was not in error in determining that the defendant's unilateral termination of death benefits was unreasonable and in finding that the defendant unreasonably delayed payment of compensation.

DOUBLE RECOVERY

The defendant asserts that not allowing the defendant to take a unilateral credit before litigation of its right to credit by the Appeals Board would impermissibly allow a double recovery.

The defendant cites *Graham v. Workers' Comp. Appeals Bd., 210 Cal. App. 3d 499, 258 Cal. Rptr. 376*, for the premise that "the subrogation provisions prevent a double recovery to an employee who makes both a workers' compensation claim and a claim against a third party tortfeasor ..."

In *Graham v. Workers' Comp. Appeals Bd*. the Court of Appeal of California annulled an Appeals Board granting of a defendant's Petition for credit.

In the *Graham* matter, the applicant resolved a civil action for medical malpractice. The civil settlement was reported to be solely for pain and suffering. The Court of Appeal was addressing the interaction between *Cal. Civ. Code § 3333.1* and *Cal. Lab. Code §§ 3858*, *3861*.

The Court of Appeal ultimately denied the employer's request for credit on the grounds that the civil **[*10]** settlement accounted for the workers' compensation benefits received by the applicant and, therefore, was not a double recovery.

In *Roe v. Workmen's Comp. Appeals Bd. (1974) supra, 12 Cal.3d 884, 117 Cal. Rptr. 683, 528 P.2d 771*, the Supreme Court of California discussed a matter where a negligent employer was claiming a credit under *section 3861* after the injured employee had settled his cause of action against the third party without determining employer negligence.

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[17] *California Compensation Ins. Co. v. Workers' Compensation Appeals Bd., 66 Cal. Comp. Cases 1076, 1078 (Cal. App. 3d Dist. July 19, 2001)*

[18] EAMS Doc ID: 41989368, 06-22-22-MausCh-Redacted Pet. for Credit. Page 2

[19] EAMS Doc ID: 41989368, 06-22-22-MausCh-Redacted Pet. for Credit. Page 2

The Court in [*Roe*] [Court, *sic*] stated that there was "doubt as to whether the recovery of workers' compensation benefits by an employee following a settlement constituted a double recovery, given the likelihood that any settlement took into account the possibility of such a recovery" and pointed out that "the policy against double recovery primarily protects the third-party tortfeasor, not the employer."

The California Supreme Court has stated that the Legislature's command in *California Labor Code section 3202* that the courts liberally construe the Act to extend benefits for the protection of persons injured in the course of their employment, governs all aspects of workers' compensation and applies to factual as well as statutory construction.[20]

In the current case, there is no evidence of the nature and amount of the third-party settlement and if it included any **[*11]** loss of consortium and/or pain and suffering. As such, there is no evidence there would be a double recovery that a credit award would exceed the benefits owed by the defendant.

Based on the above, the undersigned Judge was not in error in finding that the defendant was to recommence payments per the March 25, 2021, Award on Stipulations With Request For Award from the date of termination of payment, October 22, 2022, through the present and continuing until such time as the Award is paid in full or by Order of the Court.

PLAIN LANGUAGE OF THE COURT'S ORDER DEFERRING

The defendant asserts that the language "IT IS HEREBY ORDERED that all action upon said petition is deferred pending completion of trial on those issues, at which time a judge may rule upon the evidence then presented" was ambiguous and, as such, was not in violation of the Order deferring all action on the Petition.

The defendant states that it did not understand that the Undersigned Judge's statement "that all action upon said petition is deferred pending completion of trial on those issues, at which time a judge may rule upon the evidence then presented" was not limited to only court action. That is was not until the Undersigned **[*12]** Judge's July 27, 2023 Findings and Order that the defendant realized that the July 6, 2022, Order deferred all cation on the Petition and not just court action.

However, the defendant did not request clarification of the Undersigned Judge's Order and continued to pay benefits for an additional three months.

The Undersigned Judge does not believe that the language in his Order Deferring Determination On Petition For Credit Pending Evidentiary Hearing was ambiguous when it ordered all action upon said Petition [was] deferred.

Based on the above, the undersigned Judge was not in error in determining that the defendant violated his Order, deferring all action on the defendant's Petition for credit.

INTEREST, SANCTIONS, AND ATTORNEYS' FEES RELATED TO THE TERMINATION OF PAYMENTS

The defendant asserts that there was a satisfactory excuse for the delay in payment of benefits is genuine legal doubt as to liability for benefits.

As discussed above, the defendant's Petition for credit was for an undisclosed amount, the numbers having been redacted, and there was no indication as to the nature of the settlement proceeds.

No evidence was provided of an overlap between benefits owed in the workers' compensation **[*13]** system and the damages awarded or settled for in the civil arena.

The defendant requests that the Court accept on faith that the civil settlement exceeds the amount awarded to the applicants and that the alleged employer's negligence would not reduce or negate the defendant's right to a credit.

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[20] ***Arriaga v. County of Alameda, 9 Cal. 4th 1055, 1065***

With no evidence submitted as to the nature and amount of the third-party settlement and whether or not it included any loss of consortium and/or pain and suffering, there is no evidence. With the assertion of employer negligence that could reduce or negate the employer's right to a credit, the amount of death benefits due to the applicants, there is no evidence that the civil settlement proceeds exceed the employer's liability under Stipulations with Request for Award.

As such, the undersigned Judge was not in error in determining that the defendant's termination of death benefits was unreasonable and in finding that the defendant unreasonably delayed payment of compensation.

"When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25 percent **[*14]** or up to ten thousand dollars ($10,000), whichever is less. In any proceeding under this section, the appeals board shall use its discretion to accomplish a fair balance and substantial justice between the parties."

The defendant terminated payments per the March 25, 2021, Award on Stipulations With Request For Award on October 22, 2022.

The undersigned Judge found that the defendant's unilateral termination of death benefits was unreasonable and that the defendant unreasonably delayed payment of compensation.

According to *California Labor Code Section 5814*, the amount of payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten thousand dollars ($10,000), whichever is less.

As such, the Undersigned Judge was not in error in finding that the applicant was entitled to an increase in compensation for the defendant's unreasonable delay in payment of compensation under the March 25, 2021, Award on Stipulations with Request For Award.

Furthermore, the Undersigned Judge was not in error in finding that the applicant was entitled to interest on each delayed payment of compensation from the day it was due through the date of payment at the same rate as judgments in civil actions.

THE EMPLOYER NAME

[*15] On March 12, 2021, this matter was resolved by Stipulation with Request for Award identifying the employer as Sports Academy Foundation, LLC; Mamba Sports Academy DBA by Mamba Sports Academy, LLC; and Sports Academy Thousand Oaks.

On February 27, 2023, the parties completed a pretrial conference statement identifying the employer as Mamba & Mambacita Sports Foundation, Sports Academy Foundation, LLC, Mamba Sports Academy, and Sports Academy Thousand Oaks.

On May 17, 2023, at the time of trial, the defendant requested that it be allowed to withdraw from the stipulation that Mamba & Mambacita Sports Foundation was to be included as one of the names of the decedent's employer.

The appeals board's discretion to reject a stipulation is limited and may only do so on a showing of good cause.

A stipulation may be set aside if it has been entered into through inadvertence, excusable neglect, fraud, mistake of fact, or law. Good cause may also exist where the facts stipulated to have changed, or there has been a change in the underlying conditions that could not have been anticipated, or where special circumstances exist, rendering it unjust to enforce the stipulation.

Good cause will not be found **[*16]** if there has been a failure to exercise due diligence or a miscommunication between a principal and an agent.

At the time of trial, no good cause was provided that would make it unjust to enforce the stipulation.

In addition, according to the Secretary of State Certificate of Amendment of Articles of Incorporation, filed June 11, 2019, Sports Academy Foundation changed its' name to Mamba Sports Foundation.[21]

According to the Secretary of State Certificate of Amendment of Articles of Incorporation, filed on February 5, 2020, Mamba Sports Foundation changed its' name to Mamba and Mambacita Sports Foundation.[22]

Based on the evidence submitted, the undersigned Judge was not in error in declining to allow the defendant to withdraw from the stipulation that Mamba and Mambacita Sports Foundation is a valid name of the decedent's employer.

EMPLOYER REPRESENTATIVE WITNESS

The defendant asserts that without a factual finding that Mrs. Bryant is the employer representative or that Hartford identified Mrs. Bryant as the employer representative, the Order requiring Hartford to produce Mrs. Bryant should be overturned.

The applicant has asserted that Vanessa Bryant, as the chief executive officer for Mamba **[*17]** and Mambacita Sports Foundation (Sports Academy Foundation) and on behalf of Sports Academy Foundation LLC, Mamba Sports Academy, Mamba & Mambacita Sports Foundation, and Sports Academy Thousand Oaks, entered into a binding mutual release of both the contractual and statutory right of subrogation.

According to the California Secretary of State Electronic Filings dated 11/05/2021 and 4/21/2020, Vanessa Bryant was chief executive officer of Mamba and Mambacita Sports Foundation.[23]

According to the Secretary of State Certificate of Amendment of Articles of Incorporation, filed June 11, 2019, Sports Academy Foundation changed its' name to Mamba Sports Foundation.[24]

According to the Secretary of State Certificate of Amendment of Articles of Incorporation, filed on February 5, 2020, Mamba Sports Foundation changed its' name to Mamba and Mambacita Sports Foundation.[25]

The evidence submitted at trial shows that the Sports Academy Foundation changed its name to Mamba Sports Foundation, subsequently changing it to Mamba and Mambacita Sports Foundation. Based on this evidence, Mamba and Mambacita Sports Foundation and Sports Academy Foundation are the same entity.

Based on the evidence submitted, Vanessa **[*18]** Bryant has been the chief executive officer for Mamba and Mambacita Sports Foundation (Sports Academy Foundation) since April 21, 2020, and would have been the chief executive officer for Mamba and Mambacita Sports Foundation (Sports Academy Foundation) in November 2021 when the civil claim was resolved.

Based on the evidence submitted, the undersigned Judge was not in error in granting the applicant's Petition to compel the deposition of Vanessa Bryant as the alleged CEO of Sports Academy Foundation LLC, Mamba Sports Academy, Mamba & Mambacita Sports Foundation, and Sports Academy Thousand Oaks.

IV.

RECOMMENDATION

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[21] APPLICANT'S 1: Certificate of Amendment of Articles of Incorporation, dated June 11, 2019

[22] APPLICANT'S 2: Certificate of Amendment of Articles of Incorporation, dated February 5, 2020

[23] APPLICANT'S 4: Corporation Statement of Information, dated November 5, 2021 & APPLICANT'S 3: Corporation Statement of Information, dated April 21, 2020

[24] APPLICANT'S 1: Certificate of Amendment of Articles of Incorporation, dated June 11, 2019

[25] APPLICANT'S 2: Certificate of Amendment of Articles of Incorporation, dated February 5, 2020

For the reasons stated above, it is respectfully recommended that the defendant's Petition for reconsideration be denied.

Oliver Cathey

Workers' Compensation Administrative Law Judge

Dated: September 5, 2023

Salas v. Innovative Work Comp. Sols., LLC, 2023 Cal. Wrk. Comp. P.D. LEXIS 303

Workers' Compensation Appeals Board (Board Panel Decision)

June 29, 2023 Opinion Filed

W.C.A.B. No. ADJ16112899—WCAB Panel: Chair Zalewski, Commissioners Dodd, Razo (dissenting)

Reporter
2023 Cal. Wrk. Comp. P.D. LEXIS 303 *

Sophia Salas, Applicant v. Innovative Work Comp Solutions, LLC, leased coverage for Synctruck, LLC, insured by United Wisconsin Insurance Company, administered by Next Level Administrators, Defendants

Status:

Publication Status: CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: Reconsideration is *granted*, and the March 28, 2023 Findings and Order is *affirmed in part* and *amended in part*.

Core Terms

sudden, van, hit, trial testimony, psychiatric injury, driving, happened, feeling, remember, driver, motor vehicle accident, psyche, scared, intersection, extraordinary employment, glass, spin, roll, preponderance of evidence, regular, unexpected, freaking, industrial injury, delivery driver, liquids, routine, coming, truck, fast, employment condition

Headnotes

Psychiatric Injury—Six-Month Employment Requirement—Sudden and Extraordinary Employment Conditions—WCAB, granting reconsideration in split panel opinion, rescinded WCJ's decision that *Labor Code § 3208.3(d)*'s six-month employment requirement barred applicant delivery driver's claim for psychiatric injury stemming from 11/25/2020 automobile accident, and WCAB held that applicant's psychiatric claim was not barred because injury was caused by "sudden and extraordinary" employment event as described in *Labor Code § 3208.3(d)* and case law interpreting this provision, when psychiatric injury resulted from incident in which applicant's vehicle was struck while crossing intersection, causing vehicle to roll over, and WCAB panel majority found that accident occurred "suddenly," that while automobile accidents generally are not extraordinary events for drivers, they may become extraordinary if they occur under unusual circumstances, that extent to which determination of whether employment condition is "sudden and extraordinary" heavily depends on individual facts of each case, and that where defendant presented no contrary evidence, weight of evidence, including applicant's testimony, supported finding that applicant's motor vehicle accident was "extraordinary" as events surrounding accident were not regular, routine or commonplace; Commissioner Razo, dissenting, found that applicant failed to establish that this motor vehicle accident was unusual or uncommon, as it occurred while applicant was driving at reduced speed through residential area, engaged in regular and routine duties delivering packages. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 4.02[3][d]; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.06[3][c].]

Counsel

[*1] For applicant—Eason & Tambornini

For defendants—Park Guenthart

Panel: Chair Katherine A. Zalewski; Commissioner Katherine Williams Dodd; Commissioner Jose H. Razo (dissenting)

Opinion By: Chair Katherine A. Zalewski

Opinion

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact and Order (F&O), issued by the Workers' compensation administrative law judge (WCJ) on March 28, 2023, wherein the WCJ found in pertinent part that applicant's industrial psychiatric (psyche) injury is denied pursuant to *Labor Code section 3208.3(d)*.[1]

Applicant contends that the WCJ should have found that her injury was caused by a sudden and extraordinary employment condition within the meaning of *section 3208.3(d)*.

We have not received an answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition and the contents of the Report with respect thereto.

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

Based on our review of the record, and for the reasons discussed below, we will amend the March 28, 2023 F&O to find that **[*2]** the motor vehicle accident on November 25, 2020 was a sudden and extraordinary event (Finding 5) and that applicant's claim of injury to her psyche is not barred by *Labor Code section 3208.3(d)*. Otherwise, we will affirm the March 28, 2023 F&O.

BACKGROUND

We will briefly review the relevant facts.

Applicant claimed injury to various body parts, including her head, lumbar spine, neck, and psyche, while employed by defendant as a delivery driver on November 25, 2020. Defendant accepts compensability for neck, head, and back.

On September 26, 2022, applicant was evaluated by Trevor B. Mackin, Psy.D., Panel Qualified Medical Evaluator (PQME) in psychology. (Report by Trevor Mackin, Psy.D., dated October 26, 2022, Exhibit 1, Minutes of Hearing and Summary of Evidence, March 9, 2023 trial (MOH/SOE), p. 3 (Dr. Mackin's Report, Exh. 1).) Dr. Mackin evaluated applicant, took a detailed history, reviewed extensive medical records, and performed psychological assessments. (Dr. Mackin's Report, Exh. 1, at pp. 4-8, 36-42, 43-47.)

Dr. Mackin states, in pertinent part, as follows:

> This injury-PTSD-was predominantly (over 50%) the result of a serious motor vehicle accident which occurred while Ms. Salas was employed by Synctruck, **[*3]** LLC. This is a primary injury which resulted as the result of a specific work-related incident (e.g., serious motor vehicle accident).
>
> Ms. Salas satisfies DSM-5 criteria PTSD. On November 25, 2020, Ms. Salas was working at Synctruck, LLC, in her capacity as a delivery driver when she was "t-boned" by a truck. She described the impact as significant, "... he hit the rear right passenger side of the van. And it caused it to spin and roll and it landed facing the complete opposite side of the way I was going and landed on the driving side ... I had my seatbelt on so that saved me ..." She described having to crawl up the vehicle to exit on the passenger's side with the help of bystanders. Ms. Salas was taken via ambulance to a hospital (Harris, 11/25/2020) and received treatment for a closed head injury. In the following weeks and months Ms. Salas has described a series of symptoms related to her experience of trauma. ... (Rockers, 02/24/2022 & 03/31/2022; and Chitnis, 04/25/2022).

(Dr. Mackin's Report, Exh. 1, pp. 52-53.)

Dr. Mackin opined as follows:

> In my opinion, based on my review of the medical records, the psychological testing and clinical interview I conducted on 09/26/2022, Ms. **[*4]** Salas' PTSD is exclusively related to the motor vehicle accident she sustained on 11/25/2020. ***In my opinion, 100% of Ms. Salas' development of PTSD is related to the serious motor vehicle accident she suffered on 11/25/2020***.

(Dr. Mackin's Report, Exh. 1, p. 54 (emphasis in original).)

The parties stipulated that applicant sustained injury arising out of and in the course of employment (AOE/COE) to her head, lumbar spine, and neck. (January 13, 2023 pre-trial conference statement (PTCS), p. 2; MOH/SOE, p. 2.)

On March 9, 2023, the matter proceeded to trial on the following issues:

1. Injury arising out of and in the course of employment to applicant's psyche;

2. Defendant asserts applicant's psyche claim is barred pursuant to *Labor Code section 3208.3(d)*, the Six-Month Rule.

3. Applicant asserts the sudden and extraordinary exception applies.

(MOH/SOE, p. 2.)

In pertinent part, applicant testified to the following:

Q. Ms. Salas, I'm going to go through some background real quick. But, can you describe to me what you were doing on November 25th, 2020, when you were involved in the motor vehicle accident?

A. I was driving my work vehicle.

Q. Okay.

A. Delivering packages.

Q. And when you were in your vehicle delivering work packages, **[*5]** how do you know where to go?

A. They give us a device which shows like a map, like kind of a — directions. Like a MapQuest kind of.

(Applicant's trial testimony, March 9, 2023, p. 12:11-21.)

Q. Do you recall what time you started working then?

A. My shift started at 11:00 a.m.

Q. So your shift has already started. And are you delivering — have you delivered some packages already that day?

A. Yes.

Q. And before this accident occurred, were you traveling to the next location?

A. Yes.

Q. And what were you planning on doing in that next location?

A. Delivering packages.

Q. As you — do you recall about what time the accident occurred?

A. It was early afternoon. It was not too far after starting my shift.

Q. Now, take me to that day, at that time. You're driving through the intersection, and what happens?

A. Um, I look both ways, approach an intersection. There was no cars. So, I proceeded through the intersection. Um, and I still look both ways just in case, and I seen a truck approaching on my right side, um, through the right intersection.

Q. When you see the truck, are you already into the

(Applicant's trial testimony, March 9, 2023, p. 13:2-25.)

intersection?

A. Yes.

Q. When you see that truck, what do **[*6]** you think?

A. Um, that he's still approaching the intersection and doesn't see me. So I get scared, and I start honking as a warning to let him know that I was still crossing that intersection. I was still going through it.

Q. And what happened next?

A. That's when I was hit.

Q. What did it feel like?

A. Uh, it felt like an immediate jerk. I just remember hearing it, then feeling it. Hearing it, it sounded like a big boom. Feeling it, definitely felt like a big jerk, and, um, it happened so fast.

Q. When the vehicle hit yours, did your vehicle move at all?

A. Yes, it did.

Q. How?

A. It spun — the vehicle spun.

THE COURT: I'm going to go back just a second. You said vehicle.

What kind of — what were you driving?

THE WITNESS: It was a white van.

THE COURT: Okay. Thank you. Go back.

Q. So I want to take you to the time the

(Applicant's trial testimony, March 9, 2023, p. 14:1-25.)

— the other vehicle has now hit your van, and your van starts to spin?

A. Yes.

Q. What's that feel like to you?

A. I was scared, because it was unexpected. And I was hit, and I'm still in the vehicle, and I don't — I don't know what's going on. I just remember feeling the hit, and hearing it, and seeing everything spin around me; **[*7]** happening so fast, but it happening so slow. Because I could see that I was spinning, but I couldn't see where I was or anything beyond that.

Q. Did the van roll at all?

A. Yes, it did.

Q. How?

A. After it spun, I ended rolling to the driver's side, and that's when the vehicle landed.

Q. So while you were — were you wearing your seat belt at this time?

A. Yes, I was.

Q. Do you recall the feeling of the van rolling onto its side?

A. Yes, I do. I remember feeling it spin. And then, once the van rolled to the left, it smacked the concrete; the floor of the street. Um, and I remember hearing glass shatter, and being jerked to the left, and hitting my head on — I'm not

(Applicant's trial testimony, March 9, 2023, p. 15:1-25.)

sure if it was the window, the door or the asphalt.

Q. What part of your head hit the van or the asphalt?

A. It was the left side of my head. So right about the area of my like temple.

Q. Did any of your face get hurt or scraped up by the glass of the van?

A. At first, I didn't know. Because once I hit, my face became numb and flushed, and hot, and tingly, and very tight. So I know I hit. I just didn't know the extent of my injury on my head or if there was bleeding or cuts or anything. **[*8]** It wasn't until a few days after is when I was seeing that there was scrapes and there was like patches on my face of like where my skin was peeling.

Q. I want to take you again to that moment. You're in the van. It's already tipped over. You've hit your head. And you hear the glass breaking. Is anything inside the cab moving?

A. Uh, I see glass — once the glass shattered, and I'm already looking around, there's glass kind of falling. Um, I remember feeling liquids on my leg like if something was broken. There was nothing in the van with me in the front seat besides my belongings. So, I didn't know where those fluids came from, so I had —

Q. I want to talk about that in a second. But I want to, again, take you to the moment. The van is now on its side. Is

(Applicant's trial testimony, March 9, 2023, p. 16:1-25.)

the van still moving when you're on the side and the street is so close to you? Do you recall that at all?

A. I was at a complete stop. When it landed, it landed, and it was just on its side. We didn't move. There was like — that's like the end of the accident, of being hit.

Q. Did you — do you think you had any sort of moment where you were — not unconscious — but where you had sort **[*9]** of a lack of perception?

A. Uh, I believe I blanked out once we hit — after we hit — um, well, after it landed on the driver's side where I blanked out for a second because of shock and it happening.

Q. Have you reviewed the video of the accident?

A. Yes, I have.

Q. Well, I will offer to you that the video shows the van spinning after it did roll onto its side. But you don't really recall perceiving that?

A. No.

Q. What's the next thing you remember?

A. I remember looking around and trying to figure out where I was. And, um, I began — start getting really scared and freaking out because there was liquids on my legs, and I didn't know where it came from. And I was just like, Oh, my gosh. Like, I'm going to catch on fire. I need to get out of here. So then, I'm like screaming and looking around. And I

(Applicant's trial testimony, March 9, 2023, p. 17:1-25.)

see somebody approach the front of the vehicle, and I hear them saying they're going to get me out. And I'm yelling and screaming, and telling them, You got to get me out of here. Because I was so scared. I thought this was it.

Q. Did you know what the liquid was on your body?

A. No, I don't.

Q. What do you think it was?

A. I thought it was like **[*10]** either gas or some kind of fluid coming from the car. Because I know the accident was bad. I just didn't know how bad it was. So that's — that made me freak out. Because I didn't want to catch on fire. I didn't want anything else to happen.

Q. Did you think you were going to die?

A. Yeah, I did.

Q. How did you exit the vehicle?

A. Um, I was pulled through the passenger side. The gentlemen that approached the vehicle — there was two gentlemen. One ended up climbing his way on top of the vehicle and, um —

Q. But the "top" is really the driver's side; right? "Up" is the side of the van? So you're climbing out of the van up through the driver's side door?

A. Up through the passenger door.

Q. I'm sorry. Up through the passenger door?

A. Yes, because the driver's side was on the floor.

(Applicant's trial testimony, March 9, 2023, p. 18:1-25.)

So I took off my seat belt, and I tried to climb, but I couldn't reach it for some reason. So, he — the gentleman reached in and helped pull me up. And I just remember kicking and trying to use my feet to step on whatever to get out of the vehicle.

Q. What happened next?

A. Uh, the gentleman took me out of the vehicle. And, um, the other gentleman that came to **[*11]** help, um, helped me get off the vehicle by holding me and guiding me down. And once I was on the ground, he guided me to the curb where I sat.

Q. I'm sorry for having to go back into this. But, when you're — when the vehicle's on its side — I want to take you back to when the vehicle is on its side, and you sort of finally start to perceive things and you perceived a liquid on your body. Is there any smell that you have — that you remember when you're in the van?

A. Yeah, the smell was really strong. Um, it didn't smell — it had an odor to it. I couldn't tell you what color because I had black pants on. But, the smell was very distinctive. It smelled — I thought it was gas, but I wasn't sure, but it smelled something like that.

Q. Now, after the injury, do you recall being transported in the ambulance?

A. Yeah.

Q. On the way to the hospital, how were you feeling?

(Applicant's trial testimony, March 9, 2023, p. 19:1-25.)

A. I was crying. I was scared. Because my head was still tingly and still feeling burning. Um, and I didn't — I didn't know to the extent of my injuries, because I was scared, and I was in shock, and I was freaking out.

Because I knew the accident had just happened, and I **[*12]** felt like I was — I felt like I was — that was it. That was going to be the end of it. But then, being in the ambulance just confirmed like it really happened, and I was just crying.

Q. Now, I know that you have had — sustained some injuries to other parts of your body, some physical injuries. But for the sake of brevity today, I want to focus on your psychiatric symptoms. Can you tell me what symptoms you think you are experiencing or had experienced as a result of this injury — as a result of the car crash?

A. I am too scared to drive. That's — that's something I will not do.

Q. What does it feel like when you try to operate a vehicle?

A. It makes me sick to my stomach. Like, just sitting here thinking about me having to get in a car and drive somewhere, it makes me sick to my stomach. I get nauseated and I want to throw up. Because, I can't stomach driving. And it's so bad that even being a passenger gets me like that. Like, I could be driving with a friend, or a family member, or

(Applicant's trial testimony, March 9, 2023, p. 20:1-25.)

my significant other, and I have to be on my phone or reading something to keep my mind off of being in the car, because I feel like no matter what, **[*13]** I'm going to get hit again even if I'm not driving. Which I'm not. I'm a passenger, and it freaks me out.

Q. Have you had nightmares?

A. Yeah, plenty of nightmares. Nightmares where I just re-enact the whole accident and see it happening all over again.

(Applicant's trial testimony, March 9, 2023, p. 21:1-9.)

Q. Okay. Real quickly I would like to talk about your psychiatric treatment. You treated with Dr. Daniel Rockers

(Applicant's trial testimony, March 9, 2023, p. 22:24-25.)

right?

A. Yes.

Q. What did Dr. Rockers do for you?

A. Um, he helped me to understand the accident. You know, knowing that it wasn't something that I can get over overnight, but working my way towards trying to get through it and trying to expose myself to getting in a vehicle and taking baby steps to try and drive. Um, he also made me feel like I was okay to feel the way I felt. You know, that I — I was able to feel the way that I was feeling and that I wasn't crazy. Or, that it was normal after what I had been through, and he helped.

Q. Did he help you understand the diagnosis of PTSD?

A. Yes, he did. He really did. Because there's a stigma behind that PTSD that I — I learned that I thought it was only geared towards **[*14]** a certain specific person or peoples, you know, like somebody in the military and stuff like that. So I thought everything that I went through was like, Oh, that's not it. That's not what I have. I'm just really freaked out and traumatized. But when he explained to me in one of our sessions, This is what it is and this is what you have, then it made a lot of sense, and I felt a little bit more relief to know that there was something to it. It wasn't just me.

(Applicant's trial testimony, March 9, 2023, p. 23:1-24.)

Q. Did you find your treatment with Dr. Rockers helpful?

A. Yes, I did.

Q. If you were able to seek more treatment with Dr. Rockers or another mental health professional, would you do so?

A. Yes, I would.

Q. I see you crying right now. Why?

(Applicant's trial testimony, March 9, 2023, p. 24:18-25.)

A. Because of this accident, my life has just not been the same. I don't drive. And I used to be the type of girl that would just go for drives and enjoy life. Now, I don't. I have to have people take me to and from, and being scared of being in the car in general is just a lot. And then sitting here and going over the accident, you know, it just reminds me that that was — that was close; **[*15]** that was a close call. Even though I was being as safe as I could, you know, it still happened. And it was — I never experienced something so scary to the point where I felt like I was going to die. Like, going over that just really hits, you know. I would never want anybody to ever feel that way or go through what I went through, or still going through what I went through.

Q. Ms. Salas, earlier you testified that the motor vehicle accident was unexpected, but you also said that you did see the truck coming on your right side and that you honked at the other vehicle. Was it your impression that you were going

(Applicant's trial testimony, March 9, 2023, p. 25:1-14, 22-25.)

to get hit?

A. No. It was my impression that this gentleman did not pay attention, or was not seeing me, or possibly preoccupied on something else other than driving to approach an intersection and not see a big white van already across it and you're still coming into the intersection.

Q. Do you know approximately how fast you were driving at the time of the collision?

A. How fast I was driving?

Q. Yes.

A. Um, I believe 20 miles per hour. It was a residential area, so not very fast.

Q. And do you recall bracing yourself through **[*16]** the impact?

A. No.

Q. Do you recall if you lost consciousness?

A. I feel like I did, um, when the vehicle landed on the driver's side for a split second. Like, I blanked out.

Q. How long have you — had you been working for that employer prior to the motor vehicle accident?

A. A little under two months.

(Applicant's trial testimony, March 9, 2023, p. 26:1-20.)

No other witnesses were called to testify at trial.

The WO issued the following F&O:

FINDINGS OF FACT

1. Sophia Salas (Applicant) was thirty-five (35) years old and employed as a Delivery Driver at Woodland, California by Innovative Work Comp Solutions, LLC (Employer) on November 25, 2020 when suffered an injury arising out of and in the course of employment to her head, lumbar spine, neck and psyche.

2. Employer was insured for workers' compensation by United Wisconsin Insurance Company (Defendant) at the time of Applicant's industrial injury.

3. Applicant was shown to have sustained a psychiatric injury arising out of and in the scope of her employment as a result of the industrial injury.

4. Applicant was shown to have been working for Employer for less than six months at the time of her industrial injury.

5. The auto accident on November **[*17]** 25, 2023 was not shown to be an extraordinary event.

(F&O, pp. 1-2.)

ORDER

1. Applicant's claim for compensation for the industrial psychiatric injury is denied pursuant to *Labor Code Section 3208.3(d)*.

2. All other issues are deferred at this time.

(F&O, p. 2.)

DISCUSSION

The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark) (2015) 61 Cal.4th 291, 297-298, 302 [188 Cal. Rptr. 3d 46, 349 P.3d 141, 80 Cal.Comp.Cases 489]*; *Lab. Code, §§ 3600(a)*, *3202.5*.) With respect to psychiatric injuries, *section 3208.3* provides, in relevant part:

(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition—Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.

(b) (1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined **[*18]** of the psychiatric injury.

(2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury.

...

(d) Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition.

(*Lab. Code, § 3208.3(a)-(b)* and *(d)*.)

Here, it is undisputed that applicant was employed by defendant for less than six months at the time of her injury and applicant claims that she sustained an industrial injury to her psyche. Defendant asserts applicant's psyche claim is barred by *section 3208.3(d)*. Therefore, we must consider whether applicant's psyche injury was the result of a "sudden and extraordinary employment condition," within the meaning of *section 3208.3(d)*.

[*19] The WCJ found "[a]pplicant's credible testimony at trial established by a preponderance of the evidence that the auto accident was a sudden event" (Opinion on Decision, p. 2) and we will not disturb the WCJ's determination. Because the employment condition that caused applicant's psychiatric injury was "sudden" within the meaning of *section 3208.3(d)*, we turn to whether it was "extraordinary."

Although the Legislature refers to the term "sudden and extraordinary" employment condition in section 3208.3, section 3208.3 does not define "sudden" or "extraordinary." In *Matea v. Workers' Comp. Appeals Bd*, the Court of Appeal noted that Webster's Third International Dictionary "defines 'sudden' as 'happening without previous notice or with very brief notice : coming or occurring unexpectedly : not foreseen or prepared for.'" (*Matea v. Workers' Comp. Appeals Bd. (2006) 144 Cal.App.4th 1435, 1448 [51 Cal. Rptr. 3d 314, 71 Cal.Comp.Cases 1522] (Matea)*.) The Court further observed that "extraordinary" is defined "as 'going beyond what is usual, regular, common, or customary'; and 'having little or no precedent and usu[ally] totally unexpected.'" (*Id.*, citations omitted.)

Analysis of the decisions addressing whether a psychiatric injury resulted from a "sudden and extraordinary employment condition" reveal that this is a primarily fact-driven **[*20]** inquiry. "Each case must be considered **on its facts** in order to determine whether the alleged psychiatric injury occurred as a result of sudden and extraordinary events that would naturally be expected to cause psychic disturbances[.]" (*Matea, supra, at 1450*, emphasis added.) Consequently, appellate decisions focus heavily on the individual facts in determining whether an employment condition was sudden and extraordinary. By extension, the determination of whether an event is "sudden and extraordinary" within the meaning of *section 3208.3(d)* also hinges on the evidence in the record, or lack thereof.

For example, in *Matea*, the injured worker sustained an admitted orthopedic injury while working in a Home Depot store when a rack of lumber fell on his left leg and psychiatric injury was claimed as a compensable consequence. (*Matea, supra, at 1438*.) The worker had not been employed for six months when the injury occurred, so the employer denied that any psychiatric injury was compensable, contending that the injury was not caused by a sudden and extraordinary employment condition. (*Ibid.*) However, the injury caused by a rack of falling lumber in a store aisle was considered extraordinary because "no testimony was presented regarding how often lumber **[*21]** falls from racks into the aisles [], and **there was no evidence presented that such occurrences are regular and routine events**." (*Matea, supra*, at 1450 (emphasis added).) The Court allowed that while gas main explosions and workplace violence may constitute extraordinary events, the Court found these examples too restrictive, writing as follows:

> We also agree that the sudden and extraordinary employment condition language in *Section 3208.3, subdivision (d)*, could certainly include occurrences such as gas main explosions or workplace violence. However, giving the language of the statute 'its usual, ordinary import' [citation], in light of its legislative history, and liberally construing the statute in the employee's favor (§3202), we believe that the Legislature intended to except from the six-month limitation psychiatric injuries that are caused by 'a sudden and extraordinary employment condition,' and not by a regular or routine employment event....
>
> **Gas main explosions and workplace violence are certainly uncommon and usually totally unexpected events**; thus, they may be sudden and extraordinary employment conditions. **However, we believe that there may also be other 'sudden and extraordinary' occurrences or events within [*22] the contemplation of *section 3208.3, subdivision (d)* that would naturally be expected to cause psychic disturbances** even in diligent and honest employees. Therefore, if an employee carries his or her burden of showing by a preponderance of the evidence that the event or occurrence that caused the alleged psychiatric injury was **something other than a regular and routine employment event or condition, that is, that the event was**

> **uncommon, unusual, and occurred unexpectedly**, the injury may be compensable even if the employee was employed for less than six months....

(*Matea, supra, at 1448-1449*, emphasis added.)

In *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (Garcia) (2012) 204 Cal.App.4th 766 [139 Cal. Rptr. 3d 215, 77 Cal.Comp.Cases 307]*, the Court agreed with the view expressed in *Matea* that an employment event is extraordinary if it is something that is not a regular and routine employment event, and further noted that "an accidental injury may be uncommon, unusual and totally unexpected" depending upon the circumstances. (*Id., at 772-773*.) The Court concluded that an avocado picker did not offer "**particularly strong evidence on extraordinariness**" to support his claim that his fall from a 24-foot ladder was unusual or extraordinary because the risk of falling from a ladder was within the ordinary hazards of the occupation of picking avocados. (*Garcia, supra, at 774* (emphasis added).) Similarly, in *Travelers Casualty & Surety Co. v. Workers' Comp. Appeals Bd. (Dreher) (2016) 246 Cal.App.4th 1101 [201 Cal. Rptr. 3d 312, 81 Cal.Comp.Cases 402]*, the **[*23]** injured worker did not meet the burden of showing that a live-in maintenance supervisor's slip-and-fall on rain-slicked concrete was extraordinary. (*Travelers Casualty & Surety Co. v. Workers' Comp. Appeals Bd. (Dreher) (2016) 246 Cal.App.4th 1101, 1108-1109 [201 Cal. Rptr. 3d 312, 81 Cal.Comp.Cases 402]*.)

While an automobile accident is not necessarily an extraordinary event for a driver, it may become extraordinary because of unusual circumstances. In *Tejera*, the WCJ determined that it was not "frequent, regular or routine for a driver to fly or fall out of the passenger side of a vehicle after losing control of same while it is moving or stopped with a jackknifing trailer in pursuit as the driver tries to roll out of the way." (*California Ins. Guarantee Assn. (Tejera) v. Workers' Comp. Appeals Bd. (2007) 72 Cal.Comp.Cases 482, 484* (writ den.).)

These divergent decisions demonstrate the extent to which determination of whether an employment condition is sudden and extraordinary heavily depends on the individual facts of each case. Here, applicant provided the only testimony at trial. In pertinent part, applicant testified that:

> A. Um, that he's still approaching the intersection and doesn't see me. So I get scared, and I start honking as a warning to let him know that I was still crossing that intersection. I was still going through it.
>
> Q. And what happened next?
>
> A. That's when I was hit.
>
> Q. What did it feel like?
>
> A. Uh, it felt like an immediate **[*24]** jerk. I just remember hearing it, then feeling it. Hearing it, it sounded like a big boom. Feeling it, definitely felt like a big jerk, and, um, it happened so fast.
>
> Q. When the vehicle hit yours, did your vehicle move at all?
>
> A. Yes, it did.
>
> Q. How?
>
> A. It spun — the vehicle spun.
>
> ***

(Applicant's trial testimony, March 9, 2023, p. 14.)

> — the other vehicle has now hit your van, and your van starts to spin?
>
> A. Yes.

Q. What's that feel like to you?

A. I was scared, because it was unexpected. And I was hit, and I'm still in the vehicle, and I don't — I don't know what's going on. I just remember feeling the hit, and hearing it, and seeing everything spin around me; happening so fast, but it happening so slow. Because I could see that I was spinning, but I couldn't see where I was or anything beyond that.

***

Q. Do you recall the feeling of the van rolling onto its side?

A. Yes, I do. I remember feeling it spin. And then, once the van rolled to the left, it smacked the concrete; the floor of the street. Um, and I remember hearing glass shatter, and being jerked to the left, and hitting my head on — I'm not sure if it was the window, the door or the asphalt.

(Applicant's trial testimony, March 9, 2023, **[*25]** p. 15-16.)

***

Q. I want to take you again to that moment. You're in the van. It's already tipped over. You've hit your head. And you hear the glass breaking. Is anything inside the cab moving?

A. Uh, I see glass — once the glass shattered, and I'm already looking around, there's glass kind of falling. Um, I remember feeling liquids on my leg like if something was broken. There was nothing in the van with me in the front seat besides my belongings. So, I didn't know where those fluids came from, so I had —

***

(Applicant's trial testimony, March 9, 2023, p. 16:1-25.)

Q. What's the next thing you remember?

A. I remember looking around and trying to figure out where I was. And, um, I began — start getting really scared and freaking out because there was liquids on my legs, and I didn't know where it came from. And I was just like, Oh, my gosh. Like, I'm going to catch on fire. I need to get out of here. So then, I'm like screaming and looking around. And I see somebody approach the front of the vehicle, and I hear them saying they're going to get me out. And I'm yelling and screaming, and telling them, You got to get me out of here. Because I was so scared. I thought this was it.

Q. Did you **[*26]** know what the liquid was on your body?

A. No, I don't.

Q. What do you think it was?

A. I thought it was like either gas or some kind of fluid coming from the car. Because I know the accident was bad. I just didn't know how bad it was. So that's — that made me freak out. Because I didn't want to catch on fire. I didn't want anything else to happen.

Q. Did you think you were going to die?

A. Yeah, I did.

Q. How did you exit the vehicle?

A. Um, I was pulled through the passenger side. The gentlemen that approached the vehicle — there was two gentlemen. One ended up climbing his way on top of the vehicle and, um —

***

(Applicant's trial testimony, March 9, 2023, p. 17-18.)

Q. On the way to the hospital, how were you feeling?

A. I was crying. I was scared. Because my head was still tingly and still feeling burning. Um, and I didn't — I didn't know to the extent of my injuries, because I was scared, and I was in shock, and I was freaking out. Because I knew the accident had just happened, and I felt like I was — I felt like I was — that was it. That was going to be the end of it. But then, being in the ambulance just confirmed like it really happened, and I was just crying.

***

Q. What does it feel like **[*27]** when you try to operate a vehicle?

A. It makes me sick to my stomach. Like, just sitting here thinking about me having to get in a car and drive somewhere, it makes me sick to my stomach. I get nauseated and I want to throw up. Because, I can't stomach driving. And it's so bad that even being a passenger gets me like that.

***

(Applicant's trial testimony, March 9, 2023, p. 19-20.)

And then sitting here and going over the accident, you know, it just reminds me that that was — that was close; that was a close call. Even though I was being as safe as I could, you know, it still happened. And it was — I never experienced something so scary to the point where I felt like I was going to die.

***

Q. Ms. Salas, earlier you testified that the motor vehicle accident was unexpected, but you also said that you did see the truck coming on your right side and that you honked at the other vehicle. Was it your impression that you were going to get hit?

A. No. It was my impression that this gentleman did not pay attention, or was not seeing me, or possibly preoccupied on something else other than driving to approach an intersection and not see a big white van already across it and you're still coming into **[*28]** the intersection.

(Applicant's trial testimony, March 9, 2023, p. 25-26.)

Based on the evidence presented, including applicant's testimony, the motor vehicle accident at issue was an "extraordinary" employment condition, e.g., it was not regular and routine, going beyond what is usual, regular, common, or customary. (*Matea, supra, at 1448*, quoting Webster's.) Moreover, defendant presented no contrary evidence. Here, we are persuaded that the weight of the evidence supports a finding that the employment condition causing applicant's injury was sudden and extraordinary. We also note that the severity of any associated physical injuries are not dispositive of whether an event constitutes a sudden and extraordinary employment condition.

Accordingly, we amend the March 28, 2023 F&O to find that the motor vehicle accident on November 25, 2020 was a sudden and extraordinary event (Finding 5) and applicant's claim of injury to her psyche is not barred by *Labor Code section 3208.3(d)*. Otherwise we affirm the March 28, 2023 F&O.

It should be noted that we express no final opinion on other outstanding issues.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March 28, **[*29]** 2023 Findings and Order is **AFFIRMED**, except that **EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

***

5. The motor vehicle accident on November 25, 2020 was a sudden and extraordinary event.

ORDER

1. Applicant's claim for compensation for the industrial psychiatric injury is not barred by *Labor Code Section 3208.3(d)*.

2. All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

Chair Katherine A. Zalewski

I concur,

Commissioner Katherine Williams Dodd

I dissent,

Commissioner Jose H. Razo

DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent. My colleagues in the majority recognize that a claim of injury to psyche by an employee with less than six months of employment, like the injured worker in this case, is not compensable unless applicant proves that the injury was caused by a sudden and extraordinary employment condition. (*Lab. Code, § 3208.3(d)*; *Garcia, supra*; *Dreher, supra*.)

The determination of whether a psychiatric injury resulted from a "sudden and extraordinary employment condition" is a primarily fact-driven inquiry. (*Matea, supra.*) While the majority finds that applicant's psyche injury is a result of a sudden and extraordinary employment event, I find that the evidence supports a contrary conclusion. In this case, **[*30]** a delivery driver, driving at reduced speed through residential area, engaged in regular and routine duties when she was injured, i.e., delivering packages. In my view, applicant failed to establish that this motor vehicle accident was not an unusual or uncommon occurrence for a delivery driver. Thus, while applicant's motor vehicle accident was "sudden," it was not an "extraordinary" event and the "sudden and extraordinary" exception to the *section 3208.3(d)* requirement of six months employment does not apply. I find the WCJ's analysis persuasive:

> The party holding the affirmative on an issue bears the burden of proving it by a preponderance of the evidence.[2] Applicant holds the affirmative on the issue of industrial injury to her psyche, and that the injury was the result of a sudden and extraordinary accident as required by *Labor Code Section 3208.3(d)* when the employment is less than six months.
>
> It is undisputed that on November 25, 2020 Applicant was driving a delivery van that was struck by a pick-up truck hard enough to spin the van and flip it onto the driver's side.
>
> Applicant exited the disabled van with assistance by climbing out through the window on the passenger side of the van. The orthopedic aspects of the injury have **[*31]** been accepted by Defendant.

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[2] *Labor Code Sections 3202.5* and *5705*.

Applicant submitted the report of PQME Trevor Mackin, Psy. D. dated October 26, 2022 to establish the accident caused a psychiatric injury. Dr. Mackin gave his expert medical opinion that Applicant suffered a psychiatric injury as a result of the accident and diagnosed her with Post Traumatic Stress Disorder (PTSD). He expressly states that the auto accident was the predominant cause of Applicant's PTSD. (App. Ex. 1 Page 52) Dr. Mackin's expert opinion is based on the history take from Applicant, psychological testing, his examination of Applicant and his review of the records provided. Dr. Mackin explains how and why he reached his expert medical opinion on causation. Dr. Mackin's report is found to be substantial medical evidence on the issue of causation of Applicant's psychiatric injury pursuant to *Labor Code Section 3208.3(b)*.

Applicant also submitted treatment reports from Daniel Rockers, Ph. D that support the reasoning and conclusions of Dr. Mackin. (App. Ex. 2, 3, 4 & 5) There is no evidence contradicting the findings of Dr. Mackin. Therefore, Applicant proved by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment to **[*32]** her psyche as a result of the accident on November 25, 2020.

Defendant asserted Applicant's claim is barred by *Labor Code Section 3208.3(d)* as she worked for Employer for less than six months. The evidence in this case established that Applicant worked for Employer for less than six months at the time of the industrial injury and that she has not returned to work for Employer since the industrial injury. (MOH-SOE Pages 4 - 6) Therefore, Applicant holds the affirmative on the issue of proving an exception applies.

Applicant asserted that the auto accident was a sudden and extraordinary event that meets the requirements of *Labor Code Section 3208.3(d)*.[3] Applicant's credible testimony at trial established by a preponderance of the evidence that the auto accident was a sudden event. (MOH-SOE Pages 4 - 6) Applicant's description of the accident is confirmed by the video of constitutes an extraordinary event.

Applicant was working as a delivery driver for employer at the time of the accident. (MOH-SOE Pages 4 - 6) Applicant was performing her usual and customary duties at the time of the accident, and being in an auto accident is one of the expected types of events that would lead to an injury for a professional driver. The Traffic Collision Report **[*33]** with Supplements indicates it was a clear day, the road was dry, neither driver was using a cell phone, and neither driver was found to be impaired or under the influence of alcohol or drugs. The roadway had no unusual condition. The other driver was found to be at fault for failure to yield.[4] Neither driver was found to be operating at excessive speed. The report confirms that the delivery van had rolled onto its side. (Def. Ex. D) The record does not establish any unusual factors leading to the accident. The record does not establish that Applicant suffered an extraordinary physical injury as a result of the accident. (Joint Ex. 1, 2 & 3; App. Ex. 7, 9, 10, 11, 12, 13 & 14) Therefore, it is found that Applicant did not prove by a preponderance of the evidence that given her employment as a delivery driver the accident was an unusual or unexpected event rising to the level of extraordinary that would create an exception to the limitation created by *Labor Code Section 3208.3(d)*.

(Opinion on Decision, pp. 1-2.)

For the reasons stated above, I would amend Finding 5 solely to correct a typographical error in the date to reflect that the injury occurred November 25, 2020. Otherwise, I would affirm the WCJ's March 28, **[*34]** 2023 Findings and Order.

WORKERS' COMPENSATION APPEALS BOARD

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[3] *Labor Code Section 3208(d)*: Notwithstanding any other provisions of this division, no compensation shall be paid pursuant to this division for psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition.

[4] The initial find was that applicant was at fault for failure to yield. The finding was changed in the supplemental report.

Commissioner Jose H. Razo

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Aquino v. Tabrizi, Inc., 2023 Cal. Wrk. Comp. P.D. LEXIS 304

Workers' Compensation Appeals Board (Board Panel Decision)

October 23, 2023 Opinion Filed

W.C.A.B. No. ADJ15104781—WCJ Michael J. Holmes (LAO); WCAB Panel: Chair Zalewski, Commissioners Razo, Snellings

Reporter
2023 Cal. Wrk. Comp. P.D. LEXIS 304 *

Rigoberto Aquino, Applicant v. Tabrizi, Inc., Berkshire Hathaway Homestate Insurance Company, as administered by Berkshire Hathaway Homestate Companies, Defendants

Status:

Publication Status: **CAUTION:** This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425, fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: The Petition for Reconsideration/Removal is *denied*.

Core Terms

video, Removal, sub rosa, work product, unreliable, discovery, lines, investigator's report, undersigned, investigator, reconsideration, authentication, workers' compensation, instant case, asserting, preparing, client privilege, irreparable harm, privileges, petition for reconsideration, applicant's petition, defense counsel, discoverable, proceedings, threshold, sub-rosa, purport, camera, depict, cases

Headnotes

Discovery—*Sub Rosa* Video—Investigative Reports—WCAB, denying reconsideration based on removal standard, affirmed WCJ's order allowing defendant to forward *sub rosa* video to qualified medical evaluator (QME) even though it had not been authenticated, when WCAB reasoned that there is no requirement of formal authentication in workers' compensation proceedings, that unless there is genuine doubt regarding whether video depicts what it purports to depict, video is admissible, and that here, there was no evidence or argument asserting any doubt as to whether video depicted what it purported to depict; WCAB also affirmed WCJ's finding that applicant did not have right to obtain copy of defendant's *sub rosa* investigative report as it was privileged and protected by work product rule, given that report was generated by investigator at defense counsel's request, specifically to assist defense counsel in preparation for litigation, and WCAB further determined that because defense counsel indicated there was no intent to forward report to QME or to utilize it as exhibit for trial, there was no showing that applicant would suffer prejudice by not having access to document. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 25.29[2]; Rassp & Herlick, California Workers' Compensation Law, Ch. 16, § 16.65.]

Counsel

[*1] For applicant—Hinden & Breslavsky, APC

For defendants—England, Ponticello & St. Clair

Panel: Chair Katherine A. Zalewski; Commissioner Jose H. Razo; Commissioner Craig Snellings

Opinion By: Katherine A. Zalewski

Opinion

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Removal and the contents of the report of the workers' compensation administrative law judge (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 deny the Petition as one seeking reconsideration.

Preliminarily, we observe that *Labor Code section 5909* provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (*Lab. Code, § 5909*.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice … ." (*Shipley v. Workers' Comp. Appeals Bd. (1992) 7 Cal. App. 4th 1104, 1108 [9 Cal. Rptr. 2d 345, 57 Cal. Comp. Cases 493]*.) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of *Labor Code section 5909*. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. **[*2]** The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id. at p. 1108*.) Here, applicant's Petition was timely filed on June 6, 2023, but the Appeals Board did not receive notice within the 60-day time period. Therefore, we conclude that our time to act on it was tolled.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn (2006) 71 Cal. Comp. Cases 783, 784, fn. 2 (Appeals Board en banc)*.) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona) (2016) 5 Cal. App. 5th 658, 662 [210 Cal. Rptr. 3d 101, 81 Cal. Comp. Cases 1122]*.) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before

the WCAB or court of appeal. (See *Lab. Code, § 5904*.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid **[*3]** decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes a finding regarding a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*)

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 [38 Cal. Rptr. 3d 922, 71 Cal. Comp. Cases 155]*; *Kleemann v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 274, 280, fn. 2 [25 Cal. Rptr. 3d 448, 70 Cal. Comp. Cases 133]*.) The Appeals Board will grant removal only if the petitioner shows that significant 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 **[*4]** the WCJ's analysis of the merits of the petitioner's arguments, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

Therefore, we will deny the Petition as one seeking reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration/Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

Chair Katherine A. Zalewski

I concur,

Commissioner Jose H. Razo

Commissioner Craig Snellings

REPORT AND RECOMMENDATION ON PETITION FOR REMOVAL

I.

INTRODUCTION

Applicant has filed a timely, verified and properly served Petition for Removal, asserting error in connection with the undersigned trial judge's orders allowing Defendant to forward sub rosa video to a QME, that Applicant does not have a right to production of Defendant's sub rosa investigator report.

In reference to the sub rosa video, Applicant contends "[t]he QME would not be able to unsee the video evidence if it is unreliable evidence." **(Applicant's Petition for Removal, pg. 3, lines 20–21)**.

II.

STATEMENT OF FACTS

Applicant, born ___ while employed on June 11, 2021, as a finisher, at Temecula, California, by Tambrizi, **[*5]** Inc., claims to have sustained injury arising out of and in the course of employment to head, back, shoulders, neck, wrists, and hands.

On February 15, 2023, Applicant filed a Declaration of Readiness to Proceed to Expedited trial, indicating "Defendant seeks to send sub rosa video to QME. Applicant objects and also demands production of investigator reports. Defendant objects to production of investigator reports on basis of privilege, work product. Intervention of WCAB is reasonably required." **(EAMS DOC ID 45102002)**.

On May 11, 2023, the matter proceeded trial, with the issues in dispute being:

> 1) Whether defendant may forward an entire sub rosa video to a QME after Applicant's counsel objected to video because the video has not been authenticated; and
>
> 2) Whether applicant has the right to production of defendant's sub rosa investigator reports which defendant does not intend to forward to QME or utilize in/for litigation, with defendant asserting attorney/client privilege and work product doctrines.

On June 6, 2023, Applicant filed a Petition for Removal, asserting the May 11, 2023 decision determining Defendant may forward entire sub rosa video to the QME, and determining Applicant **[*6]** does not have the right to production of Defendant's sub rosa investigator report, will cause Applicant to suffer significant prejudice and irreparable harm if removal is not granted. **(EAMS DOC. ID 46733433)**. On June 12, 2023, Defendant filed an Answer to Petition for Removal. **(EAMS DOC. ID 46790771)**.

It is from the order that Defendant may forward the entire sub rosa video to QME, and the order that Applicant does not have the right to production of Defendant's sub rosa investigator report based on privilege and work product, the Applicant Petitions for Removal.

III.

DISCUSSION

Removal by the Appeals Board is an extraordinary remedy rarely exercised. *Cortez v. Workers' Comp. Appeals Bd. (2006) 136 Cal. App. 4th 596, 600, fn. 5, 38 Cal. Rptr. 3d 922, 71 Cal. Comp. Cases 155, 157, fn. 5*; *Kleeman v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 274, 281, fn. 2, 70 Cal. Comp. Cases 133, 136, fn. 2*. Removal will only be granted if the Petitioner shows the order at issue will result in significant prejudice or irreparable harm if not granted and that reconsideration will not be an adequate remedy after the issuance of a final order, decision or award. *California Code of Regulations § 10843(a)*; *Cortez, supra; Kleeman, supra*.

This case involves discovery issues related to a sub rosa video and investigator report. In the Petition for Removal at issue, Applicant asserts, "Applicant will suffer irreparable harm and substantial prejudice if the sub-rosa video is reviewed by the **[*7]** QME without authentication because the evidence will taint discovery in this matter if the video is later found to be unreliable." **(Petition for Removal, page 4, lines 24–26)**. Applicant further asserts "the undersigned Judge "...should not have found that Defendant is entitled to forward the sub-rosa video to the QME without the video being authenticated and Applicant not having the right to the sub-rosa investigator report." **(Petition for Removal, page 5, lines 3–5)**.

SUB ROSA VIDEO

In support of the petition for removal, Applicant relies on *8 CCR § 10680 (c)*, which states:

> A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. This presumption is a presumption affecting the burden of

> producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving by a preponderance of the evidence that the printed representation is an accurate representation of the existence and content of the images that it purports to represent, **[*8]** requires a showing of "foundation or authentication on the record." **(Petition for Removal, page 5, lines 6–14)**.

Applicant further cites *Johnson v. Tennant Co., 2009 Cal. Wrk. Comp. P.D. LEXIS 234*, arguing "...some sort of authentication is required before evidence could be admitted." **(Petition for Removal, page 6, lines 17–20)**. However, omitted from Applicant's analysis is the fact that the *Johnson* court also opined:

> "...unless there is a genuine doubt regarding whether the videos depict what they purport to depict (i.e. whether the subject was actually the applicant; whether the videos were shot on the dates they were purported to be shot on), the WCJ should have introduced them into evidence. There is no requirement of formal authentication in workers' compensation proceedings."

Johnson v. Tennant Co., 2009 Cal. Wrk. Comp. P.D. LEXIS 234, 238.

In the instant case, the record is void of any evidence or argument, asserting a genuine doubt (or any sort of doubt) as to whether the videos depict what they purport to depict. What is clear from the record is that Applicant's argument for removal is premised entirely on the possibility of a genuine doubt.

For example, Applicant argues the "… QME would not be able to unsee the video evidence if it is unreliable evidence." **(Petition for Removal, page 3, lines 20–21)**. Applicant **[*9]** is not arguing the video is unreliable, he is arguing "if" it is unreliable.

The lack of a genuine doubt as to the reliability of the sub rosa video in the instant case is further evidenced by Applicant attorney's argument that the Applicant:

> "… will suffer irreparable harm and substantial prejudice if the sub-rosa video is reviewed by the QME without authentication because the evidence will taint discovery in this matter if the video is later found to be unreliable." **(Petition for Removal, page 4, lines 24–26)**.

Once again, Applicant's argument is not that the video is unreliable. Applicant is arguing "if" the video is later found to be unreliable. No party requested this judge to conduct an *in camera* hearing to review the video and determine its "reliability."

Applicant further argues, "[u]nfortunately, WCJ Holmes failed to allow Applicant to obtain any evidence to authenticate the sub-rosa video, but will still allow the QME to review the video." **(Petition for Removal, page 7, lines 24-26)**. The undersigned judge points to the entire record in response to this baseless assertion. The record is void of any ruling, argument, or other conduct by the undersigned judge to prevent the Applicant **[*10]** from obtaining evidence. If Applicant's counsel has failed conduct discovery up to this point in the proceedings, that failure is unrelated to anything the undersigned judge has done or not done.

In response to Applicant counsel's concerns about "if" the sub rosa video is later determined unreliable, the undersigned judge reminds Applicant it is within Applicant's rights to conduct discovery and present any evidence in support of an argument that the video is unreliable. For example, if Applicant seeks to argue the video is unreliable because were to argue he is not depicted in the video, the Opinion on Decision and Findings & Order at issue would not preclude Applicant from conducting discovery, and ultimately arguing the video is unreliable. If Applicant were to argue the sub rosa video is unreliable because the video was captured prior to the alleged injury, the Opinion on Decision and Findings & Order at issue would not preclude Applicant from conducting discovery, and ultimately arguing the video is unreliable.

INVESTIGATOR REPORT

In the instant case, Applicant seeks to obtain a copy of the investigator report drafted by Defendant's private investigator. In response, Defendant asserts **[*11]** the report in question is protected by attorney client privilege and work product doctrines. **(MOH/SOE dated April 19, 2023, pg. 2, lines 19–20)**.

To determine the issues related to attorney client privilege and work product doctrines, Defendant presented a CD to the undersigned Judge, after Defendant requested the undersigned Judge conduct an *in camera* review of the report at issue, without waiving the claimed doctrines. **(MOH/SOE dated April 19, 2023, pg. 3, lines 15–16)**.

Applicant argues Applicant further claims "WCJ Holmes ordered and conducted an *in camera* review of the investigator report in question. **(Petition for Removal, page 8, lines 5–6)**. It is further argued the undersigned judge erred by conducting the *in camera* review, with Applicant now claiming the matter should be returned to the trial level "… so that the issue of whether the unredacted document was subject to attorney-client and work-product privileges...." **(Petition for Removal, page 8, lines 12–14)**. In support of this contention, Applicant cites *Regents of University of California v. Workers; Comp. Appeals Bd. (Lappi) (2014) 226 Cal. App. 4th 1530*, arguing:

> "Evidence Code statutes prohibiting disclosures of assertedly privileged materials for the purpose of determining their related privilege claims apply to WCAB proceedings. **[*12]** Therefore, the WCAB erred when it required a party to submit assertedly privileged materials to the WCJ for determination of the privilege claims on the grounds that *Evidence Code section 915* expressly bars any such orders. The matter was returned to the trial level so that the issue of whether the unredacted document was subject to attorney-client and work-product privileges would be developed on the record. (*Lappi, supra, at 1537*)."

In reference to the investigator report at issue, Defendant assert attorney/client privilege and work product, arguing they should not be required to disclose the contents of such documents to Applicant. **(MOH/SOE, pg. 2, lines 18-20)**. In an effort to resolve the issues of attorney/client privilege and work product, Defendant sought an *in camera* review of the document in question. **(MOH/SOE, pg. 3, lines 14–16)**.

Prior to determining the issues of attorney/client privilege and work product, the undersigned judge made note of the fact that Defense counsel filed a Notice of Appearance in the instant case on September 8, 2021. **(EAMS DOC ID 38143005)**. Also of note is the fact that the investigation report in question was generated after Defense Counsel filed the Notice of Appearance in the instant case, and **[*13]** the report is clearly marked "ATTORNEY WORK PRODUCT," and "Privileged and Confidential."

The Appeals Board in *Hardesty v. McCord & Holdren [(1976) 41 Cal. Comp. Cases 111* (Appeals Board panel decision) discusses whether the work-product privilege applies by stating it is taking a "middle ground." The Appeals Board states: "As the work-product rule is a declaration of policy, not a rule of procedure, we are of the opinion that it is applicable in workers' compensation proceedings, and we recognize that statements of witnesses taken by an attorney or his agent are a part of the attorney's work product [citing *Greyhound Corporation v. Superior Court (1961) 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266]*." The Appeals Board then quotes former *Section 2016(b)* and *(g)* of the Code of Civil Procedure applicable to attorney work product, which is quoted herein with the current versions of those sections:

> *Code of Civil Procedure Section 2018.010*:
>
> For purposes of this chapter, "client" means a "client" as defined in *Section 951 of the Evidence Code*.
>
> *Code of Civil Procedure Section 2018.020*:
>
> It is the policy of the state to do both of the following:
>
> *(a)* Preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases.

(b) Prevent attorneys from taking undue advantage of their adversary's industry and efforts. **[*14]**

Code of Civil Procedure Section 2018.030:

(a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.

(b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

Code of Civil Procedure Section 2018.040:

This chapter is intended to be a restatement of existing law relating to protection of work product. It is not intended to expand or reduce the extent to which work product is discoverable under existing law in any action.

The Appeals Board in *Hardesty* reiterates existing case law that states that the work product rule does not apply to information gathered by an investigator or by a claims adjuster who is not an agent of the attorney and who obtained the information before counsel was retained, citing *Wilson v. Superior Court [(1964) 226 Cal. App. 2d 715, 38 Cal. Rptr. 255]*. So those witness statements are discoverable. However, the Appeals Board qualifies its opinion regarding attorney work product privileges in workers' compensation cases: "The work product of an attorney is discoverable where the court determines that denial of **[*15]** discovery would unfairly prejudice the party seeking discovery in preparing his claim or will result in an injustice." The Appeals Board held that based on the uncertainty as to what caused Mr. Hardesty's death, "the denial of discovery of statements of witnesses taken by a party, his agent, or his attorney (including statements taken by a private investigator) would unfairly prejudice the opposing party in preparing his case and would unduly expose him to the danger of surprise at trial" [*see* *41 Cal. Comp. Cases at p. 117*].

More importantly, and currently applicable to all workers' compensation cases since *Hardesty*, the Appeals Board clarified what is protected by privilege: "We distinguish here, however, between statements taken by an investigator and statements made by an investigator to the attorney who retained him. Concerning the latter, we think that they are such as integral part of the attorney's work product that their confidentiality should be preserved absent a stronger showing than has been made thus far that denial of their discovery would unduly prejudice the party seeking discovery or would result in an injustice" [*see* *41 Cal. Comp. Cases at p. 117*].

In the instant case, without **[*16]** disclosing contents of the investigator's report in question, it does appear the communications and information contained within the document was generated by the investigator at the behest of Defendant and defense counsel, specifically to assist defense counsel in preparation for litigation. Additionally, it is also important to note that Defense counsel indicated there is no intent to forward the investigator report to the QME, or to utilize it as an exhibit for trial, instead it was prepared to assist with preparation for trial.

Having reviewed the report and sub rosa video at issue, it appears the report would not be relevant or admissible at trial, and irrespective of the determination that it is privileged and work product, Applicant will not be prejudiced by not having access to the document.

Therefore, it is the undersigned Judge's determination that the Applicant does not have a right to production of defendant's sub rosa investigator report, as it is privileged and work product, which Defendant does not intend to utilize them for litigation of the issues in the instant case.

IV.

RECOMMENDATION

For the reasons stated above, it is the undersigned Judge's recommendation that the **[*17]** Petition For Removal be denied.

Michael J. Holmes

Workers' Compensation Administrative Law Judge

Dated: June 15, 2023

Camacho v. Gable House Bowl, Inc., 2023 Cal. Wrk. Comp. P.D. LEXIS 295

Workers' Compensation Appeals Board (Board Panel Decision)

October 23, 2023 Opinion Filed

W.C.A.B. No. ADJ12242523—WCJ Jerilyn Cohen (LAO); WCAB Panel: Commissioners Razo, Capurro, Snellings

Reporter
2023 Cal. Wrk. Comp. P.D. LEXIS 295 *

Francisco Camacho (deceased), Applicant v. Gable House Bowl, Inc., Everest National Insurance, administered by Sedgwick Claims Management, Defendants

Status:

CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: The Petition for Reconsideration of the July 31, 2023 Findings and Order is *denied*.

Core Terms

power of attorney, proceeds, terminated, durable, coupled, invalid, parties, rights, no evidence, bona fide, contends, petition for reconsideration, incapacity, settlement, deceit, mutual mistake, bona fide transaction, undersigned, deceased, words, heir, fair dealing, instant case, subdivision, binding, honesty, powers

Headnotes

Compromise and Release Agreements—Setting Aside for Mutual Mistake—Power of Attorney—WCAB, denying reconsideration, affirmed WCJ's finding that Order Approving Compromise and Release (OACR)

settling applicant's claim for death benefits arising from death of her husband on 2/11/2021 was product of mutual mistake, and that there was no valid power of attorney that authorized applicant's son to negotiate and receive proceeds of Compromise and Release (C&R), which was executed after applicant's death, when applicant's death was not disclosed at time C&R was executed nor was WCJ aware of her death when she issued OACR, and WCAB found that son's power of attorney did not survive applicant's death per Civil Code *§ 2356(a)* and *Probate Code § 4152(a)*, that exception to automatic termination of power of attorney at death did not apply in this matter because there was no evidence that when power of attorney was created, proceeds of applicant's death claim would go to her son, and that son's power of attorney did not qualify as durable power of attorney, which would have survived applicant's death. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 29.05[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 18, § 18.11[1].]

Counsel

[*1] For applicant—Graiwer & Kaplan, LLP

For defendants—Russell Legal Group, APC

Panel: Commissioner Jose H. Razo; Commissioner Joseph V. Capurro; Commissioner Craig Snellings

Opinion By: Commissioner Jose H. Razo

Opinion

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration of the July 31, 2023 Findings and Order and the contents of the report 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 report and opinion, which are both adopted and incorporated herein, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the July 31, 2023 Findings and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Jose H. Razo

I concur,

Commissioner Joseph V. Capurro

Commissioner Craig Snellings

* * * * *

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

The applicant, Socorro Robles Camacho, was the widow filing in a death claim regarding her husband, Francisco Camacho, who was employed as a janitor, aged 66 when he passed away. Petitioner is Jorge Miguel Camacho Robles, ("Jorge Robles") adult son of the applicant and the decedent who held a power of attorney for applicant Socorro Robles Camacho at the time of her death.

The verified Petition is timely filed on 8-24-2023 following service of the Findings and Order on 7-31-2023. No Answer has been received to date.

The petitioner's contentions: 1. That the WCJ erred in finding facts not supported by the record. 2. That the WCJ erred in not finding a valid power of attorney. 3. That the WCJ erred in finding a mutual mistake of fact. 4. That the WCJ erred in not ordering penalties under *Labor Code Section 5814.5* to enforce the Compromise and Release.

II.

FACTS

On 9-5-2020 Applicant Socorro Robles Camacho **[*2]** executed a Power of Attorney in favor of her son Jorge Robles. Applicant Socorro Robles Camacho passed away 2-11-2021. A Compromise and Release Agreement was executed on 4-1-2021 by defendant and Jorge Robles. The signature stated "Jorge Miguel Camacho Robles with Power of Attorney on behalf of Socorro Robles Perez". A copy of the Power of Attorney was attached. The Power of Attorney did not specifically provide for the powers to extend beyond the death of the principal. The Power of Attorney did not provide for any payment to, or monetary interest of, Jorge Robles in the proceeds of any agreement. The Power of Attorney did not state that the principal was in any way incapacitated. The applicant herself signed the Power of Attorney.

At the time of execution of the Compromise and Release on 4-1-2021, neither counsel for applicant nor Jorge Robles disclosed to defendants that the applicant was deceased. At the time an Order Approving Compromise and Release was sought, this WCJ was not informed that the applicant was deceased. The Order Approving Compromise and Release issued on 4-12-2021. A check for the proceeds of the Compromise and Release less attorneys fee payable to the applicant **[*3]** Socorro Robles Camacho and decedent Francisco Camacho timely issued. A check for the attorneys fee was issued to Graiwer and Kaplan who represented both Socorro Robles Camacho and Jorge Robles.

On 6-17-2021 applicant's counsel, then acting for Jorge Robles, requested defense claims examiner to reissue the payment in his name because the check could not be negotiated. This was defendant's first notice that widow Socorro Robles Camacho had passed. Defendants refused to reissue the check. On 6-29-2021 defendants filed a Petition to Set Aside OACR and C&R, counsel for Jorge Robles filed a response. The matter was the subject of a trial with testimony by both Jorge Robles and a defense claims examiner, resulting in the Findings and Order under reconsideration presently.

Counsel for Petitioner offers no evidence that the firm represents the Petitioner. No Notice of Representation has been filed regarding the Petitioner. Defendant did not object to standing of the Petitioner to litigate the issues presented. No evidence was submitted that Jorge Robles is the son of the decedent or the applicant or was at any time a dependent of the decedent. No evidence was submitted that Jorge Robles was or **[*4]** is the legal heir of the applicant. The Power of Attorney was executed by the applicant on 9-5-2020, then filed 12-20-21. The applicant did not have a Guardian ad Litem or Conservator at any time in this litigation. No proof of service is entered into evidence so the WCJ is unaware of when defendants learned of the power of attorney.

III.

DISCUSSION

1. The Petition Is Properly Viewed As A Petition For Reconsideration.

A Petition for reconsideration may only be taken from a final order, decision or award, *Labor Code Sections 5900(a)*, *5902* and *5903*. A final order is one that "determines any substantive right or liability of those involved in the case", *Rymer v. Hagler (1989) 211 Cal. App. 3d 1171, 45 Cal. Comp. Cases 410*; *Hansen v. Workers' Comp. Appeals Bd. (1988) 53 Cal. Comp. Cases 193 (Writ Den.)*: *Jablonski v. Workers' Comp. Appeals Bd. (1987) 52 Cal. Comp. Cases 399 (Writ Den.)*

In the present case Petitioner is correctly propounding a petition for reconsideration of a Findings and Order which is finally dispositive of any claim for compensation in the case in chief.

2. Petitioner Contends That the WCJ Erred In Finding Facts Not Supported By the Record.

Petitioner lists 11 items that are contended to be unsupported by the facts. Respectfully, a close reading of each of them will reveal each and every fact is supported by the evidence, most in Exhibit C, the Power of Attorney. It is noteworthy that Petitioner offers no evidence to support his arguments. **[*5]** A close review of the Power of Attorney, Exhibit C, will reveal that it grants no financial rights or personal interest to Jorge Robles. The document gives him the power to act for Socorro Robles Camacho in the workers compensation case, not to keep the proceeds. Exhibit C gives Petitioner no personal interest in the proceeds of the litigation. Exhibit C describes no rights or powers specifically intended to last after the death of Socorro Robles Camacho.

Petitioner in fact did not meet his burden of proof on all 11 issues at trial. For example, at item 7, Petitioner contends another unsupported fact is the determination Jorge Robles and his counsel withheld the fact the that Socorro Robles Camacho had passed away at the time of the execution of the C+R. Defendant's witness testified credibly that their first knowledge of the death of Socorro Robles Camacho was on 6-22-2021, MOH/SOE 5-16-2023, p.5 l.12–14. The Compromise and Release was signed on 4-1-2021. Petitioner offered no rebuttal testimony or evidence. A claim that the finding is unsupported is disingenuous and factually incorrect.

The petitioner testified. He did not testify about the substance of the power of attorney or whether **[*6]** he disclosed the prior death of the applicant at the time the C+R was executed. In any case, the document as a matter of law speaks for itself. As will be discussed in detail below and was discussed in the Finding and Order, the Power of Attorney does not qualify as a durable power of attorney on its face, and therefore does not survive the death of the person granting the power.

Petitioner complains that the undersigned based her opinion on law which was not included in the trial briefs. Respectfully, the parties were aware from the beginning that the primary issue was the validity of the Power of Attorney. The WCJ is not bound by the Trial Briefs. How the parties choose to analyze and prepare their case should not be a concern of the WCJ and should not be a subject for reconsideration.

3. Petitioner Contends That the WCJ Erred In Not Finding A Valid Durable Power of Attorney.

Facts are Supported

Petitioner contends that the WCJ overlooked the words in the Power of Attorney "regarding my husband pending WCAB case, D/A: October 11, 2018". The undersigned reviewed and noted that language. It has no relevance to the issues: the Power of Attorney clearly gives the agent the right to sign **[*7]** documents related to the litigation. The problem is that it the Power of Attorney does not specifically state that the right survives the death of Socorro Robles Camacho. It is not a Durable Power of Attorney. When the applicant died, petitioner's rights died with her.

Petitioner further contends it gives Jorge Robles an "interest" in the litigation. The document gives Jorge Robles an interest to the extent that he may act for Socorro Camacho Robles in this litigation during her lifetime. There are no words passing any financial or personal interest in the proceeds to Jorge Robles, during her lifetime or after. Petitioner's repeated use of the word "interest" is not accurate, because it does not state what the interest actually is. Considering the Power of Attorney a contract, the terms stated give Jorge Robles the right to act for Socorro Camacho Robles, but never give him the right to keep the money. Jorge Robles has the rights granted specifically

by the Power of Attorney and no others. It is completely inappropriate to assume or read into the language of the document to find rights not specifically granted.

Petitioner contends that Jorge Robles testified in support of his personal **[*8]** interest in the proceeds of the case. The record shows no such testimony. The witness in fact testified that he held a power of attorney in the case. The witness also stated that he "signed the Compromise and Release for his mother". MOH/SOE 5-16-2023 p.5 l. 19–23. He did not testify that he held any personal right, expectation or interest, did not testify that he was the heir of his mother Socorro Camacho Robles, and did not offer any evidence that he was the heir. Petitioner did not meet his burden of proof that he held a personal right or his own "interest" to overcome the presumption of termination of power of attorney at death.

Petitioner also contends there was no deceit. All parties were aware that Socorro Robles Camacho was acting through an agent, her son, with the power of attorney prior to her death. (Although it is unknown when the Power of Attorney was served, it was filed for the first time 12-20-21.) The applicant had been acting for some months before her death through Petitioner with the power of attorney. However, there is evidence that defendant was unaware that Socorro Robles Camacho was deceased at the time of execution of the C+R. The fact of the death of the applicant **[*9]** is highly material at the time the C+R was signed. Withholding that information deprived the defendants of the opportunity to determine that the power of attorney was not durable and thus invalid at the settlement execution. Petitioner contends that Defendant did not use due diligence to learn of the applicant's death. This is disingenuous. Defendant would have no way of knowing even what country the applicant was living in at the time of her death. Further, Petitioner did not file his address for the Official Address Record (and still has not done so).

The Power of Attorney was not valid when the C+R was executed

The Finding and Order includes an exhaustive analysis of why the power of attorney is invalid. A brief review is included here. *California Civil Code Section 2356(a)(2)* states:

> "Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by any of the following:
>
> (2) The death of the principal."

It is stipulated by the parties that the applicant, Socorro Robles Camacho passed away on February 11, 2021, before the Compromise and Release was executed on April 1, 2021, which terminates the power of attorney under *Civil Code Section 2356(a)*. *Civil Code Section 2356 (b)* provides an exception. Where the power of the agent is "coupled **[*10]** with an interest in the subject of the agency" is it not terminated by death. There are 3 requirements for an agency coupled with an interest:

> "For an agency agreement to be coupled with an interest, it must be *all* of the following:
>
> • Held for the benefit of the agent rather than the principal.
>
> • Created to secure the performance of a duty to the agent or to protect a title in the agent.
>
> • Created at the same time that the duty or title is created or be created for consideration."
>
> *Becket v. Welton Becket & Associates (1974) 39 Cal. App. 3d 815, 820, 114 Cal. Rptr. 531*, *citing Restatement of Agency § 138.*

Here there is no evidence that when the Power of Attorney was created, the proceeds of this case were given to the Petitioner. There are no words in the document to evidence this, and no testimony to support it. Further, any interest was entirely speculative and unproved at that time. There is also no evidence that there was any title created for Jorge Camacho, or any specific duty required. Because the Power of Attorney does not grant a right to

keep the proceeds, there is no benefit to the agent. This Power of Attorney is not coupled with an interest. The Power of Attorney is not durable and terminates with the death of the applicant.

> []It must be emphasized that for an agency to be coupled with an **[*11]** interest, the interest must be a specific, present, and coexisting interest in the subject of the agency; the interest cannot be obtained by the exercise of the agency.[] *O'Connell v. Superior Court (1935) 2 Cal. 2d 418, 422, 41 P.2d 334*;

Petitioner contends that the wording inserted in the Power of Attorney "regarding my husband pending WCAB case, D/A: 10/11/2018" grants the agent Jorge Robles an *interest* in the litigation. Taking the clear language on its' face, it grants the agent the right to *act* in the case only. There is no language whatsoever in the power of attorney granting a right to keep the proceeds of the litigation. The Petitioner has no *interest* in the proceeds of the litigation therefore the requirements of the exception to the automatic termination of the power of attorney at death are not met.

In the instant case, no written evidence or testimony is offered that any of the 3 requirements of *Becket, supra* have been met. The interest of the agency, i.e., the proceeds of the Compromise and Release, can only be obtained by the exercise of the agency after the agency is created. The Power of Attorney, Exhibit C, gives the agent Jorge Robles no benefits or personal rights in any of the proceeds of the agreement in the present or future. **[*12]** The Power of Attorney authorizes action to benefit the applicant only. The Power of Attorney solely empowers Jorge Robles to act for the applicant. The Power of Attorney was created about rights that at the time were speculative, as the proceeds of the lawsuit had not been determined. No actual right existed at the time the Power of Attorney was created, so the three part test of *Becket, supra* is not met. The agency power of attorney is terminated with the death of the principal.

Under *Civil Code Section 2356(a)(2)* the interest of the agent at the time the agency is created must be a present interest, not created by exercising a future interest. There is no evidence that Jorge Robles had any legal and legitimate present interest in the proceeds at the time the power of attorney was signed. Further, the power of attorney did not give Jesus Camacho any legal right to any future proceeds, and such a future right would not meet the requirements of subsection (a). Again, Petitioner fails in his burden of proof of an interest in the proceeds of the litigation or the right to take such proceeds under the Power of Attorney. Since there is no evidence that the agency here was coupled with an interest in the subject of the **[*13]** agency at the time the agency was created, the requirements of *Civil Code Section 2356(a)* have been met, and the Power of Attorney terminated on the death of the applicant.

In the Finding and Order, the undersigned noted there was an exception to *Civil Code Section 2356(b)* which states:

> "(b) Notwithstanding subdivision (a), any bona fide transaction entered into with an agent by any person acting without actual knowledge of the revocation, death, or incapacity shall be binding upon the principal, his or her heirs, devisees, legatees, and other successors in interest".

Subsection (b) grants a right on the third party in the transaction to bind the principal. It does not offer the same right to the agent, so is not directly relevant here. However, Petitioner questions my finding that execution of the C+R was not a bona fide transaction. This touches on the reason there was ultimately a mutual mistake of fact, so bears consideration here. "Bona fide" is defined as follows:

> []Viewing the term "bona fide" within the entire statutory scheme in which it appears, we conclude that it is there used in the first lexical sense adverted to above—to wit, that of honesty, fair dealing, and freedom from deceit.[] *Merrill v. Department of Motor Vehicles, 71 Cal. 2d 907, 80 Cal. Rptr. 89, 458 P.2d 33 (1968)*.

Petitioner, the agent, and his counsel **[*14]** withheld the knowledge that the individual holding the legal rights to be relinquished had actually passed away. The agent entering into the contract did not have any direct rights to compensation in the case. It cannot be said that the agent and his counsel acted with "honesty", 'with "fair dealing" and with "freedom from deceit" when the disclosure of the death could have led to a good faith basis to withdraw the settlement offer. The value of the proposed Compromise and Release was $85,000.00 while the value of the

accrued benefits was $38,226.26, based on the testimony of the defense witness. At the time the Compromise and Release was signed, months after the death of the applicant, the transaction was no longer "bona fide", no longer in the words of the Supreme Court, "fair dealing". Given the transaction was not a bona fide transaction, the exception of *Section 2356 (b)* does not apply. The power of attorney terminated at the time of the death of the applicant. The execution of the Compromise and Release by Jorge Robles was invalid. The agreement is void.

The Power of Attorney is also invalid based on *Probate Code Section 4152(a)(4)* which states in pertinent part:

> **(a)** Subject to subdivision (b), the authority of an attorney-in-fact **[*15]** under a power of attorney is terminated by any of the following events:
>
> > **(4)** Death of the principal, except as to specific authority permitted by statute to be exercised after the principal's death.

In the instant case, there is no specific authority in the Power of Attorney authorizing any actions after the death of the principal, so the document does not survive the death of the principal under *Probate Code Section 4152*.

The Power of Attorney does not qualify as a durable power of attorney which would allow it to be effective after the death of the applicant. The document does not include the warnings required by *Probate Code Section 4128* to create a valid durable type power of attorney. The document also does not identify itself as a durable power of attorney. Finally, the document does not include a provision expressly stating that it is intended to grant powers to continue in effect after the death or incapacity of the principal. A power of attorney that is not specifically a durable power of attorney is terminated by incapacity of the principal, *Probate Code Section 4155*. Thus the power of attorney was not valid at the time the Compromise and Release was signed, which occurred after the death of the principal. This renders the Compromise and Release invalid. **[*16]**

4. Petitioner's contention that the WCJ erred in finding a mutual mistake of fact.

At the time the settlement agreement was executed, both parties believed that Jorge Robles had a valid Power of Attorney that authorized him to sign the Agreement. The parties labored under a mutual mistake of fact that the Power of Attorney was valid on 4-1-2023. It is disingenuous for Petitioner to claim there was no mistake of fact when both sides have acted in accordance with that mistaken belief. Petitioner even now contends the Power of Attorney is valid, and files this reconsideration in support of his belief.

Defendants testified under oath to their belief the Power of Attorney was valid at trial as noted above. This testimony is unrebutted by Petitioner. Further the defendants petitioned to set aside the agreement as soon as they learned that the death of the applicant had occurred before the settlement was signed. Defendants executed the agreement and issued checks based on the Order Approving. It was not until they learned of the death of the applicant before execution of the settlement that they objected. The C+R was submitted to the undersigned WCJ for approval including the Power of Attorney. **[*17]** The undersigned prefers to believe that both parties genuinely believed the Power of Attorney was valid rather than that fraud was contemplated. There is no evidence of intentional fraud or deceit, only an omission of material fact to the WCJ. Both parties believed the Power of Attorney was valid at the time the agreement was signed, and acted accordingly.

5. That the WCJ erred in not ordering penalties under *Labor Code Section 5814.5* to enforce the Compromise and Release.

The settlement was signed and an Order Approving obtained based on a mutual mistaken belief that the Power of Attorney was valid. Since the agreement was not valid and the Order Approving was obtained on false premises, no penalty for enforcing the Order is appropriate.

IV.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Jerilyn Cohen

Workers' Compensation Administrative Law Judge

Dated: September 1, 2023

OPINION ON DECISION

A Denial was issued by Defendant on 6-5-2019 based on causation. On 9-5-2020 Applicant Socorro Robles Perez Camacho executed a Power of Attorney in favor of Jorge Miguel Camacho Robles (hereinafter "Jorge Camacho"). A Compromise and Release Agreement was executed on 4-1-2021 by defendant **[*18]** and Jorge Camacho. The signature stated "Jorge Miguel Camacho Robles with Power of Attorney on behalf of Socorro Robles Perez". A copy of the Power of Attorney was attached. The Power of Attorney did not specifically provide for the powers to extend beyond the death of the principal. The Power of Attorney did not provide for any payment to, or monetary interest of, Jorge Camacho in the proceeds of any agreement. The Power of Attorney did not state that the principal was in any way incapacitated. The applicant herself signed the Power of Attorney.

Applicant Socorro Robles Perez Camacho passed away 2-11-2021. At the time of execution of the Compromise and Release on 4-1-2021, neither counsel for applicant nor Jorge Camacho disclosed to defendants that the applicant was deceased. At the time an Order Approving Compromise and Release was sought, the WCJ was not informed that the applicant was deceased. The Order Approving Compromise and Release issued on 4-12-2021. Defendant Claims Examiner Linda de la Rosa credibly testified that Defendants learned of the death of the applicant for the first time from Counsel for applicant on 6-17-2021 when a check made payable to the applicant and decedent **[*19]** Francisco Camacho could not be negotiated.

1. AUTHORITY OF JORGE CAMACHO TO SIGN THE C+R FOR THE DECEASED APPLICANT ON 4-1-2021.

California Civil Code Section 2356 states:

> "(a) Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by any of the following:
>
> (1) Its revocation by the principal.
>
> (2) The death of the principal.
>
> (3) The incapacity of the principal to contract.
>
> (b) Notwithstanding subdivision (a), any bona fide transaction entered into with an agent by any person acting without actual knowledge of the revocation, death, or incapacity shall be binding upon the principal, his or her heirs, devisees, legatees, and other successors in interest.
>
> (c) Nothing in this section shall affect the provisions of *Section 1216*.
>
> (d) With respect to a proxy given by a person to another person relating to the exercise of voting rights, to the extent the provisions of this section conflict with or contravene any other provisions of the statutes of California pertaining to the proxy, the latter provisions shall prevail."

It is stipulated by the parties that the applicant, Socorro Robles Camacho passed away on February 11, 2021, before the Compromise and Release was executed on April 1, 2021. *Civil Code Section 2356(a)(2)* finds **[*20]** that the death of the principal, here Socorro Robles Camacho, terminates an agency, the power of attorney, under certain conditions. Only where the power of the agent is "coupled with an interest in the subject of the agency" is it not terminated by death.

> []For an agency agreement to be coupled with an interest, it must be *all* of the following:
>
> • Held for the benefit of the agent rather than the principal.
>
> • Created to secure the performance of a duty to the agent or to protect a title in the agent.
>
> • Created at the same time that the duty or title is created or be created for consideration.[]
>
> *Becket v. Welton Becket & Associates (1974) 39 Cal. App. 3d 815, 820, 114 Cal. Rptr. 531*, *citing Restatement of Agency § 138*.
>
> []It must be emphasized that for an agency to be coupled with an interest, the interest must be a specific, present, and coexisting interest in the subject of the agency; the interest cannot be obtained by the exercise of the agency.[], *O'Connell v. Superior Court (1935) 2 Cal. 2d 418, 422, 41 P.2d 334*

In the instant case, no written evidence or testimony is offered that any of the 3 requirements of *Becket, supra* have been met. The interest of the agency, i.e., the proceeds of the Compromise and Release, can only be obtained by the exercise of the agency. The Power of Attorney, Exhibit C, gives the agent Jorge Camacho no benefits or personal rights in **[*21]** any of the proceeds of the agreement in the present or future. The Power of Attorney authorizes action to benefit the applicant only. The Power of Attorney solely empowers Jorge Camacho to act for the applicant. The Power of Attorney was created about rights that at the time were speculative, as the proceeds of the lawsuit had not been determined. No actual right existed at the time the Power of Attorney was created, so the three part test of *Becket, supra* is not met. The agency power of attorney is terminated with the death of the principal.

Under *Section Civil Code Section 2356(a)(2)* the interest of the agent at the time the agency is created must be a present interest, not created by exercising a future interest. There is no evidence that Jorge Camacho had any legal and legitimate present interest in the proceeds at the time the power of attorney was signed. Further, the power of attorney did not give Jesus Camacho any legal right to any future proceeds, and such a future right would not meet the requirements of subsection (a). Since there is no evidence that the agency here was coupled with an interest in the subject of the agency at the time the agency was created, the requirements of *Section 2356(a)* have been met, and the Power **[*22]** of Attorney terminated on the death of the applicant.

Section 2356(b) notes an exception:

> "(b) Notwithstanding subdivision (a), any bona fide transaction entered into with an agent by any person acting without actual knowledge of the revocation, death, or incapacity shall be binding upon the principal, his or her heirs, devisees, legatees, and other successors in interest".

Subsection (b) grants a right on the third party in the transaction to bind the principal. It does not offer the same right to the agent. *Section 2356(b)* requires that the transaction be "bona fide". This is a question of law, *Merrill v. Department of Motor Vehicles, 71 Cal. 2d 907, 917–921*, *Granco Steel, Inc. v. Workmens' Comp. App. Board (1968) 68 Cal. 2d 191, 197 [65 Cal. Rptr. 287, 436 P.2d 287]*.

"Bona fide" is of course a Latin term whose literal English translation is the compound adjective "good faith." Webster's Third New International Dictionary (1961) indicates that it is or has been used in three different senses. The first of these signifies an absence of fraud or deceit and is used in connection with promises or representations—e.g., a bona fide contract. The second imparts sincerity or "earnest or wholehearted intent"—e.g., a bona fide proposal or suggestion. The third expresses genuineness or authenticity and is the antithesis of the spurious or counterfeit—e.g., a bona fide Renoir.

The term "bona **[*23]** fide" has been used in a variety of legal contexts. Each such use reflects an emphasis upon one or more of the basic meanings set forth above … (examples omitted). Here the notion of honesty and lack of sharp dealing predominates, and therefore the first lexical meaning of the term is paramount.

Viewing the term "bona fide" within the entire statutory scheme in which it appears, we conclude that it is there used in the first lexical sense adverted to above—to wit, that of honesty, fair dealing, and freedom from deceit." *Merrill v. Department of Motor Vehicles, 71 Cal. 2d 907, 80 Cal. Rptr. 89, 458 P.2d 33(1968)*.

In the instant case, a similar situation is found. Did the agent act with honesty, fair dealing, and freedom from deceit? It is found that he did not. The agent and his counsel withheld the knowledge that the individual holding the legal rights to be relinquished had actually passed away. The agent entering into the contract did not have any direct rights to compensation in the case. It cannot be said that the agent and his counsel acted with an "absence of deceit", 'with "sincerity" and with "genuineness" when the disclosure of the death could have led to a good faith basis to withdraw the settlement offer. The value of the proposed Compromise and Release was $85,000.00 **[*24]** while the value of the accrued benefits was $38,226.26. At the time the Compromise and Release was signed, months after the death of the applicant, the transaction was no longer "bona fide", no longer in the words of the Supreme Court, "in good faith". Given the transaction was not a bona fide transaction, the exception of *Section 2356 (b)* does not apply. The power of attorney terminated at the time of the death of the applicant. The execution of the Compromise and Release by Jorge Camacho was invalid. The agreement is void.

> *Probate Code Section 4152(a)(4)* is also relevant. It states in pertinent part:
>
> **(a)** Subject to subdivision (b), the authority of an attorney-in-fact under a power of attorney is terminated by any of the following events:
>
> **(4)** Death of the principal, except as to specific authority permitted by statute to be exercised after the principal's death.

In the instant case, there is no specific authority in the Power of Attorney authorizing any actions after the death of the principal, so the document does not survive the death of the principal under *Probate Code Section 4152*.

The Power of Attorney, Exhibit C herein, does not qualify as a durable power of attorney. The document does not include the warnings required by *Probate Code Section 4128* for a durable type power of **[*25]** attorney. The document also does not identify itself as a durable power of attorney. Finally, the document does not include a provision expressly stating that it is intended to grant powers to continue in effect after the death or incapacity of the principal. A power of attorney that is not specifically a durable power of attorney is terminated by incapacity of the principal, *Probate Code Section 4155*. Thus the power of attorney was not valid at the time the Compromise and Release was signed which occurred after the death of the principal. This renders the Compromise and Release invalid.

The Order Approving was obtained without disclosing the material fact of the death of the principal to the undersigned. The request for the Order was based on an invalid Compromise and Release with an invalid Power of Attorney. The Order Approving is vacated and set aside.

2. WHETHER THE POWER OF ATTORNEY DATED 9-5-2020 WAS VALID AT THE TIME THAT THE COMPROMISE AND RELEASE WAS EXECUTED ON 4-4-2021

Based on *Civil Code section 2356* and *Probate Code section 4152*, as noted above, the Power of Attorney was not valid at the time the Compromise and Release was executed.

3. WHETHER DEFENDANT DISCOVERED NEW MATERIAL EVIDENCE AFTER THE C+R WAS AGREED UPON WHICH THEY COULD NOT, WITH REASONABLE [*26] DILIGENCE, HAVE DISCOVERED AT THE TIME THE C+R WAS ENTERED INTO, AND WAS THERE A MUTUAL MISTAKE OF FACT?

Whether there was discovery of new evidence is moot. The Compromise and Release fails due to a mutual mistake of fact. At the time the settlement agreement was executed, both parties believed that Jorge Camacho had a valid Power of Attorney that authorized him to sign the Agreement. As described above, this was not correct. It is found that the parties labored under a mutual mistake of fact that the Power of Attorney was valid on 4-1-2023. Given the

Compromise and Release was invalid, the Order Approving arising from the Compromise and Release is vacated and set aside.

4. WHETHER APPLICANT'S ATTORNEY IDENTIFIED THE CORRECT PARTIES FOR PAYMENT IN PARAGRAPH 6 OF THE C+R.

The issue is moot, as the Compromise and Release is invalid.

5. APPLICANT'S PETITION FOR PENALTIES, ATTORNEY FEES

The issue is moot as the Order Approving Compromise and Release is vacated and set aside.

6. DEFENDANT'S PETITON TO SET ASIDE

The Compromise and Release signature is invalid, so the agreement is null and void. The Petition to Set Aside is granted.[1]

Jerilyn Cohen

Workers' Compensation Administrative Law Judge

Dated: **[*27]** July 31, 2023

[1] Defendant has not requested payment of penalties or interest regarding the attorneys fee already paid to counsel for applicant. Neither party has raised the issue of payment of accrued benefits in the event the Compromise and Release is declared invalid.

Zelnik v. Office of Statewide Health Planning, 2023 Cal. Wrk. Comp. P.D. LEXIS 259

Workers' Compensation Appeals Board (Board Panel Decision)

September 22, 2023 Opinion Filed

W.C.A.B. No. ADJ11777251—WCAB Panel: Commissioner Snellings, Chair Zalewski, Commissioner Capurro

Reporter
2023 Cal. Wrk. Comp. P.D. LEXIS 259 *

Gerard Zelnik, Applicant v. Office of Statewide Health Planning, legally uninsured, administered by State Compensation Insurance Fund, Defendants

Subsequent History:

Review denied by *Gerard Zelnik, Petitioner v. Workers' Compensation Appeals Board, Office of the Statewide Health Planning, legally uninsured, administered by State Compensation Insurance Fund, Respondents, 2023 Cal. Wrk. Comp. LEXIS 72 (Dec. 13, 2023)*

Status:

Publication Status: CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: Reconsideration is *granted*, the August 15, 2022 F&A is *rescinded*, and the matter is *returned* to the trial level for further proceedings and a new decision by the WCJ.

Core Terms

personnel action, good faith, asserting, psyche, Reconsideration, presumed, rescind, workers' compensation, further proceedings, psychiatric injury, burden of proof, matter to trial, new decision, discovery of evidence, claim form, nondiscriminatory, Recommendation, discoverable, rebuttable, conflicts, decisions, reasons

Headnotes

Presumption of Compensability—Admissibility of Evidence—Good Faith Personnel Action Defense to Psychiatric Injury—WCAB, granting reconsideration, rescinded decision in which WCJ applied *Labor Code § 5402(b)* presumption of compensability to bar defendant from asserting *Labor Code § 3208.3(h)* good faith personnel action defense to applicant's claim for 8/31/2018 psychiatric injury, when WCAB found that WCJ's decision directly conflicted with existing law, which establishes that defendant is not precluded from asserting and presenting evidence regarding good faith personnel action defense, regardless of when evidence was reasonably obtainable. [See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 24.01[4]*; Rassp & Herlick, California Workers' Compensation Law, Ch. 10, § 10.02.]

Counsel

[*1] For applicant—Boxer & Gerson

For defendants—State Compensation Insurance Fund

Panel: Commissioner Craig Snellings; Chair Katherine A. Zalewski; Commissioner Joseph V. Capurro.

Opinion By: Commissioner Craig Snellings

Opinion

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant sought reconsideration of the Findings of Fact and Award and Opinion on Decision (F&A) issued by a workers' compensation administrative law judge (WCJ) on August 15, 2022, wherein the WCJ found that applicant sustained an industrial injury to his psyche on or about August 31, 2018. The WCJ also applied *Labor Code section 5402(b)*[1] to bar defendant from asserting the *section 3208.3(h)* "good faith personnel action defense" against applicant's psyche claim.

Defendant asserts that the WCJ's decision to preclude it from raising the "good faith personnel action defense" using *section 5402(b)* directly conflicts with existing Appeals Board decisions on this issue.

We received an Answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of **[*2]** the Petition for Reconsideration and the Answer and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the August 15, 2022 F&A and return the matter to the trial level for further proceedings and a new decision by the WCJ.

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[1] All further statutory references are to the Labor Code unless otherwise noted.

FACTS

During trial, the parties stipulated that applicant, while employed on August 31, 2018 as a regional compliance officer by defendant, sustained injury arising out of and in the course of employment (AOE/COE) to his psyche. (Minutes of Hearing (MOH), August 8, 2022, p. 2.)

The sole issue for adjudication at trial was whether defendant could raise the "good faith personnel action" defense to applicant's psyche claim. The issue was framed in the Minutes of Hearing as follows:

> Is defendant allowed to argue that the *Labor Code section 3208.3* good faith personnel action can be asserted at trial to deny the psychiatric injury claim, even though *Labor Code section 5402(b)* provides that "If liability is not rejected within 90 days after the date the claim form is filed under *Labor Code section 5401*, the injury shall be presumed compensable …" and that "The presumption … is rebuttable only by evidence discovered subsequent **[*3]** to the 90-day period."

(MOH, August 8, 2022, p. 4.)

According to the Minutes of Hearing, applicant submitted his injury claim form to defendant on September 4, 2018, and that defendant twice denied the claim more than 90 days thereafter, once on December 13, 2018 and again on January 2, 2019 based upon the "good faith personnel action defense." (MOH, August 8, 2022, p. 3.)

After trial, the WCJ issued the contested F&A, concluding that, because defendant failed to reject liability for applicant's psyche claim within 90 days of receiving the form, the psyche injury was presumed compensable under *section 5402(b)*. The WCJ also found that *section 5402(b)* barred defendant from asserting the *section 3208.3(h)* "good faith personnel action defense" against applicant's psyche claim, where there was no showing that the evidence was only discoverable outside of the initial 90-day period set forth in *section 5402(b)*. The WCJ thus concluded that applicant sustained a psyche injury AOE/COE compensable under *section 5402(b)* and issued an award in applicant's favor.

DISCUSSION

Defendant asserts that the WCJ erred in finding that *section 5402(b)* barred defendant from asserting the good faith personnel action defense against applicant's psyche claim under *section 3208.3(h)*. Specifically, defendant asserts that the **[*4]** WCJ's finding conflicts with existing Appeals Board decisions on this issue. We agree with defendant. We note here that defendant raised the affirmative defense of good faith personnel action on January 2, 2019, within several weeks of issuing its untimely denial on December 13, 2018. (See *Lab. Code, §§ 3208.3(h)* ["The burden of proof shall rest with the party asserting the issue" of whether the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action.]; *5705* [..."burden of proof rests upon the party or lien claimant holding the affirmative of the issue."].) As explained below, we will rescind the F&A of August 15, 2022 and return this matter to the trial level so that defendant may try the good faith personnel action defense utilizing all competent evidence.

Section 5402 states, in relevant part:

> If liability is not rejected within 90 days after the date the claim form is filed under *Section 5401*, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period.

(*Lab. Code, § 5402(b)(1)*.)

Section 3208.3(h), which provides for the "good faith personnel action" defense, states:

> (h) No compensation under this division shall be paid by an **[*5]** employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue.

(*Lab. Code, § 3208.3(h)*.)

In *Insalaco v. Workers' Comp. Appeals Bd. (Insalaco) (1999) 64 Cal.Comp.Cases 1407 (writ den.)*, *Carrasco v. Cal. Dept. of Corrections and Rehab. (Carrasco) (2018) 83 Cal.Comp.Cases 1931*, and *Khachatrian v. State Attorney General's Office (March 6, 2019, ADJ10908110) 2019 Cal. Wrk. Comp. LEXIS 37 (Khachatrian)*,[2] the Appeals Board held that *section 5402(b)* does not preclude a defendant from asserting the good faith personnel action defense to bar compensation for a psyche injury. In fact, in *Khachatrian*, we explicitly rejected the conclusion reached by the WCJ here, namely, that the *section 5402(b)* presumption of compensability bars evidence of a good faith personnel action unless that evidence was only discoverable outside of the initial 90-day period established by the statute. We stated:

> [W]hen a psychiatric injury is presumed compensable under *section 5402(b)*, defendant is not precluded from asserting and presenting evidence on the good faith personnel action defense under *section 3208.3(h)*, *regardless of when the evidence was reasonably obtainable*.

(*Khachatrian, supra, 2019 Cal. Wrk. Comp. LEXIS at *7-8*, italics added, citing *Carrasco, supra, 83 Cal.Comp.Cases 1931* & *Insalaco, supra, 64 Cal.Comp.Cases 1407*.)

Based on *Insalaco*, *Carrasco*, and *Khachatrian, supra*, we will rescind the WCJ's decision and return this matter to the trial level for further proceedings and a new decision by the WCJ on the merits of the good faith personnel action defense under *section 3208.3(h)*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration **[*6]** of the Workers' Compensation Appeals Board, that the F&A of August 15, 2022 is **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings and a new decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Craig Snellings

I concur,

Chair Katherine A. Zalewski

Commissioner Joseph V. Capurro

End of Document

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[2] Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See ***Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [118 Cal. Rptr. 2d 105, 67 Cal.Comp.Cases 236]***.) While not binding, the Appeals Board may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc)*.) We find the reasoning in these cases persuasive given that the case currently before us involves the same legal issue.

Shaw v. Automobile Club of Southern California, 2023 Cal. Wrk. Comp. P.D. LEXIS 253; 89 Cal. Comp. Cases 166

Workers' Compensation Appeals Board (Board Panel Decision)

September 22, 2023 Opinion Filed

W.C.A.B. No. ADJ8996318

Reporter
2023 Cal. Wrk. Comp. P.D. LEXIS 253 *; 89 Cal. Comp. Cases 166 **

Lynne Shaw, Applicant v. Automobile Club of Southern California, Hartford Insurance, Defendants

Status:

CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425, fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, **[**167]** claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Prior History:

W.C.A.B. No. ADJ8996318—WCAB Panel: Commissioners Snellings, Capurro, Razo

Disposition: Defendant Automobile Club of Southern California's Petition for Reconsideration is *granted*, and the July 3, 2023 Findings and Award is *amended*.

Core Terms

body part, Deferred, reconsideration, utilization, disorder, Notices, patient, industrial injury, bilateral, cervical, spine, gait, knee, petition for reconsideration, attorney's fees, future medical, extremity

Headnotes

CALIFORNIA COMPENSATION CASES HEADNOTES

Stipulations—Enforcement of Medical Treatment Award—WCAB, granting reconsideration, amended WCJ's decision to indicate that defendant did not timely defer utilization review of applicant's requests for medical treatment, but WCAB concurred with WCJ's findings that medical treatment requested for applicant's knee pain was compensable consequence of industrial injuries to her cervical spine and wrists, previously resolved by 2016 Stipulated Award, that addendum to Stipulated Award could not validly limit future medical care to exclude medical treatment for compensable consequence body parts, and that WCAB has jurisdiction to award treatment for new, compensable consequence condition that is not part of original award even if treatment request is for condition arising more than five years from date of injury, because future medical care in Stipulated Award must always necessarily include future medical care for treatment later found to be compensable consequence of original industrial injury, and this right cannot be bargained away by parties.

[See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 24.13*, *27.10[2]*; Rassp & Herlick, California Workers' Compensation Law, Ch. 14, § 14.06, Ch. 16, § 16.38[1].]

Counsel

[*1] For applicant—Law Office of Michael K. Wax, APC

For defendants—Law Offices of Weitzman & Estes

Panel: Commissioner Craig Snellings; Commissioner Joseph V. Capurro; Commissioner Jose H. Razo

Opinion By: Commissioner Craig Snellings

Opinion

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Automobile Club of Southern California seeks reconsideration of the July 3, 2023 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that the Workers' Compensation Appeals Board **[**168]** (WCAB) has jurisdiction to resolve the parties' dispute and that the treatments requested in applicant's exhibits 3 and 4 are reasonable, necessary, and are a compensable consequence of the industrial injury to the cervical spine and bilateral wrists.

Defendant contends that based on the parties' stipulations and the Qualified Medical Evaluator's (QME) reports of Aidan Clarke, M.D., the requested treatment is non-industrial and not medically necessary on an industrial basis. Defendant further contends that the Primary Treating Physician (PTP) reports of Edward Wieseltier, D.O., who requested the treatment, is not substantial evidence. Finally, defendant contends that the **[*2]** issue of whether the requested treatment is medically necessary should be submitted to utilization review pursuant to *Labor Code,*[1] *section 4610(m)* or, in the alternative, that defendant be allowed to obtain an update QME report under *section 4062*.

[1] All statutory references are to the Labor Code unless otherwise indicated.

We received applicant's answer. We also received applicant's own petition for reconsideration.[2] Applicant seeks penalties and attorney's fees in her petition for defendant's delay in authorizing the requested treatment. However, we note that although the May 30, 2023 Minutes of Hearing identifies penalties and attorney's fees as an issue for trial, the July 3, 2023 does not contain any findings on the issue of penalties and attorney's fees. Thus, applicant's petition for reconsideration is premature.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration of the July 3, 2023 Findings and Award to amend finding number 1 to indicate that defendant did not timely deferred utilization review upon receiving two medical reports with **[*3]** two requests for authorization.

FACTS

As the WCJ stated in his Report:

> The exhibits offered by the parties indicate that the treating physician, Dr. Edward Weiseltier issued a Request for Authorization (RFA) on June 16, 2022. (Applicant's Exhibit 1) Under the heading of diagnosis, the doctor has indicated “knee pain, bilateral”, and “gait disorder.” Defendant, upon receipt of this RFA issued a timely “Notice of Deferred RFA” dated June 21, 2022, addressed to Dr. Weiseltier and copied to applicant's attorney. (Applicant's Exhibit 8).
> **[**169]**
>
> In this notice, defendants state that the only accepted orthopedic body parts are the cervical spine and bilateral wrists. This first notice of deferred RFA was in concert with the requirements of California code of regulations *section 9792.9.1*, as the physician's report did not provide any explanation as to why these new body parts are a compensable consequence of the original industrial injury. Defendant required additional information prior to processing the RFA through utilization review.
>
> Thereafter, on September 29, 2022 Dr. Weiseltier issued a supplemental report addressing the issues raised by defendant concerning applicant's gait disorder and knee pain. The report states **[*4]** in relevant part:
>
> > The patient has a severe spinal cord injury that had resulted in partial loss of her use of the tower extremity resulting in a severe gait disorder. As I had previously mentioned in my 06/16/2022 report:
> >
> > She has been having progressively worsening right lower extremity complaints, most notably around the right knee. She states that this has been going on due to the severe gait disorder that she has. She describes herself as “dragging her right lower extremity during ambulation.” On examination today, the patient demonstrates this exactly as she describes it. Despite having full motor strength of her knee extensors and dorsiflexors on the right side, she is unable to coordinate hip flexion, knee flexion and dorsiflexion during the swing phase of gait. This clearly puts a tremendous amount of effort and stress in the patient's right lower extremity to prevent full weight bearing while trying to attempt swing phase. She has developed a significant amount of medial joint space narrowing in the right knee as confirmed on the x-rays today.
> >
> > The reason for her having this significant gait disorder is due to her spinal cord injury after her cervical spine surgery. At this time, **[*5]** it would be important for the patient to undergo an orthoptist evaluation for consideration of an AFO or other orthosis to help with the patient's swing phase during ambulation.

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[2] Applicant's Petition for Reconsideration and Answer to Defendant's Petition for Reconsideration was erroneously filed in ADJ8939984, a matter that has been dismissed. (Defendant Exhibit H, Award and Stipulations with Request for Award.) Nevertheless, we considered it as part of this matter, ADJ8996318.

> The patient is unable to go out to the community without any assistance from family members or friends as she is not safe by herself with a rollator alone. This extremely limits her to performing her activities of daily living in the community. Therefore, I am asking for the patient to be provided with a mobility scooter.
>
> …
>
> Unfortunately, there is no proof that the above supplemental report and accompanying RFA dated September 29, 2022 was transmitted by mail, **[**170]** email or fax to defendant for utilization review until applicant sent the report to defendants on October 28, 2022.
>
> On October 28, 2022, applicant's attorney sent the September 28th report to the adjuster with a cover letter stating in part: PLEASE RETRACT YOUR DEFERRAL OF UR AS THE BODY PARTS INJURED PER THE STIPULATION AND AWARD ARE ALSO PART OF THE MEDICAL REPORTS AND RFAS SO THE TREATMENT SHOULD BE COVERED. Applicant is in need of further medical treatment and request is hereby made that same be furnished per Dr. Wieseltier's reports and recommendations. **[*6]** (Applicant's Exhibit 6)
>
> Thereafter, on October 31, 2022 defendant again issued a notice of deferred RFA stating: "the only accepted orthopedic body parts are the cervical spine and bilateral wrists." (Report, pp. 2–4; internal quotations omitted.)

DISCUSSION

Section 4610(l) permits a defendant to defer utilization review when it disputes liability for injury or treatment. (*§ 4610(l)*; *Cal. Code Regs., tit. 8, Rule 9792.9.1(b)*.) *Rule 9792.9(b)(1)* requires that, among other things, that the deferral be served on the injured worker, in addition to the injured worker's attorney if the injured worker is represented by counsel. (*Cal. Code Regs., tit. 8, Rule 9792.9.1(b)(1)*.) Here, there is no indication that either the June 21, 2022 or the October 31, 2022 Notices of Deferred RFA were served on applicant. (Defendant Exhibits F and G, Notices of Deferred RFA dated June 21, 2022 and October 31, 2022.) As such, the Notices of Deferred RFA are defective and deemed untimely. (*Dubon v. World Restoration (Dubon II) (2014) 79 Cal. Comp. Cases 1298, 1306 [2014 Cal. Wrk. Comp. LEXIS 131*] (Appeals Board En Banc); *Bodam v. San Bernardino County/Dept. of Soc. Servs. (2014) 79 Cal. Comp. Cases 1519, 1522 [2014 Cal, Wrk. Comp. LEXIS 156*].) Under these circumstances, the WCAB may decide on the issue of medical necessity of the requested treatment based on substantial evidence. (*Dubon II at p. 1312*; *Bodam at p. 1522*.) We agree with the WCJ that the treatment requested is reasonable, necessary, and a compensable consequence of the industrial injury.

> The WCJ has found that the treatment requested **[*7]** is reasonable, necessary, and a compensable consequence of the industrial injury, pursuant to the opinions of the primary treating physician. Defendant's petition makes numerous arguments as to why the treating physician's opinion is not substantial evidence. However, the plain language of the physician's opinion, as cited above, provides a clear and logical explanation as to why the requested treatment is a compensable consequence of the industrial injury. Applicant's treatment for her serious industrial injuries should not suffer any further delays. (Report, p. 8.)

We further agree with the WCJ that the 2016 stipulations and award entered between the parties does not prohibit the requested treatment. (Defendant Exhibit H, Award and Stipulations with Request for Award.) The WCJ states in his Report:

[171]**

> CAN AN ADDENDUM TO A STIPULATION AND AWARD LIMIT FUTURE MEDICAL CARE TO EXCLUDE MEDICAL TREATMENT TO BODY PARTS THAT ARE A COMPENSABLE CONSEQUENCE OF THE ORIGINAL INJURY?
>
> Numerous cases have established the rule that the WCAB has jurisdiction to award treatment for new conditions that are a compensable consequence of the initial industrial injury—even if the condition was not part of the **[*8]** original award, and even if the employee first requests treatment for the condition more than five years after date of injury: *Testa Enterprises v. WCAB (De La Garza) (2003) 68 CCC 1626 (writ denied)*;

Pirelli Armstrong Tire Co. v. WCAB (Van Zant) (2003) 68 CCC 970 (writ denied); Gardner v. WCAB (1992) 57 CCC 670 (Court of Appeal decision unpublished in official reports); Bidwell v. WCAB (1993) 58 CCC 237 (Court of Appeal decision unpublished in official reports); Allar v. Fullerton School District, 2010 Cal. Wrk. Comp. P.D. LEXIS 455; Del Rosario v. City of Oakland, 2010 Cal. Wrk. Comp. P.D. LEXIS 574; City of Los Altos (Police Department) v. WCAB (Verna) (2012) 77 CCC 640 (writ denied); San Joaquin Community Hospital v. WCAB (Clark, Diefenbach) (2014) 79 CCC 984 (writ denied); Crossley v. Federal Express Corp., 2015 Cal. Wrk. Comp. P.D. LEXIS 342; Meadows v. Bridgestone, 2019 Cal. Wrk. Comp. P.D. LEXIS 498.

Turning to the case at hand, applicant has alleged that she is in need of medical treatment to the lower extremities as a compensable consequence of the industrially injured neck and wrists. However, the parties entered into a stipulated Award on January 14, 2016 which states at paragraph (d) of the addendum: "This Stipulated Award specifically limits the defendant's liability for future medical care to only the body parts of psyche/adjustment disorder, cervical spine and bilateral carpal tunnel syndrome post release surgery."

The cases cited above establish the principle that medical care for an industrially injured body part will include treatment to other conditions and body parts that are later found to be a compensable consequence of the original injury. Therefore, defendant may not refuse treatment to body parts or conditions which are found to be a compensable consequence of the original injury to admitted body parts. **[*9]** Any language in a settlement which purports to do so is contrary to law, and should not be enforced by the WCAB. In this case, paragraph (d) of the addendum to the stipulations with request for award states: "Therefore this stipulated award specifically limits the defendant's liability for future medical care to only the body parts of psyche/adjustment disorder, cervical spine and bilateral carpal tunnel syndrome post release surgery." (Defendant's exhibit H).

Future medical care in a stipulated award must always necessarily include future medical care for treatment that is found to be a compensable consequence resulting from the original industrially injured parts. **[**172]** **This right cannot be bargained away by the parties**. To hold otherwise would severely diminish the rights of injured workers to receive appropriate medical care that results from their injury. Insurance carriers would forever seek to include addendums in stipulated awards of medical care that limit their liability for treatment to additional body parts. (Report, pp. 5–6; emphasis in original.)

Finally, although we conclude that applicant's petition for reconsideration for penalties and attorney's fees is premature, we agree **[*10]** with the WCJ that, based on the facts of this case, penalties and attorney's fees are not appropriate.

Accordingly, we grant reconsideration of the July 3, 2023 Findings and Award to amend finding number 1 to indicate that defendant did not timely deferred utilization review upon receiving two medical reports with two requests for authorization.

For the foregoing reasons,

IT IS ORDERED that defendant Automobile Club of Southern California Petition for Reconsideration of the July 3, 2023 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 3, 2023 Findings and Award is **AMENDED** as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The evidence submitted supports a conclusion that defendant did not timely defer utilization review upon receiving two reports and two Requests for Authorization from the primary treating physician that requested treatment to additional body parts that were not included in the prior award.

…

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Craig Snellings

I concur,
[173]**

Commissioner Joseph V. Capurro

Commissioner Jose H. Razo

Perez v. Galt Joint Union Elementary School Dist.

Court of Appeal of California, Third Appellate District

September 25, 2023, Opinion Filed

Civil No. C092691

Reporter
96 Cal. App. 5th 150 *; 314 Cal. Rptr. 3d 194 **; 88 Cal. Comp. Cases 937 ***; 2023 Cal. App. LEXIS 773 ****

ANEL PEREZ, Plaintiff and Appellant, v. GALT JOINT UNION ELEMENTARY SCHOOL DISTRICT, Defendant and Respondent.

Subsequent History: [**1]** Certified for Publication October 5, 2023

Prior History: Sacramento Superior Court No. 34201600196960CUPOGDS—Gerrit W. Wood, Judge

Perez v. Galt Joint Union Elementary School District, 2023 Cal. App. Unpub. LEXIS 5632, 2023 WL 6209501 (Cal. App. 3d Dist., Sept. 25, 2023)

Disposition: The judgment is *affirmed*.

Core Terms

school district, volunteer, governing board, Elementary, spelling bee, minutes, workers' compensation, district board, trial court, elementary district, Megan's Law, authorization, policies, Interrogatory, coverage, spelling, governing board of school district, elementary school, deposition, designee, notice, staff, governing board of the district, administrative regulation, exclusive remedy, answering, clearance, recording, judging, entity

Case Summary

Overview

HOLDINGS: [1]-A resolution passed under *Lab. Code, § 3364.5*, in 1968 by the school district's governing board converted a volunteer's status to that of an employee under the Workers' Compensation Act, rendering workers' compensation the sole and exclusive remedy for her injuries sustained at an elementary school spelling bee. The evidence supported that the resolution had been passed and not rescinded, that the volunteer had been authorized by the governing board to perform volunteer services at the bee, and that her judging activities were under the direction and control of the principal, acting for the superintendent; [2]-Defendant's answers, identifying the district by a different name than used when passing the resolution, did not prevent defendant from relying on the resolution.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Business & Corporate Compliance > Education > Employment Regulations & Rules
Education Law > Administration & Operation > Employment Regulations & Rules

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

Workers' Compensation & SSDI > Coverage > Employment Status > Governmental Employees

Education Law > Departments of Education > State Departments of Education > School Superintendents

HN1[] **Education, Employment Regulations & Rules**

Under the Workers' Compensation Act, Lab. Code, § 3200 et seq., the right to recover workers' compensation benefits is the sole remedy of an employee against an employer for an injury arising out of and in the course of

employment, Lab. Code, §§ 3600, 3602. Generally, a person performing voluntary services for a public agency who does not receive remuneration for the services is excluded from the definition of employee under the act. Lab. Code, § 3352, subd. (a)(9). However, under certain circumstances, usually upon the governing board's adoption of a resolution, volunteers of statutorily identified organizations can be deemed employees under the act. One such exception to the exclusion of volunteers from the definition is contained in Lab. Code, § 3364.5, and applies upon the adoption of a resolution of the governing board of the school district to persons authorized by the governing board of a school district or the county superintendent of schools to perform volunteer services for the school district who are injured while engaged in the performance of any service under the direction and control of the governing board of the school district or the county superintendent. Lab. Code, § 3364.5.

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN2[] Standards of Review, Questions of Fact & Law

When the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed.

Governments > Legislation > Interpretation

HN3[] Legislation, Interpretation

In construing a statute, the court strives to ascertain and effectuate the Legislature's intent. Because statutory language generally provides the most reliable indicator of that intent citations, the court turns to the words themselves, giving them their usual and ordinary meanings and construing them in context. If the language contains no ambiguity, the court presumes the Legislature meant what it said, and the plain meaning of the statute governs. If, however, the statutory language is susceptible of more than one reasonable construction, the court can look to legislative history and to rules or maxims of construction The court may also consider the impact of an interpretation on public policy, for where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.

Governments > Legislation > Interpretation

HN4[] Legislation, Interpretation

Lab. Code, § 3202, commands that the Workers' Compensation Act, Lab. Code, § 3200 et seq., be liberally construed by the courts with the purpose of extending its benefits for the protection of persons injured in the course of their employment. This command governs all aspects of workers' compensation; it applies to factual as well as statutory construction. Thus, if a provision in the act may be reasonably construed to provide coverage or payments, that construction should usually be adopted even if another reasonable construction is possible. The rule of liberal construction is not altered because a plaintiff believes that he or she can establish negligence on the part of the employer and brings a civil suit for damages. It requires that the court liberally construe the act in favor of awarding workers' compensation, not in permitting civil litigation.

Business & Corporate Compliance > Education > Employment Regulations & Rules
Education Law > Administration & Operation > Employment Regulations & Rules

Workers' Compensation & SSDI > Coverage > Employment Status > Governmental Employees

HN5[] Education, Employment Regulations & Rules

Applying principles of liberal construction of the Workers' Compensation Act (Lab. Code, § 3200 et seq.), the court concludes (1) that so long as a resolution has been passed at some point by the governing board of a school district and not later rescinded, Lab. Code, § 3364.5 does not require that district board members and staff be aware of the statute at the time a volunteer is injured in order for exclusivity to apply; (2) district board members do not need to know about and authorize a specific volunteer's involvement in a specific activity for the exception to apply; and (3) district board members do not need to

directly control and direct a volunteer's actions for the exception to apply.

Governments > Legislation > Interpretation

HN6[] Legislation, Interpretation

The court does not add words to a statute. Code Civ. Proc., § 1858.

Governments > Local Governments > Employees & Officials

HN7[] Local Governments, Employees & Officials

Lab. Code, § 3364.5, applies principles of workers' compensation exclusivity to a volunteer performing services under the supervision of an authorized board or county superintendent designee who is abiding by the rules, policies, and regulations developed by the board and exercising that supervision pursuant to authority granted by the board.

Governments > Legislation > Interpretation

HN8[] Legislation, Interpretation

The court selects the statutory construction that comports most closely with apparent intent of Legislature, with a view to promoting rather than defeating the general purpose of the statute. Statutes are to be so construed as not to give rise to an absurdity in their attempted application and as not to destroy their efficacy as a whole or in substantial part.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Inferences & Presumptions > Inferences

HN9[] Substantial Evidence, Sufficiency of Evidence

The substantial evidence standard, has three pillars. First, the court accepts all evidence supporting the trial court's order. Second, the court completely disregards contrary evidence. Third, the court draws all reasonable inferences to affirm the trial court. These three pillars support the lintel: the court does not reweigh the evidence. Under this standard of review, parties challenging a trial court's factfinding bear an enormous burden.

Evidence > ... > Documentary
Evidence > Transcripts & Translations > Deposition Transcripts

HN10[] Transcripts & Translations, Deposition Transcripts

Even if a witness's deposition testimony had been inconsistent with his trial testimony, such inconsistency is to be evaluated by the trier of fact. Trial testimony may be impeached by inconsistent deposition testimony, but absent an abuse of the discovery process, such testimony should not be precluded.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN11[] Appeals, Appellate Briefs

Every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. Issues not raised in an appellant's brief are deemed waived or abandoned. Additionally, each brief must: state each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority. Cal. Rules of Court, rule 8.204(a)(1)(B). Arguments that fail to satisfy this rule are forfeited.

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > Effect of Admissions

Evidence > Types of Evidence > Judicial Admissions > Admissions During Trials

Evidence > Types of Evidence > Judicial Admissions > Pleadings

Evidence > Types of Evidence > Judicial Admissions > Effects

HN12[] Requests for Admissions, Effect of Admissions

A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case. Judicial admissions may be made in a pleading. Facts established by pleadings as judicial admissions are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her. A pleader cannot blow hot and cold as to the facts positively stated.

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN13[] Standards of Review, Questions of Fact & Law

When the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule.

Workers' Compensation & SSDI > Defenses > Exclusivity Provisions

HN14[] Defenses, Exclusivity Provisions

Lab. Code, § 3364.5 does not require a resolution passed pursuant to the statute regarding application of workers' compensation exclusivity to use the precise name of the district for the resolution to apply.

Headnotes/Summary

Summary

[*150] CALIFORNIA OFFICIAL REPORTS SUMMARY

A volunteer brought a personal injury action against the school district after she was seriously injured at an elementary school spelling bee. Following a bench trial, the court entered judgment in favor of the district on the ground that a resolution passed under Lab. Code, § 3364.5, in 1968 by the district's governing board converted the volunteer's status to that of an employee under the Workers' Compensation Act (Lab. Code, § 3200 et seq.), rendering workers' compensation the sole and exclusive remedy. (Superior Court of Sacramento County, No. 34201600196960CUPOGDS, Gerrit W. Wood, Judge.)

The Court of Appeal affirmed the judgment, holding that 1968 resolution applied to convert the volunteer's status to that of an employee. When a resolution has been passed by the governing board of a school district and not later rescinded, Lab. Code, § 3364.5 does not require, in order for the resolution to apply, that district board members and staff be aware of the statute at the time a volunteer is injured, that district board members know about and authorize a specific volunteer's involvement in a specific activity, or that district board members directly control and direct a volunteer's actions. In the current case, the evidence supported that the resolution had been passed and not rescinded, that the volunteer had been authorized by the governing board to perform volunteer services at the bee, and that her judging activities were under the direction and control of the principal, acting for the superintendent. Defendant's answers, identifying the district by a different name than used when passing the resolution, did not prevent defendant from relying on the resolution. (Opinion by Hull, Acting P. J., with Robie and Mauro, JJ., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] (1)

Workers' Compensation § 6—Exclusivity of Remedy—Volunteers.

Under the Workers' Compensation Act (Lab. Code, § 3200 et seq.) the right to recover workers' compensation benefits is the sole remedy of an employee against an employer for an injury arising out of and in the course of employment (Lab. Code, §§ 3600, 3602). Generally, a person performing voluntary services for a public agency who does not receive remuneration for the services is excluded from the definition of employee under the act (Lab. Code, § 3352, subd. (a)(9)). However, under certain circumstances, usually upon the governing board's adoption of a resolution, volunteers of statutorily identified organizations can be deemed employees under the act. One such exception to the exclusion of volunteers from the definition is contained

in *Lab. Code, § 3364.5*, and applies upon the adoption of a resolution of the governing board of the school district to persons authorized by the governing board of a school district or the county superintendent of schools to perform volunteer services for the school district who are injured while engaged in the performance of any service under the direction and control of the governing board of the school district or the county superintendent (*Lab. Code, § 3364.5*).

CA(2) **(2)**

Appellate Review § 126—Scope—Substantial Evidence.

When the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed.

CA(3) **(3)**

Statutes § 21—Construction—Legislative Intent—Plain Meaning—Context—Aids.

In construing a statute, the court strives to ascertain and effectuate the Legislature's intent. Because statutory language generally provides the most reliable indicator of that intent, the court turns to the words themselves, giving them their usual and ordinary meanings and construing them in context. If the language contains no ambiguity, the court presumes the Legislature meant what it said, and the plain meaning of the statute governs. If, however, the statutory language is susceptible of more than one reasonable construction, the court can look to legislative history and to rules or maxims of construction. The court may also consider the impact of an interpretation on public policy, for where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.

CA(4) **(4)**

Workers' Compensation § 5—Construction of Statutes.

Lab. Code, § 3202, commands that the *Workers' Compensation Act (Lab. Code, **[*152]** § 3200 et seq.)* be liberally construed by the courts with the purpose of extending its benefits for the protection of persons injured in the course of their employment. This command governs all aspects of workers' compensation; it applies to factual as well as statutory construction. Thus, if a provision in the act may be reasonably construed to provide coverage or payments, that construction should usually be adopted even if another reasonable construction is possible. The rule of liberal construction is not altered because a plaintiff believes that he or she can establish negligence on the part of the employer and brings a civil suit for damages. It requires that the court liberally construe the act in favor of awarding workers' compensation, not in permitting civil litigation. The court does not add words to a statute (*Code Civ. Proc., § 1858*).

CA(5) **(5)**

Workers' Compensation § 6—Exclusivity of Remedy—Volunteers—Resolution—School District.

A resolution passed in 1968 by the school district's governing board converted a volunteer's status to that of an employee under the *Workers' Compensation Act (Lab. Code, § 3200 et seq.)*, rendering workers' compensation the sole and exclusive remedy for injuries sustained at an elementary school spelling bee. Liberally construing the *Workers' Compensation Act (Lab. Code, § 3200 et seq.)*, the court concluded that (1) so long as a resolution has been passed at some point by the governing board of a school district and not later rescinded, *Lab. Code, § 3364.5*, does not require that district board members and staff be aware of the statute at the time a volunteer is injured in order for it to apply; (2) district board members do not need to know about and authorize a specific volunteer's involvement in a specific activity for the exception to apply; and (3) district board members do not need to directly control and direct a volunteer's actions for the exception to apply. *Section 3364.5* applies to a volunteer performing services under the supervision of an authorized board or county superintendent designee who is abiding by the rules, policies, and regulations developed by the board and exercising that supervision pursuant to authority granted by the board.

[*Cal. Forms of Pleading and Practice (2023) ch. 577, Workers' Compensation, § 577.311*.]

CA(6) **(6)**

Statutes § 21—Construction—Legislative Intent.

The court selects the statutory construction that comports most closely with apparent intent of Legislature, with a view to promoting rather than defeating the general purpose of the statute. Statutes are to be so construed as not to give rise to an absurdity in their attempted application and as not to destroy their efficacy as a whole or in substantial part.

[*153] CA(7)[] (7)

Appellate Review § 126—Scope of Review—Substantial Evidence.

The substantial evidence standard has three pillars. First, the court accepts all evidence supporting the trial court's order. Second, the court completely disregards contrary evidence. Third, the court draws all reasonable inferences to affirm the trial court. These three pillars support the lintel: the court does not reweigh the evidence. Under this standard of review, parties challenging a trial court's factfinding bear an enormous burden.

CA(8)[] (8)

Discovery and Depositions § 14—Use at Trial—Inconsistent Testimony.

Even if a witness's deposition testimony had been inconsistent with his trial testimony, such inconsistency is to be evaluated by the trier of fact. Trial testimony may be impeached by inconsistent deposition testimony, but absent an abuse of the discovery process, such testimony should not be precluded.

CA(9)[] (9)

Appellate Review § 109—Briefs—Argument and Authority.

Every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. Issues not raised in an appellant's brief are deemed waived or abandoned. Additionally, each brief must: state each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority (*Cal. Rules of Court, rule 8.204(a)(1)(B)*). Arguments that fail to satisfy this rule are forfeited.

CA(10)[] (10)

Pleading § 13—Construction—Judicial Admissions.

A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case. Judicial admissions may be made in a pleading. Facts established by pleadings as judicial admissions are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her. A pleader cannot blow hot and cold as to the facts positively stated.

CA(11)[] (11)

Workers' Compensation § 6—Exclusivity of Remedy—Volunteers—Resolution.

Lab. Code, § 3364.5, does not require a resolution passed pursuant to the statute to use the precise name of the district for the resolution to apply.

California Compensation Headnotes/Summary

Headnotes

Employees Covered by Workers' Compensation > School District Volunteers

Court of Appeal, affirming trial court's judgment, held that plaintiff who was seriously injured in fall on 12/4/2015 while volunteering at elementary school spelling bee could not pursue personal injury action against [*938] defendant school district, but was limited to workers' compensation as her exclusive remedy under *Labor Code § 3364.5*, which provides that, upon governing board's adoption of resolution, school district volunteer authorized by and under direction and control of school district's governing board or county superintendent to act as district volunteer is deemed to be district employee for purposes of workers' compensation, when Court of Appeal rejected plaintiff's narrow reading of *Labor Code § 3364.5* to require district board members to be aware of their duties under statute when she was injured, know about spelling bee, and be present at**

bee, and interpreted *Labor Code § 3364.5* more broadly, to find that (1) so long as resolution has been passed at some point by governing board of district and not later rescinded, *Labor Code § 3364.5* does not require that district board members and staff be aware of statute at time volunteer is injured, nor to know about and authorize a specific volunteer's involvement in a specific activity or directly control and direct volunteer's actions for exception to apply, (2) substantial evidence supported trial court's finding that plaintiff was authorized to act as volunteer and acted under direction and control of board in this instance, where evidence established that defendant's governing board adopted *Labor Code § 3364.5* resolution in 1968, and resolution remained in effect at time of plaintiff's injury in 2015, that plaintiff was "authorized by the governing board of the school district" to perform volunteer services when she was serving as volunteer at spelling bee, and that spelling bee and plaintiff's judging activities were under direction and control of elementary school principal, who acted at direction of district superintendent with respect to daily operations of elementary school, including spelling bee, and (3) *Labor Code § 3364.5* does not require resolution passed pursuant to statute to use precise name of school district for resolution to apply, as it is possible district's name may change over time, and to require new resolution with each potential name change would create rule where numerous persons who would otherwise be covered by exception to be inadvertently excluded.

[See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 3.45*; Rassp & Herlick California Workers' Compensation Law, Ch. 2, § 2.04[4].]

Counsel: Fielder Fielder & Fielder and Scott L. Fielder for Plaintiff and Appellant. **[*154]**

Horvitz & Levy, Steven Samuel Fleischman, Scott P. Dixler; Schuering Zimmerman & Doyle, Robert H. Zimmerman and Denise Jarman for Defendant and Respondent.

Judges: Opinion by Hull, Acting P. J., with Robie and Mauro, JJ., concurring.

Opinion by: Hull, Acting P. J.

Opinion

[199]**

HULL, Acting P. J.—

SUMMARY OF THE APPEAL

HN1[↑] *CA(1)*[↑] **(1)** Under the *Workers' Compensation Act (Lab. Code, § 3200 et seq.; the Act)* the right to recover workers' compensation benefits is the sole remedy of an employee against an employer for an injury arising out of and in the course of employment (*Lab. Code, §§ 3600*, *3602*; see also *Arriaga v. County of Alameda (1995) 9 Cal.4th 1055, 1058–1059 [40 Cal. Rptr. 2d 116, 982 P.2d 150]*). Generally, a person "performing voluntary service[s] for a public agency … who does not receive remuneration for the services" is excluded from the definition of "employee" under the Act. (*Lab. Code, § 3352, subd. (a)(9)*.) **[***939]** However, under certain circumstances, usually upon the governing board's adoption of a resolution, volunteers of statutorily identified organizations can be deemed employees under the Act. (See, e.g., *Lab. Code, §§ 3361.5–3364.7*.) **[****2]** One such exception to the exclusion of volunteers from the definition is contained in *Labor Code section 3364.5*, and applies "upon the adoption of a resolution of the governing **[**200]** board of the school district" to "person[s] authorized by the governing board of a school district or the county superintendent of schools to perform volunteer services for the school district" who are injured "while engaged in the performance of any service under the direction and control of the governing board of the school district or the county superintendent." (*Lab. Code, § 3364.5*.)

Here, plaintiff and appellant Anel Perez filed a personal injury action against the defendant and respondent school district after she was seriously injured while volunteering at an elementary school event. Following a bench trial, the court entered judgment in favor of the district on the ground that a resolution passed under *Labor Code section 3364.5* in 1968 by the "Governing Board of Galt Joint Union School District of Sacramento and San Joaquin Counties" for the "Galt Joint Union School District" converted plaintiff's status to that of an employee under the Act, rendering workers' compensation the sole and exclusive remedy to compensate plaintiff for her injuries.

On appeal, we consider what **[****3]** it means for a volunteer to be "authorized" and under the "direction and control" of the governing board or county superintendent under the statute. We also consider

whether the resolution **[*155]** needed to be expressly made applicable to the "Galt Joint Union Elementary District" and passed by a governing board that specifically identified itself as the governing board of the "Galt Joint Union Elementary School District" in order for the resolution to apply to plaintiff. In relation to the second issue, plaintiff has asked us to decide if the defendant school district, which was sued and filed answers under the name "Galt Joint Union Elementary School District" should be estopped under the doctrines of judicial admissions and from arguing the resolution applied to volunteers of the defendant district in 2015.

We affirm the trial court's judgment.

Preliminary Matters

Before we begin our analysis, we offer an explanation as to how we refer to the district throughout this decision, and we rule on one undecided motion and two requests for judicial notice filed in this appeal upon which we deferred rulings. We also offer a brief note regarding our treatment of some of the facts and issues raised **[****4]** in the briefs.

One of the issues that arose at trial was whether the defendant school district should be referred to as the Galt Joint Union *Elementary* School District, or the Galt Joint Union School District and/or whether the board of the Galt Joint Union School District could pass a resolution that applied to the Galt Joint Union *Elementary* School District. Though we conclude the trial court correctly determined that the evidence admitted at trial supports that the two names refer to one **[***940]** and the same district, throughout this decision we will refer to the defendant as "the defendant" or "the district," and we will avoid using the two names unless necessary in referring to the evidence regarding the district's name or to how the parties refer to the district in the pleadings in this matter.

The defendant requested judicial notice of an analysis prepared by the staff of the Senate Local Government Committee regarding Senate Bill No. 336 (1967 Reg. Sess.) (Senate Bill 336). Defendant attached a copy of the subject report to its request. Plaintiff did not oppose defendant's request. Legislative committee reports and analyses are properly subject to judicial notice. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2005) 133 Cal.App.4th 26, 32 [34 Cal. Rptr. 3d 520]*.) We grant defendant's **[****5]** request.

Plaintiff requested judicial notice of a petition to stay proceedings that she filed before the Workers' Compensation Appeals Board (WCAB) and the WCAB's order staying those proceedings. These materials were offered to support **[**201]** an argument that plaintiff made in reply to defendant's argument that **[*156]** she should be estopped from disputing the exclusive jurisdiction of the WCAB. Defendant opposed plaintiff's request and filed a motion to strike the portion of plaintiff's reply brief that relies on the documents. Because, when considering the merits of both parties' arguments, we find the trial court correctly concluded the WCAB has exclusive jurisdiction, a finding as to whether plaintiff ought to be estopped from arguing WCAB does not have exclusive jurisdiction would not change our final decision. Accordingly, we deny both plaintiff's request and defendant's motion because they have no impact on the disposition of this appeal. Similarly, we note that when and how a workers' compensation claim was filed on plaintiff's behalf, and whether benefits have been paid under that claim does not affect our decision here. Plaintiff did not need to have notice of the resolution nor to opt **[****6]** to be treated as an employee under the Act in order to be deemed an employee subject to workers' compensation's exclusive remedies once the district's board adopted a controlling resolution. (See *Minish v. Hanuman Fellowship (2013) 214 Cal.App.4th 437, 468 [154 Cal. Rptr. 3d 87]*.) Thus, we do not consider the evidence in the record regarding whether plaintiff personally made a claim for benefits or accepted workers' compensation payments.

Facts and History of the Proceedings

The Pleadings

In July 2016, plaintiff filed an unverified complaint in the Superior Court in Sacramento County alleging personal injury. Plaintiff named Galt Joint Union Elementary School District as the defendant.

According to the complaint, on December 4, 2015, plaintiff was acting as a volunteer for the spelling bee held at River Oaks Elementary School, which is owned or in the possession of the Galt Joint Union Elementary School District. The complaint alleges that while attending the event, plaintiff fell off the school's auditorium stage and down an adjacent stairway, causing catastrophic injury to her. Plaintiff alleged economic and noneconomic damages.

[*941]**

Defendant filed an answer in November 2016. In the introductory paragraph of the answer, defendant wrote, "COMES NOW Defendant GALT JOINT UNION **[****7]** ELEMENTARY SCHOOL DISTRICT, a public entity, and answering the Complaint of Plaintiffs on file herein, admits, denies and alleges as follows." The answer then contained a general denial under *Code of Civil Procedure section 431.30, subdivision (d)*, in which the defendant generally and specifically denied each and every allegation and cause of action contained in the complaint, and in which defendant denied plaintiff was entitled to damages due to any wrongful act by the defendant. The answer then alleged various affirmative defenses. The affirmative defenses in **[*157]** this initial answer did not include anything regarding the availability of workers' compensation coverage.

In late 2018, the defendant filed a successful motion for leave to amend its answer to the complaint which added an affirmative defense labeled "EXCLUSIVE REMEDY." It says, "[a]s a separate, further and affirmative defense, this answering defendant alleges plaintiff is barred and precluded from recovery herein by *Labor Code sections 3600* and *3602* in that the exclusive remedy against this answering defendant, if any, is that provided by the California Labor Code, Division 4."

Bifurcation of Issues and Phase One Trial

The defendant filed a motion to bifurcate the trial. The motion proposed phase **[**202]** one would **[****8]** address if a resolution adopted under *Labor Code section 3364.5* applied to defendant, such that plaintiff's sole and exclusive remedy would be the defendant's workers' compensation. The trial court granted the motion. The two-day phase one bench trial took place in January 2020.

Testimony and Evidence Presented by the District's Superintendent

The defense called Dr. Karen Schauer, who testified that she was the superintendent of the "Galt Joint Union Elementary School District." She had worked for the district since 1980, in various capacities, beginning as a teacher. Schauer's testimony and the evidence she presented touched on three key issues: the 1968 adoption of a resolution pursuant to *Labor Code section 3364.5* by the governing board of the "Galt Joint Union School District," the names by which the district identifies itself, and her use of school principals as her designees.

Part of Schauer's testimony with respect to the first and second key issues involved the authentication of district records, including board minutes and the *Labor Code section 3364.5* resolution at issue here. Schauer described the process of recording and verifying the content of board meeting minutes. She stated final minutes are kept in the district office in a fireproof safe. The **[****9]** defense brought copies of minutes from district archives dating back to 1952 to trial. Schauer stated district resolutions will also be archived, but not necessarily stored with the minutes. When asked if the district office where she works would "maintain the board minutes or resolutions for any other school district other than the Galt Joint Union Elementary School District" she responded, "[n]o."

Schauer's testimony on the three key topics is summarized here.
[*942]** **[*158]**

Evidence Regarding the Labor Code Section 3364.5 Resolution

Schauer testified about board minutes from the March 18, 1968, board meeting. According to the header of those minutes, the name of the school district whose governing board held a meeting that day was the "Galt Joint Union School District." The members of the governing board identified in the minutes included Donald F. Nottoli. Schauer knew Nottoli from working with the district. He was on the governing board of the district for years—until he retired in the 2000's. As far as Schauer knew, Nottoli never served on the governing board of any district other than the defendant district. The minutes reflect that at the meeting, the board unanimously voted to approve Resolution No. 37, "which provides **[****10]** for compensation insurance coverage for persons authorized to perform volunteer services for the district."

Schauer also testified about Resolution No. 37. According to the resolution, on March 18, 1968, the "Governing Board of Galt Joint Union School District of Sacramento and San Joaquin Counties" adopted the resolution. Resolution No. 37 states the "Governing Board of the Galt Joint Union School District desire[d] to avail itself of the opportunity to provide" the coverage outlined in *Labor Code section 3364.5*. It resolved "that authorized, unsalaried volunteers are hereby deemed to be employees of the Galt Joint Union School District for

workmen's compensation insurance purposes." The resolution was signed by Donald F. Nottoli, whose title was clerk of the board.

It was Schauer's understanding that Resolution No. 37 was passed on behalf of the district for which she worked. She understood this to be true because it was signed by Donald Nottoli, and it contained the "name of our district, Galt Joint Union School District" within the resolution. She **[**203]** understands both "Galt Joint Union School District" and "Galt Joint Union School District of Sacramento and San Joaquin Counties" to refer to the district for **[****11]** which she works, the "Galt Joint Union Elementary School District." She agreed the governing board that identified itself as serving Galt Joint Union School District of Sacramento and San Joaquin Counties and Galt Joint Union School District was the same entity as the governing board of the Galt Joint Union Elementary School District.

Schauer stated she was not aware of the existence of Resolution No. 37 before the date of plaintiff's accident.

Evidence Regarding the Name of the District

Schauer testified that the names "Galt Joint Union School District, Galt Joint Union Elementary District, and Galt Joint Union School District of **[*159]** Sacramento and San Joaquin Counties" all refer to the district for which she works, and the governing board of the district would refer to itself using the various iterations of the district's name.

Schauer identified many documents that reflected the district sometimes being referred to as "Galt Joint Union Elementary" or "Galt Joint Union Elementary School District," and at other times being referred to as "Galt Joint Union School District." For example, she described a 2016 W-2 form that identified the **[***943]** employer as "Galt Joint Union Elementary," a 1973 Registration **[****12]** for Tax-Free Identification registering the "Galt Joint Union School District," and a 2009 information return for tax-exempt governmental obligations issued by the "Galt Joint Union School District" which each used the same unique employer identification number (EIN) to identify the respective employer, registrant, and issuer. Addresses listed on the 1973 and 2009 documents were for buildings where Schauer had worked in her capacity as a district employee, and they were signed by persons she recognized as former district administrators.

Schauer also identified an indirect costs allocation plan for the "Galt Joint Union School District" and a State Department of Education listing for the "Galt Joint Union Elementary" school district that both identify the referenced districts using the same county district school (CDS) number, which she recognized as being the CDS number for the district where she works and a number she said she had never seen used for any other district.

Schauer reviewed copies of minutes of the governing board from district archives going back many years including: minutes from a 1959 meeting of the governing board of the "Galt Joint Union School District" on which **[****13]** she recognized one listed board member who was a member of the governing board of the district at which she works when she began working for the district and another as a person who has a school in the district named after him; meeting minutes from the April, May, June, and July meetings in 1998, which alternatingly are labeled as the meeting minutes for the board of the "Galt Joint Union School District" and the "Galt Joint Union Elementary District."

Schauer looked at board minutes from June 26, 2001. Nottoli is identified as a board member at the meeting. The minutes identify the district as "Galt Joint Union Elementary School District." A resolution was passed at the meeting to acquire real property for a middle school. She also looked at the grant deed for the property, which was recorded on July 13, 2001. The grantee is listed as "Galt Joint Union School District." The deed also identifies the district requesting the recording and to which a copy should be **[*160]** mailed **[**204]** following recording as "Galt Joint Union School District." It is her understanding that the "Galt Joint Union Elementary School District" owned the property.

Schauer also testified to a statement of facts prepared and **[****14]** filed with the California Secretary of State in December 2000. Jeff Jennings, who was the superintendent of the district for which she works in December 2000 signed the statement. It identifies the "Galt Joint Union Elementary School District" as the legal name of the district. Donald Nottoli is identified as a board member on the document. She understands the Donald Nottoli listed to be the same one she worked with and the same one who executed Resolution No. 37. On cross-examination, Schauer acknowledged that a statement of facts, in part, serves as a means for a school district to file its name with the California Secretary of State, in order to provide a legal way to identify the district filing the statement.

[*944]**

Schauer admitted that she represents to the general public that the name of the district is "Galt Joint Union Elementary School District." Schauer agreed it was reasonable for plaintiff to believe she was volunteering for the "Galt Joint Union Elementary School District."

Schauer explained why the district has come to use both the name "Galt Joint Union School District" and "Galt Joint Union Elementary School District" to identify itself. She said, "in a community with two **[****15]** school districts," the other of which is called the Galt Joint Union *High* School District, "when it comes to communicating the name of the school district" to identify the elementary district only "Galt Joint Union School District is not necessarily clear that it's an elementary district. So … there's so many different organizations or agencies that we prepare information for and what they require in terms of the name of the school district may vary but the ID numbers are the same."

Testimony Regarding Using Principals as Designees

Schauer testified that she understands the governing board grants her authority to direct and control volunteers in the district and she, in turn, can delegate the direction and control to school administrators. From a practical standpoint, the governing board could not provide direct oversight of events at schools like spelling bees. They are not present during the school day, and oversight requires being able to provide redirection and the board is not on site at schools to do that. If an event is happening at a school where her job duties do not include providing direct oversight, she delegates that power. At River Oaks Elementary School, Schauer typically **[****16]** delegates that power to the **[*161]** principal, who was Lois Yount in 2015. She delegated that power to Yount pursuant to board policies and administrative regulations. Schauer hired Yount as the principal.

According to Schauer, the governing board has the authority to prohibit events like spelling bees. The governing board knows about the spelling bees for the most part, because they have been going on for years, and she believes a board member has even judged one at River Oaks. Monthly calendars with scheduled events are included in board information packets, and she would expect to see school spelling bees listed on those.

Schauer testified Yount had the authority to control the spelling bee setup, including the seating of volunteers, placement of tables, and where students would stand during the bee. In turn, Schauer could have given directives on those topics to Yount and had Yount act on those directives, pursuant to authority given to **[**205]** Schauer through district policies and administrative regulations. Furthermore, the board could vote to change the policy to modify the direction and control Schauer has over volunteers, and Schauer and Yount would follow that policy.

Schauer testified about **[****17]** Megan's Law (Pub.L. No. 104-145 (May 17, 1996) 110 Stat. 1345) clearance forms. District volunteers need to fill out a Megan's Law clearance form each year before working with children.

If Schauer had any reason to prohibit plaintiff from volunteering at the spelling bee, she could have done so. Likewise, as Schauer's designee, Yount could have prohibited plaintiff from volunteering if Yount had discovered plaintiff had not **[***945]** obtained Megan's Law clearance. According to a compliance report to which the district has access, plaintiff had obtained Megan's Law clearance on October 22, 2015, before the spelling bee. When asked if she had any control over plaintiff's activities, Schauer said the control aspect would be related to what it takes to participate in a district event at the school "and that control would mean she needed to have Megan's Law completed and that needed to happen for her to volunteer."

Schauer admitted she was not personally at the spelling bee. She did not personally give any direction to plaintiff at the spelling bee. Schauer was not aware of anyone from the board giving any direction to plaintiff when she volunteered for the spelling bee.

Testimony of Anel Perez

The defendants called plaintiff.
[*162]

Plaintiff testified she **[****18]** had two children who attended River Oaks Elementary at the time of the accident, and she was a frequent volunteer at the school. She was vice-president of the PTA.

Plaintiff testified that the PTA president asked her to volunteer at the bee the day before the event. When plaintiff arrived for the bee, she connected with Yount. Yount gave plaintiff the judge's packet. Yount gave plaintiff insight and instruction on what she expected from plaintiff as a judge. Yount told plaintiff to listen carefully, and if there was a question or dispute about

how a student spelled something, the judges would confer. The judges' table was set up on stage and Yount told plaintiff where to sit at the table. During the bee, plaintiff's chair went backwards off the edge of the stage and she was injured.

Plaintiff agreed that during the time of the spelling bee and before her fall, she "understood that [she] w[as] under the direction and control of Ms. Yount who was in essence running the spelling bee."

Testimony of Lois Yount

The defense called Yount. Pertinent points of her testimony were as follows:

She has worked for "Galt Joint Union Elementary School District" for 20 years. She used to work as a school **[****19]** administrator at River Oaks Elementary. As a school administrator, she would oversee every aspect of the school, including student safety and staff safety, day-to-day happenings, and school functions. She would serve as a leader of instruction, maintenance, and operation. Her direct supervisor, with whom she would communicate on an ongoing basis, was the district superintendent. The superintendent works under the board to make sure employees follow its policies and administrative regulations. The board makes policies and administrative regulations and has the ultimate authority to implement what needs to be done.

There is a school calendar that she knows goes up to the board which would include the date of the annual spelling bee at the school.
[*946]**

[206]** The board makes the policies school administrators need to follow. The board provides oversight to individual schools with their voting power. That voting power relates to the direction and control of volunteers in the district. She understands that the board has a policy that grants authority to the superintendent to direct and control volunteers. Those polices and administrative regulations also allow the superintendent to delegate direction **[****20]** and control over volunteers to school administrators. Regular visitors who are not **[*163]** volunteering on campus—maybe who do a quick visit—have to sign in and get a visitor's badge, but they do not have to go through the Megan's Law clearance.

She was principal of River Oaks on December 4, 2015. She knew plaintiff as a parent, and as a recognizable face on campus. Yount testified that plaintiff volunteered regularly.

Yount met with plaintiff the morning of the bee. The PTA president had informed Yount she was not able to volunteer and had asked plaintiff to take her place. Yount and plaintiff met in the multipurpose room before the bee started. She showed plaintiff where the judging table was, gave her a packet, and showed her where some things were on the table. The packet contained the rules of the spelling bee and had judging instructions. She told plaintiff her job was to listen to the students spell the words and use her list to determine if the child spelled the word correctly. She agreed her contact with plaintiff that morning was "extremely brief."

Yount's power to direct and control the spelling bee the day of the accident came from the administrative regulations and board policies **[****21]** from the governing board, and from the district superintendent. She has to approve spelling bee judges. While the PTA president did not need to ask Yount before she asked plaintiff to judge, if the PTA president asked someone who had not cleared Megan's Law or who Yount thought would not represent the school properly, Yount would not have let that person volunteer. If it was a parent Yount did not know or who had not cleared Megan's Law, Yount would have told the president to find someone else.

The spelling bee at River Oaks goes back at least as far as 2000. It was common for governing board members to serve as judges at the bees.

In working for the district, Yount has heard the district referred to by different names. Those include Galt Joint Union School District, Galt Joint Union Elementary School District, Galt School District, and Galt Elementary School District and all those names refer to the district for which she works. She would not be surprised if someone referred to the district for which she works as "Galt Joint Union School District" because over the years she has heard the district referred to in different ways.

Plaintiff's counsel read from a deposition transcript in **[****22]** which Yount, when asked if she gave plaintiff instructions on how to conduct herself at the bee, responded, "[n]o, she asked me what her role would be, and I said her role would be to listen to the words, that was it. Very little direction was given."
[*947]**

When asked if plaintiff was under a particular person's direction the day of the bee, Yount said plaintiff was under the direction of the school, then added, **[*164]** "I think that would be me as principal." Plaintiff's counsel then read from Yount's deposition, where, when asked, "[w]as [plaintiff] under any particular person's direction that day?," Yount responded, "[n]o." He also read from Yount's deposition where, when asked if anyone gave plaintiff instructions on how to act as a **[**207]** judge, Yount responded, "[n]obody did that I'm aware of."

Interrogatories Read into Evidence

At the trial, plaintiff's counsel read interrogatory responses into the record: "Special Interrogatory No. 37 asks, identify the name, address, title, if applicable, and telephone number of each person and/or entity under whose direction pursuant to Labor Code Section 3364.5 Plaintiff Anel Perez was acting while she was judging the spelling bee that took place at River Oaks Elementary School on December **[****23]** 4th, 2015. The response, as verified by Mr. Barentson is, as a judge at the spelling bee, plaintiff would not be under the direction of a particular person or entity dependent upon the definition of direction. The spelling bee committee, the principal and assistant principal were in charge of running the spelling bee at River Oaks Elementary School on December 4th, 2015.

"And then in a similar Interrogatory No. 38 was asked with regard to the question of control. And the interrogatory reads, identify the name, address, title, if applicable, and telephone number of each person and/or entity under whose control, pursuant to Labor Code Section 3364.5 Plaintiff Anel Perez was acting while she was judging the spelling bee that took place at River Oaks Elementary School on December 4th, 2015. [¶] The Special Interrogatory No. 38 response verified by Mr. Barentson reads, as a judge at the spelling bee, plaintiff would not be under the control of a particular person or entity dependent upon the definition of control. The spelling bee committee, the principal and assistant principal were in charge of running the spelling bee at River Oaks Elementary School on December 4th, 2015."

Dr. Donald Nottoli Stipulation

The parties **[****24]** agreed that the court could consider that if Dr. Donald Nottoli—the son of the Mr. Donald F. Nottoli who signed Resolution No. 37—testified at trial, he would have said he joined the district's board in 1977, and when he joined the board there were two school districts in Galt: one for high school and one for elementary. He would also say that during his time the elementary district was referred to as both Galt Joint Unified School District and Galt Joint Union Elementary School District.

Proceedings After Close of Evidence, Judgment, and Notice of Appeal

Following the close of evidence, the parties submitted posttrial briefs. The court issued a tentative ruling in defendant's favor and provided the parties **[*165]** the opportunity to discuss the tentative ruling at a hearing before entering a final judgment. After the court heard arguments, it adopted and affirmed the tentative ruling. **[***948]**

Judgment in defendant's favor was entered on June 26, 2020. Plaintiff filed and served a timely notice of appeal on August 28, 2020.

DISCUSSION

I

Authorization, Direction, and Control Under Labor Code Section 3364.5

Plaintiff argues that because there was no evidence the district board members were aware of their duties under Labor Code section 3364.5 when she was injured, **[****25]** none of the members were present at the bee, and there is no evidence they knew about the bee, she was not "authorized by the governing board" to act as a volunteer, and she was not performing services under their "direction and control" at the time she was injured. Thus, plaintiff reasons, the trial court should have rejected the **[**208]** defendant's affirmative defense that she was covered by the Act and, therefore, that workers' compensation provided her exclusive remedy.

A. *Standards of Review*

CA(2)[↑] **(2)** To the extent evaluating this argument requires us to determine whether Labor Code section 3364.5 only applies when (1) district board members and employees are aware of its application when a volunteer is injured; (2) district board members know about and authorize a specific volunteer's involvement

in a specific activity; and/or (3) district board members directly control and supervise a volunteer's actions, we consider the question de novo. (*Lopez v. Ledesma (2022) 12 Cal.5th 848, 857 [290 Cal. Rptr. 3d 532, 505 P.3d 212]*.) To the extent it requires us to determine, given our resolution of the foregoing, whether plaintiff was authorized to act as a volunteer and acted under the direction and control of the board in this instance, we ask if that determination was supported by substantial evidence. (*Winograd v. American Broadcasting Co. (1998) 68 Cal.App.4th 624, 632 [80 Cal. Rptr. 2d 378]* ***HN2***[↑] ["When **[****26]** the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed"].)

[*166]

B. *Meaning of the Statute*

CA(3)[↑] **(3)** ***HN3***[↑] "'In construing a statute, "'we strive to ascertain and effectuate the Legislature's intent.' [Citations.] Because statutory language 'generally provide[s] the most reliable indicator' of that intent [citations], we turn to the words themselves, giving them their 'usual and ordinary meanings' and construing them in context. …" (*People v. Castenada (2000) 23 Cal.4th 743, 746–747 [97 Cal. Rptr. 2d 906, 3 P.3d 278]*.) "If the language contains no ambiguity, we presume the Legislature meant what it said, and the plain meaning of the statute governs." (*People v. Robles (2000) 23 Cal.4th 1106, 1111 [99 Cal. Rptr. 2d 120, 5 P.3d 176]*.) If, however, the statutory language is susceptible of more than one reasonable construction, we can look to legislative history (*ibid.*) and to rules or maxims of construction (*Mejia v. Reed (2003) 31 Cal.4th 657, 663 [3 Cal. Rptr. 3d* ***[***949]*** *390, 74 P.3d 166]*.) "… [T]he court may [also] consider the impact of an interpretation on public policy, for '[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.'" (*Ibid.*, quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1387 [241 Cal. Rptr. 67, 743 P.2d 1323]*.)' (*People v. Smith (2004) 32 Cal.4th 792, 797–798 [11 Cal. Rptr. 3d 290, 86 P.3d 348]*. **[****27]**)" (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc. (2005) 36 Cal.4th 412, 426 [30 Cal. Rptr. 3d 755, 115 P.3d 41]*.)

HN4[↑] ***CA(4)***[↑] **(4)** Our Supreme Court has discussed, with respect to determining coverage under the Act, the necessity of complying with "the Legislature's command in *[Labor Code] section 3202* that the Act 'be liberally construed by the courts with the purpose of extending [its] benefits for the protection of persons injured in the course of their employment.'[] This command governs all aspects of workers' compensation; it applies to factual as well as statutory construction. [Citations.] Thus, '[i]f a provision in [the Act] may be reasonably construed to provide coverage or payments, that construction should usually be adopted even if another reasonable construction is possible.' [Citation.] The rule of liberal construction 'is not altered because a plaintiff believes **[**209]** that [she] can establish negligence on the part of [her] employer and brings a civil suit for damages.' [Citation.] It requires that we liberally construe the Act 'in favor of *awarding work*[*ers'*] *compensation*, not in permitting civil litigation. [Citation.]' [Citations.]" (*Arriaga v. County of Alameda, supra, 9 Cal.4th at p. 1065*, italics added.)

HN5[↑] ***CA(5)***[↑] **(5)** Applying these principles, we conclude (1) that so long as a resolution has been passed at some point by the governing board of a district and not later rescinded, *Labor Code section 3364.5* does not require **[****28]** that district board members and staff be aware of the statute at the time a volunteer is injured in order for it to apply; (2) district board members do not need to **[*167]** know about and authorize a specific volunteer's involvement in a specific activity for the exception to apply; and (3) district board members do not need to directly control and direct a volunteer's actions for the exception to apply.

As to our first conclusion, the statute says it applies to subject school district volunteers, "upon the adoption of a resolution of the governing board of the school district." (*Lab. Code, § 3364.5*.) Interpreting the statute to require that every future board member knows of *Labor Code section 3364.5* and a resolution passed within the meaning of that statute reads requirements into the statute that are not in the statute's text. ***HN6***[↑] This runs contrary to the rule of statutory construction that we do not add words to a statute. (See *B.B. v. County of Los Angeles (2020) 10 Cal.5th 1, 9 [267 Cal. Rptr. 3d 203, 471 P.3d 329]*; see also *Code Civ. Proc., § 1858* ["In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction **[****29]** is, if possible, to be adopted as will give effect to all"].) Moreover that interpretation of the statute potentially

narrows the scope of persons to whom the statutory exception can **[***950]** apply contrary to *Labor Code section 3202*'s command that we "liberally construe[]" sections of the Act to extend "their benefits for the protection of persons injured in the course of their employment."

As to our second conclusion, to interpret the phrase "person[s] authorized by the governing board of a school district or the county superintendent of schools to perform volunteer services for the school district" to apply only to persons who have been specifically authorized by the board to volunteer at specific events is also outside the reach of the statute. (See *Minish v. Hanuman Fellowship, supra, 214 Cal.App.4th at pp. 465–466* [rejecting an argument that specific volunteers needed to be identified by the governing board of nonprofits under a similar statute, *Lab. Code, § 3363.6*].) An equally sensible reading of the term "authorized by the governing board" is to interpret it as applying to the class of persons the board authorizes to perform volunteer services at the type of activities it authorizes vis-à-vis its policies and regulations.

As to our third conclusion, to interpret the phrase under the "direction **[****30]** and control of the governing board of the school district or the county superintendent" to mean the board would literally need to directly direct and control a volunteer's activities before the exception could apply is nowhere found in the statute. ***HN7***[⬆] A proper reading of the language of the statute, which is more in keeping with *Labor Code section 3202*'s directive, is that it applies to a volunteer performing services **[**210]** under the supervision of an authorized board or **[*168]** county superintendent designee who is abiding by the rules, policies, and regulations developed by the board and exercising that supervision pursuant to authority granted by the board.

This interpretation of the statute is further supported by the legislative history of *Labor Code section 3364.5*. This history shows that the purpose of its enactment was to enable school districts to provide workers' compensation coverage for the increasing number of school volunteers. A Senate staff analysis described the problem addressed by Senate Bill 336 as follows: "Increasing use is being made of volunteer assistance by numerous school districts—such as under the compensatory programs … and general school assistance … . As volunteers, they are neither compensated nor covered **[****31]** by insurance." (Sen. Local Government Com., staff analysis of Sen. Bill No. 336 (1967 Reg. Sess.) as amended Apr. 13, 1967.) The staff analysis further noted that the proposed legislation would "provide that a school district board may provide personal liability and workmans['] compensation insurance for a volunteer, the same as or comparable to that provided for its regular employees." (*Ibid.*) Examples of the growing class of volunteers included, "tutors, librarian aides, playground monitors, etc." and "aides for handicapped, teacher aides, etc." (*Ibid.*)

CA(6)[⬆] **(6)** The broad purpose of *Labor Code section 3364.5*, reflected in the legislative history, reinforces our decision that the statute does not apply just in the narrow circumstances and to the narrow class of volunteers to which plaintiff's reading would have us apply the statute. To adopt plaintiff's proposed interpretation would thwart a district's ability to provide workers' compensation coverage to the range of school volunteers identified in the staff report, given the obvious impracticability of such a requirement. (See *Day v. City of Fontana (2001) 25 Cal.4th 268, 272 [***951] [105 Cal. Rptr. 2d 457, 19 P.3d 1196]* [***HN8***[⬆] we select statutory construction that comports most closely with apparent intent of Legislature, ""with a view to promoting rather than defeating **[****32]** the general purpose of the statute""]; *Spier v. Peck (1918) 36 Cal.App. 4, 6 [171 P. 115]* ["Statutes are to be so construed as not to give rise to an absurdity in their attempted application and as not to destroy their efficacy as a whole or in substantial part"].)

Thus we reject plaintiff's reading of the statute at issue.

C. *Substantial Evidence Supports the Trial Court's Findings*

HN9[⬆] ***CA(7)***[⬆] **(7)** The substantial evidence standard "has three pillars. First, we accept all evidence supporting the trial court's order. Second, we completely disregard contrary evidence. Third, we draw all reasonable inferences to affirm the trial court. These three pillars support the lintel: We do not reweigh the **[*169]** evidence. (See *Harley-Davidson, Inc. v. Franchise Tax Bd. (2015) 237 Cal.App.4th 193, 213–214 [187 Cal. Rptr. 3d 672]*.) Under this standard of review, parties challenging a trial court's factfinding bear an '"enormous burden"' (*People v. Thomas (2017) 15 Cal.App.5th 1063, 1071 [223 Cal. Rptr. 3d 470]*.)" (*Schmidt v. Superior Court (2020) 44 Cal.App.5th 570, 581–582 [257 Cal. Rptr. 3d 699]*, as modified on denial of rehg. Feb. 14, 2020.) Considering the manner in which we have interpreted *Labor Code section 3364.5* here, plaintiff cannot meet this burden.

First, the governing board of the district adopted a *Labor*

Code section 3364.5 resolution, Resolution No. 37, in 1968, and there is no suggestion that the resolution has been rescinded since then. That the superintendent and possibly the **[**211]** current board members were not individually aware of the resolution **[****33]** and its implications under Labor Code section 3364.5 does not change this fact.

Second, the evidence supports a finding that the plaintiff had been "authorized by the governing board of [the] school district" to perform volunteer services when she was serving as a volunteer at the spelling bee. As reflected in district records, she had satisfied a central district requirement for the authorization of district volunteers: she had obtained Megan's Law clearance. The board's designee, Schauer, and Schauer's designee pursuant to board authorization, Yount, could have prevented plaintiff from volunteering at the event. In short, plaintiff's authority to serve as a volunteer was given because she satisfied the district's policies regarding its volunteers, and the superintendent and her designee—who had a better capacity to observe volunteers in the day-to-day school environment—could have revoked that authorization based on variables they might have observed. Additionally, evidence supported a conclusion that the governing board was aware that spelling bees were held at River Oaks, likely was given a calendar that stated when this particular spelling bee would be held, and the board could have removed the authority **[****34]** for the school to host the bee.

Finally, evidence supports a finding that the spelling bee on December 4, 2015, in general, and plaintiff's judging activities specifically were under the direction and control of Yount, who, as principal, was acting for Schauer with respect to daily operations at River Oaks. Yount's and plaintiff's testimony establish that Yount told plaintiff where to sit and provided plaintiff instructions on how to judge **[***952]** the spelling bee. Schauer's testimony established that Yount had the authority to control and direct the spelling bee setup, including the seating of volunteers, placement of tables, and where students would stand during the bee based on authority established by the board.

CA(8)[↑] **(8)** The fact that Yount's responses during her deposition may have suggested that plaintiff was not under any one person's control during the **[*170]** spelling bee does not require a finding that plaintiff was not under Yount's direction and control. As the trier of fact, the trial judge was permitted to weigh the deposition responses against Yount's, plaintiff's, and Schauer's testimony. (See Mardirossian & Associates, Inc. v. Ersoff (2007) 153 Cal.App.4th 257, 271 [62 Cal. Rptr. 3d 665] [stating that HN10[↑] even if a witness's deposition testimony had been "inconsistent with his trial testimony" **[****35]** it was proper for the trial court to conclude "such inconsistency was to be evaluated by the trier of fact." "Trial testimony may be impeached by inconsistent deposition testimony, but absent an abuse of the discovery process, such testimony should not be precluded"].)

Likewise, the district's responses to interrogatories numbered 37 and 38 do not dictate that we reach a different conclusion. As the trial court observed, "[d]efendant's actual responses to these interrogatories were not unequivocal denials" and reflect that a complete response would turn on precise definitions of "control" and "direction," which the plaintiff never attempted to define.

II

The Resolution Applies to the District

A. *Scope of the Issue*

CA(9)[↑] **(9)** Before we address plaintiff's argument regarding the name of the district, we offer a note on its scope. In so doing, we consider some basic rules governing appellate briefing. HN11[↑] "'[E]very brief should **[**212]** contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' (9 Witkin, Cal. Procedure, (3d ed. 1985) Appeal, § 479, p. 469; see also People v. Ashmus (1991) 54 Cal.3d 932, 985, fn. 15 [2 Cal. Rptr. 2d 112, 820 P.2d 214]; **[****36]** Duncan v. Ramish (1904) 142 Cal. 686, 689–690 [76 P. 661].)" (People v. Stanley (1995) 10 Cal.4th 764, 793 [42 Cal. Rptr. 2d 543, 897 P.2d 481]; accord, Bettencourt v. City and County of San Francisco (2007) 146 Cal.App.4th 1090, 1102 [53 Cal. Rptr. 3d 402]; see also Reyes v. Kosha (1998) 65 Cal.App.4th 451, 466, fn. 6 [76 Cal. Rptr. 2d 457] ["Issues not raised in an appellant's brief are deemed waived or abandoned. (Tan v. California Fed. Sav. & Loan Assn. (1983) 140 Cal.App.3d 800, 811 [189 Cal. Rptr. 775].]".) Additionally, "[e]ach brief must: [¶] … [¶] … [s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority." (Cal. Rules of Court, rule 8.204(a)(1)(B).) Arguments that fail to satisfy this rule are forfeited. (Consolidated Irrigation Dist. v. City of Selma (2012) 204 Cal.App.4th 187, 201 [138 Cal. Rptr.

3d 428].)
[*953]**

Based on the headings contained in plaintiff's opening brief, plaintiff's argument regarding the name of the district is as follows: defendant was barred by judicial admissions from claiming that its name has ever been **[*171]** anything but Galt Joint Union Elementary District. Plaintiff preserved this issue by raising it below, and she has been prejudiced by the trial court's rulings regarding names. One of plaintiff's headings regarding the question of the district's name also suggests she has either taken the position that the governing board that passed the resolution was not the governing board of the defendant district or that Resolution No. 37 needs to contain the exact name of the district used today in order to apply. Though this position is not well developed and supported, we can dispose of it quickly on **[****37]** the merits.

B. *The Pleadings Did Not Prevent Defendant from Relying on the Resolution*

CA(10)[] **(10)** HN12[] "'A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case. [Citations.]' (*Gelfo v. Lockheed Martin Corp. (2006) 140 Cal.App.4th 34, 48 [43 Cal. Rptr. 3d 874].*) 'Judicial admissions may be made in a pleading … . [Citations.] Facts established by pleadings as judicial admissions "'are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her.' [Citations.] '"[A] pleader cannot blow hot and cold as to the facts positively stated."' [Citation]" [Citation.]' (*Myers v. Trendwest Resorts, Inc. (2009) 178 Cal.App.4th 735, 746 [100 Cal. Rptr. 3d 658].*)" (*Minish v. Hanuman Fellowship, supra, 214 Cal.App.4th at p. 456.*)

Here, while the district did file answers as "Galt Joint Unified Elementary School District" the answer and amended answer contain no express admissions of fact. The answers do not "positively state[]," or even imply, that in the course of over 50 years the district has never gone by any other name, or that the district even currently only operates under one name. Thus, plaintiff has failed to persuade us that defendant must be foreclosed from claiming it is the district whose governing board identified **[****38]** as the governing board of "Galt Joint Union School District" on March 18, 1968, and passed Resolution No. 37.
[213]**

C. *Governing Board's Adoption of the Resolution*

The trial court concluded the evidence shows the defendant's governing board adopted the resolution. HN13[] This is a finding of fact that we review under the substantial evidence standard. (*Winograd v. American Broadcasting Co., supra, 68 Cal.App.4th 624, 632* ["When the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed"].)

The record amply supports a finding that the governing board that passed Resolution No. 37 is the governing board of the defendant district. Schauer's testimony regarding the use of "Galt Joint Union School District" and "Galt **[*172]** Joint **[***954]** Union Elementary District" and her review of numerous district documents that use the two names interchangeably—some of which also reflect how the unique EIN and CDS identifiers have been used on documents identifying the district under both names—support the finding that the two names refer to one and the same district. Additionally, according to Schauer, the board **[****39]** representative that signed Resolution No. 37 only ever served on the board of one district, which is the one that is sometimes called "Galt Joint Union District" and other times called "Galt Joint Union Elementary District," i.e., the defendant district.

The trial court's factual determination that the district's governing board passed Resolution No. 37 is sound.

D. *The Resolution Need Not Use a Specific District Name*

CA(11)[] **(11)** The governing board was not required to refer to the district as "Galt Joint Union Elementary School District" for the resolution to apply. HN14[] Applying de novo review and the principles of statutory construction articulated above (see pt. I.B., ***ante***) we find that *Labor Code section 3364.5* does not require a resolution passed pursuant to the statute to use the precise name of the district for the resolution to apply. The statute contains no such language requiring the precise use of a district name, and we would needlessly narrow the scope of the exception's coverage if we were to read that requirement into the statute. As this case demonstrates, it is possible that, over time, a district's name might change or evolve to better reflect the community it serves. To require a new resolution be adopted **[****40]** with each potential name change, when the governing body of the district and the core

district remains unchanged, would create a rule where numerous persons who would otherwise be covered by the exception would become inadvertently excluded.

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal. (*Cal. Rules of Court, rule 8.27(a)(1), (2)*.)

Robie, J., and Mauro, J., concurred.

Arellano v. Griffith Co., 2023 Cal. Wrk. Comp. P.D. LEXIS 227

Workers' Compensation Appeals Board (Board Panel Decision)

August 28, 2023 Opinion Filed

W.C.A.B. No. ADJ10647918

Reporter
2023 Cal. Wrk. Comp. P.D. LEXIS 227 *

Antonio Arellano, Applicant v. Griffith Company, Zurich American Insurance Company, Defendants

Status:

CAUTION: This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Prior History:

W.C.A.B. No. ADJ10647918—WCJ Howard Lemberg (AHM); WCAB Panel: Commissioners Capurro, Razo, Deputy Commissioner Schmitz (dissenting)

Disposition: Reconsideration is *granted*, and the February 1, 2022 F&O is *affirmed*.

Core Terms

skull, amputation, limb, Dictionary, removal, reconsideration, appendage, surgery, industrial injury, body part, surgical removal, definitions, disability, contends, jointed, workers' compensation, en banc, fragments, fracture, partial, bone

Headnotes

Temporary Disability—Exceptions to Two-Year Cap on Benefits—Amputations—WCAB, granting reconsideration in split panel opinion, affirmed WCJ's finding that applicant did not qualify for 240-week exception to 104-week cap on temporary disability benefits set forth in *Labor Code § 4656(c)(3)(C)*, because partial removal of applicant's skull did not qualify as "amputation" under statute, as interpreted by WCAB in *Cruz v. Mercedes-Benz of San Francisco (2007) 72 Cal. Comp. Cases 1281* (Appeals Board en banc opinion), where WCAB defined "amputation" as including severance or removal of limb, part of limb, or other body appendage, whether by traumatic loss in industrial injury or by surgical removal during treatment of industrial injury; Deputy Commissioner Schmitz, dissenting, would return this matter to trial level for further development of record, when Deputy Commissioner Schmitz found that on current record, there was insufficient evidence to make determination as to whether or not partial removal of applicant's skull was "amputation" within meaning of *Labor Code § 4656(c)(3)(C)*. [See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 7.02[2][b]*; Rassp & Herlick, California Workers' Compensation Law, Ch. 6, § 6.12.]

Counsel

[*1] For applicant—Minaie Law Group

For defendants—Law Offices of Tracey Lazarus

Panel: Commissioner Joseph V. Capurro; Commissioner Jose H. Razo; Deputy Commissioner Anne Schmitz (dissenting)

Opinion By: Commissioner Joseph V. Capurro

Opinion

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board previously granted reconsideration to further study the factual and legal issues in this case.[1] This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact and Opinion on Decision (F&O) issued by a workers' compensation administrative law judge (WCJ) on February 1, 2022. In the F&O, the WCJ found that applicant did not qualify for the 240-week exception to the 104-week cap on temporary disability benefits set forth in *Labor Code section 4656(c)(3)(C)*,[2] because the partial removal of applicant's skull did not qualify as an "amputation" under the statute, as interpreted by the Appeals Board in *Cruz v. Mercedes-Benz of San Francisco (Cruz) (2007) 72 Cal. Comp. Cases 1281* (Appeals Board en banc).

Applicant contends that the 240-week exception under *section 4656(c)(3)(C)* does apply, because the surgical removal of a portion of his skull qualifies as an "amputation" pursuant to *Cruz* and the plain meaning of the term.

We did not receive an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration **[*2]** (Report), recommending that applicant's Petition for Reconsideration be denied.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, it is our decision after reconsideration to affirm the February 1, 2022 F&O.

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[1] Commissioner Sweeney, who previously served as a panelist in this matter, no longer serves on the Appeals Board. Another panel member was assigned in her place.

[2] All further statutory references are to the Labor Code unless otherwise noted.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 1, 2022 F&O is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Joseph V. Capurro

I concur,

Commissioner Jose H. Razo

I dissent,

Deputy Commissioner Anne Schmitz

Dissent By: Deputy Commissioner Anne Schmitz

Dissent:

DISSENTING OPINION OF DEPUTY COMMISSIONER SCHMITZ

I respectfully dissent from the majority opinion to affirm the WCJ's F&O issued on February 1, 2022. I would rescind the F&O and return this matter to the trial level for further development of the record.

The only issue for reconsideration is the applicability of the *section 4656(c)(3)(C)* exception to the 104-week cap on temporary disability benefits (TD), which is set forth in *section 4656(c)(1)*. (*Lab. Code, §§ 4656(c)(1), 4656(c)(3)(C)*.) Pursuant to *section 4656(c)(3)(C)*, an employee who suffers an "amputation" **[*3]** may receive up to 240 weeks of TD within a period of five years from the date of injury. The applicant bears the burden of proof to establish, by a preponderance of the evidence, that the injury falls within the scope of the *section 4656(c)(3)(C)* exception. (*Lab. Code, § 3202.5*.) In *Cruz*, we held that, for the purpose of applying *section 4656(c)(3)(C)*, the definition of "amputation" includes the severance or removal of a limb, part of a limb, or other body appendage, including both traumatic loss in an industrial injury and surgical removal during treatment of an industrial injury. (*Cruz, supra, 72 Cal. Comp. Cases at pp. 1282–1283*.) Here, applicant argues that the head is an appendage, and that the surgical removal of part of his skull, a "subset" of the head, resulted in an "amputation."

I disagree with the majority opinion to affirm the WCJ's decision that the partial removal of applicant's skull is not an "amputation" within the meaning of *section 4656(c)(3)(C)*; under the current record, there is insufficient evidence to make this determination.

A decision must be supported by substantial evidence such as medical opinion and/or testimony considering the entire record. (*Lab. Code, §§ 5903*, *5952*; *Garza v. Workmen's Comp. Appeals Bd. (1970) 3 Cal. 3d 312, 317–319 [33 Cal. Comp. Cases 500]*.) A medical opinion is not substantial evidence when based on incorrect facts, history, examination or legal theory, or surmise, speculation, **[*4]** conjecture or guess. (*Place v. Workers' Comp. Appeals Bd. (1970) 3 Cal. 3d 372, 378 [90 Cal. Rptr. 424, 475 P.2d 656, 35 Cal. Comp. Cases 525]*.) A medical opinion should also be based on reasonable medical probability and logical and persuasive reasoning, which is consistent with the record. (*McAllister v. Workmen's Comp. Appeals Bd. (1968) 69 Cal. 2d 408, 413, 416–417 [33 Cal. Comp. Cases 660]*; *Escobedo v. Marshalls (2005) 70 Cal. Comp. Cases 604, 620–621* (Appeals Board en banc).) The record may be ordered developed when required for a decision or award to be based on substantial evidence and due process. (*Lab. Code, §§ 5701*, *5906*; *Tyler v. Workers' Comp. Appeals Bd. (Tyler) (1997) 56 Cal. App. 4th 389, 393–395 [65 Cal. Rptr. 2d 431, 62 Cal. Comp. Cases 924]*; *McDuffie v. L.A. County Metropolitan Transit Authority (2002) 67 Cal. Comp. Cases 138, 141–143* (Appeals Board en banc).)

This matter proceeded to trial with only two exhibits: 1) a medical report from applicant's primary treating physician, Dr. David M. Kupfer, M.D., and 2) an Operative Report created by applicant's neurosurgeon, Dr. Marvin Bergsneider, M.D. (App. Exh. 1; Joint Exh. AA.) This sparse record leaves myriad questions unanswered.

First, Dr. Kupfer's report lacks the documentation, facts, or analysis necessary to support the WCJ's conclusion that the partial removal of applicant's skull was not an "amputation," where the report only addresses applicant's *orthopedic* injuries (bilateral knees, shoulders, and cervical spine), and not applicant's *skull* injury or replacement. Indeed, Dr. Kupfer specifically deferred any conclusions regarding "any neurologic impairment" of applicant to the "appropriate specialist." (App. Exh. 1, p. 17.) Additionally, **[*5]** although Dr. Kupfer's report does mention two reports generated by an evaluating neurologist, Dr. Thomas Schweller, M.D., said reports are not in evidence.

Dr. Bergsneider's Operative Report is similarly insufficient. The Operative Report contains a one-paragraph description of the operation procedure itself and a short set of post-operative notes, primarily addressing pre- and post-operative medications and anesthesia and containing the following statements:

> Findings: right parietal partial thickness bone fracture depression, s/p elevation, cranioplasty, washout, and wound revision
>
> Complications: None; patient tolerated the operation(s)/procedure(s) well.

(Joint Exh. AA, p. 4.)

Dr. Bergsneider's report is little more than a synopsis of the operation itself that is completely devoid of any medical opinion that would allow the WCJ or the Appeals Board to determine whether the partial removal of applicant's skull was an "amputation" within the meaning of *section 4656(c)(3)(C)*. (*Lab. Code, § 4656(c)(3)(C)*; *Cruz, supra, 72 Cal. Comp. Cases at pp. 1282–1283*.) Again, the WCJ and the Appeals Board have a duty to further develop the record when there is a complete absence of (*Tyler, supra, 56 Cal.App.4th at pp. 393–395*) or even insufficient (*McClune v. Workers' Comp. Appeals Bd. (1998) 62 Cal.App.4th 1117, 1121–1122 [72 Cal. Rptr. 2d 898, 63 Cal. Comp. Cases 261]*) medical evidence on an issue. The Appeals Board also has a constitutional mandate to ensure **[*6]** "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd. (2000) 79 Cal. App. 4th 396, 403 [94 Cal. Rptr. 2d 130, 65 Cal. Comp. Cases 264]*.) Since, in accordance with that mandate, "it is well established that the WCJ or the Board may not leave undeveloped matters" within its acquired specialized knowledge (*Id. at p. 404*), pursuant to *section 5906*, I would rescind the F&O and return this matter for further development of the record.

Thus, I respectfully dissent.

WORKERS' COMPENSATION APPEALS BOARD

Deputy Commissioner Anne Schmitz

* * * *

REPORT AND RECOMMENDATION ON RECONSIDERATION

I

INTRODUCTION

Applicant has filed a timely and verified petition for reconsideration wherein he disputes the Findings of Fact dated 02/01/2022 finding that the 240-week exception pursuant to *Labor Code section 4656(c)(3)(C)* does not apply in this case. Applicant contends that the exception under *section 4656(c)(3)(C)* does apply in this case because the industrial injury required surgery to remove a portion of applicant's skull which qualifies as an amputation as defined by the WCAB in the case of *Cruz v. Mercedes-Benz of San Francisco (2007) 72 Cal. Comp. Cases 1281, 1285 and 1286* (Appeals Board en banc).

II

STATEMENT OF FACTS

Applicant, born [], while employed on 08/24/2016 at Brea, California by Griffith Company, then insured by Zurich American Insurance Company, sustained injury arising out of and in the course of employment to head and neck.

A trial was held in **[*7]** this matter on 12/15/2021. Testimony was taken of the applicant. Following review of the testimony of the applicant and the medical reports and records of all the physicians in this matter, the Court issued a finding that the 240-week exception pursuant to *Labor Code section 4656(c)(3)(C)* does not apply in this case.

III

DISCUSSION

Applicant contends that the (human) skull is a "*jointed appendage*", and therefore, the removal of skull fragments constitutes an amputation pursuant to *section 4656(c)(3)(C)* as defined in the *Cruz* case. This contention lacks merit.

Labor Code section 4656(c)(2) states:

> "(2) Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury."

Labor Code section 4656(c)(3)(C) states:

> "(3) Notwithstanding paragraphs (1) and (2), for an employee who suffers from the following injuries or conditions, aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 240 compensable weeks within a period of five years from the date of the injury:
>
> (C) Amputations."

Applicant testified that the injury occurred when he was trying to remove a water pipe **[*8]** or tube from a trench. Applicant testified that the foreman got on a machine and used a part of the machine to lift the pipe. Applicant testified that the foreman put a lot of pressure on it, and the pipe lifted and then flipped over to the other side and fell on applicant's entire body. Applicant testified that the pipe weighed about 500 pounds. Applicant testified that he lost consciousness as a result of the injury. (MOH/SOE 12/15/2021 Trial, at 4:14–20.)

Applicant testified that after the accident he was transported to a hospital and underwent surgery during which a part of his skull was removed and replaced by a titanium plate with screws. (MOH/SOE 12/15/2021 Trial, at 4:20–5:3.)

Applicant testified that after being released from the hospital he elected Dr. (David) Kupfer as his primary treating physician, that Dr. Kupfer continued to treat him until 11/02/2020 and that between the date of injury and the present he has not worked anywhere. (MOH/SOE 12/15/2021 Trial, at 5:4–6.)

Applicant's Exhibit "1" consists of a medical report from Dr. David Kupfer (Plastic & Reconstructive Surgery/Hand Surgery) dated 11/02/2020. Dr. Kupfer states that applicant's condition is maximal medical improvement **[*9]** as of the date of his evaluation (11/02/2020).

Joint Exhibit "AA" consists of an operative report from UCLA Neurosurgery dated 08/24/2016. This report states that the operation performed was: "*Elevation of Depression Traumatic Skull Fracture, Craniectomy, Cranioplasty, complex wound closure*."

The description of the operative procedure contained in the report from UCLA Neurosurgery dated 08/24/2016 states:

""The patient was brought to the Operating Room, intubated and placed under the general anesthesia. Appropriate IV access and monitoring was placed. A pre-surgical time-out was performed with all key personnel present. The head was rested on the Mayfield gel-padded horseshoe. The large right parietal incision was superficially washed with sterile saline, and the surrounding scalp cleansed. The area was prepped. The depressed skull fracture elements were removed piecemeal with a curette. Surrounding bone was waxed for hematasis. Surgifoam used.

Central tack ups were placed. Meningeal arteries coagulated. The defect was covered with a Leibinger titanium plate and screws. The galea was closed with 3-0 Vicryl. The skin was lacerated in a stellate manner at the center, and was closed with ***[*10]*** *3-0 nylon vertical mattress sutures combined with 4-0 simple nylon. The incision was infiltrated with 1:200,000 epinephrine 0.25% Marcaine. Sterile dressing was placed. The patient was kept intubated and taken to the PAR in stable condition."*

The evidence indicates that applicant sustained a skull fracture as a result of his industrial injury and that surgery was performed to remove skull fragments from the right parietal area of the skull which was replaced by a titanium plate with screws.

In the case of *Cruz v. Mercedes-Benz of San Francisco (2007) 72 Cal. Comp. Cases 1281, 1285* and 1286 (Appeals Board en banc) the WCAB stated:

"There are many different dictionary definitions of "amputate" and "amputation." A few examples are:

""The cutting off of a limb or part of a limb, the breast, or other projecting part." (Stedman's Medical Dictionary, 27th Edition, 2000.)

"To cut off (a projecting body part), especially by surgery." (American Heritage Dictionary of the English Language, 4th Edition, 2006.)

"The surgical removal, by cutting, of a part of the body, as an ear or a breast, but especially of a limb, or a part thereof*. The term also applies to the separation of a part or a limb from the body by accidental means, or by a morbid process, as in ainhum." (Attorney's* ***[*11]*** *Dictionary of Medicine and Word Finder, 1990.)* (Emphasis added.)

"Removal of a limb, body part, or organ, usually as a result of surgery but occasionally due to trauma." (Taber's Cyclopedic Medical Dictionary, Edition 20, 2005.)

"The removal of a limb, part of a limb, or other body appendage." (International Dictionary of Medicine and Biology, 1986.)

"to cut off (an arm, leg, etc.), esp. by surgery." (Webster's New World Dictionary of American English, 1988.)

"cut off from an animal body (some part, esp. a limb because of injury or disease). (The New Shorter Oxford English Dictionary , 1993.)

"cut off (a limb), typically by surgical operation." (The New Oxford American Dictionary, 2nd edition, 2005.)

"the removal of a limb or other appendage or outgrowth of the body." (Dorland's Illustrated Medical Dictionary, 2003.)"

Dictionary definitions provide us some limited assistance, but we are guided primarily by the mandate to give words "their plain and commonsense meaning" and their "usual and ordinary meaning." In ordinary usage, the word "amputation" nearly always refers to a limb, or a part of a limb, including digits. This usage is reflected in most definitions, either directly or in an explanatory ***[*12]*** *clause modifying a more general definition. Although we are not bound by dictionary definitions, we find considerable support in dictionaries for the commonsense and ordinary meaning of "amputation." Defining amputation as the severance or removal of a limb, part of a limb, or other body appendage comports with the ordinary meaning, and includes the range of potentially*

> *compensable scenarios, including both traumatic loss of a body part in an industrial injury and surgical removal during treatment. This definition conforms to our understanding of the common meaning of the term "amputation," which encompasses external projecting body parts, not internal parts, even if they include bone. It is also consistent with the definitions in the International Dictionary of Medicine and Biology, Dorland's Illustrated Medical Dictionary, and Stedman's Medical Dictionary. To the extent that some definitions refer to organs, appear to encompass all body parts, or include an equivocal "etc.," we reject them or interpret them in a manner consistent with our understanding of the term "amputation."*

Applicant contends that "*the skull is considered a jointed appendage per the definition found in the diagram* ***[*13]*** *of life science: "Despite its shape the skull is a jointed appendage*." *(Jointed Appendages Life Science CK-12 PLIX Series, https://www.ck12.org.)"* (Pet. For Recon, at 3:24–4:2.)

The court reviewed this website and it is an educational website for teachers and students for grades K through 12. It is unclear what the basis of this definition is or what is meant by "jointed appendage." Also, no substantial medical evidence was offered by applicant to support his contention that the skull is an appendage.

Applicant contends that because the skull is a "jointed appendage" it is an external projecting body part. This contention lacks merit. Unlike the ear, the skull bone is not an external protruding body part.

Applicant contends that the removal of the skull fragments constitutes an amputation because it resulted in a reduction of the size of the skull. This contention lacks merit.

In support of his contention that the removal of the skull fragments resulted in a reduction of the size of the skull applicant relies on the case of *Parco v. Workers' Compensation Appeals Board (2018) 83 Cal. Comp. Cases 1288* (writ denied.)

In the *Parco* case applicant sustained an industrial injury to his left thumb, left hand, and the skin of his left thumb. Applicant suffered second and **[*14]** third degree burns to his left hand and underwent three surgeries on his left hand. The QME, Dr. David Doty testified in his deposition that as a result of applicant's crush injury, tendon damage, and the fracture of his bone and subsequent surgery with the bone removal he had a 7mm shortening of his left thumb. The [Appeals Board] concluded that the 7mm shortening of the thumb constituted the severance or removal of a limb, part of a limb or other body appendage, including both traumatic loss in an industrial and surgical removal treatment of an industrial injury pursuant to *section 4656(c)(3)(C)*.

This contention lacks [merit] as there is no substantial medical offered to indicate that the skull was reduced in size. The evidence indicates that skull fragments were removed and replaced by a titanium plate with screws.

IV

RECOMMENDATION

The petition for reconsideration should be denied.

Howard Lemberg

Workers' Compensation Administrative Law Judge