

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

JOSE LUIS AYALA, *Applicant*

vs.

**McCONNELL CABINETS; LIBERTY MUTUAL INSURANCE COMPANY;
VIRGINIA SURETY, *Defendants***

**Adjudication Numbers: ADJ3065118 (LAO 0786543); ADJ3683536 (LAO 0788762)
Los Angeles District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Amended Joint Findings and Award of September 2, 2021, wherein it was found that, while employed as a cabinet maker on November 12, 1998 (ADJ3065118), applicant sustained industrial injury to his cervical spine, mid spine, lumbar spine, right shoulder, wrists and psyche, but not in the forms of sleep disorder, sexual dysfunction, hypertension, or gastroesophageal reflux disease, causing compensable permanent disability of 65% and the need for further medical treatment. Additionally, it was found that while employed as a cabinet maker during a cumulative period ending September 12, 2000 (ADJ3683536), applicant sustained industrial injury to his cervical spine, lumbar spine, right shoulder, and psyche, causing compensable permanent disability of 23% and the need for further medical treatment.

Applicant contends that the WCJ erred in issuing final orders regarding permanent disability in both cases, arguing that the record must be further developed regarding applicant's orthopedic and psychiatric disability. Applicant also contends in the Petition for Reconsideration that temporary disability should be placed at issue, and further development of the record should be ordered on that issue, despite the fact that it was not placed at issue at trial. We have received answers from both Virginia Surety and Liberty Mutual. Liberty Mutual requests that we dismiss applicant's Petition because the Petition was not served on Liberty Mutual's counsel as required by Appeals Board Rule 10610 (Cal. Code Regs., tit. 8, § 10610). Additionally, the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will deny the applicant's Petition.

As noted in the WCJ's Report, it has now been almost 23 and over 21 years since the respective injuries at issue. The WCJ relied upon the reporting of orthopedists Phillip J. Kanter, M.D. and Lynn E. Wilson, M.D. in determining applicant's orthopedic permanent disability. The reports relied upon by the WCJ issued in 2017. At the time of his evaluations by Drs. Kanter and Wilson, applicant was significantly impaired as evidenced by the significant permanent disability found, apportioned among both injuries and non-industrial causes. In 2017, applicant already complained to Dr. Wilson that the pain in his cervical spine was on average a nine on a scale of one to ten, with the pain sometimes reaching ten. (August 29, 2017 report at p. 6.) He told Dr. Wilson that he was unable to walk more than one block, was unable to sit or stand for more than a half hour at a time, and that he had difficulty dressing himself. (August 29, 2017 report at pp. 6-7.) Similarly, he rated his lumbar pain as nine to ten and his right shoulder pain at eight. (August 29, 2017 report at pp. 7-8.) Similarly, applicant complained to Dr. Kanter of "constant" cervical spine pain with an intensity of nine to ten on a ten-point scale (August 17, 2017 report at p. 6), "constant" right shoulder pain with an intensity of eight (August 17, 2017 report at p. 7), and "constant lumbar pain with an intensity of nine (August 17, 2017 report at p. 8).

Additionally, at the time of the 2017 reports, applicant was already using a cane. (August 17, 2017 report at p. 8; August 29, 2017 report at p. 8.)

At trial, applicant introduced the reports of treating physician pain management specialist Jonathan F. Kohan, M.D. spanning the period from June 2019 to March 2021. We note that Dr. Kohan's first reports document a substantial improvement in applicant's condition. For instance, in a report of August 23, 2019, while acknowledging that applicant has experienced falls, Dr. Kohan also notes a 30% to 40% improvement in applicant's condition. (August 23, 2019 report at p. 1.) While Dr. Kohan did note that applicant had an increase in neck and low back complaints in his June 12, 2020 and October 28, 2020 reports, given the earlier improvement, there is no evidence that his condition was any worse than it was than when he was evaluated by Drs. Kanter and Wilson.

While applicant requests an updated neurological evaluation due to a February 2, 2021 fall, Dr. Kohan's contemporaneous reporting makes no mention of this fall. We note that the WCJ found that applicant's testimony at trial regarding his present condition, including the severity of any falls, was somewhat exaggerated. A WCJ's credibility determinations are "entitled to great

weight.” (*Garza v. Workmen’s Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].)

Similarly, with regard to applicant’s request to reopen discovery because of his apparent need for carpal tunnel surgery, Dr. Wilson stated in his August 20, 2017 report that applicant was not interested in availing himself of surgery. (August 29, 2017 report at p. 35.) No other medical records disclose a present need for surgery, and there is no evidence presented that surgery, which in theory would be undertaken to better applicant’s condition, would increase applicant’s permanent disability in this case governed by the 1997 Schedule for Rating Permanent Disabilities. In any case, the WCJ did not find applicant’s change of heart regarding carpal tunnel surgery to be credible (Report at p. 2), and we must give this credibility determination great weight.

Applicant also requests further development of the psychiatric record based on his testimony at trial that he had suicidal thoughts. (Minutes of Hearing and Summary of Evidence of February 3, 2021 trial at p. 5.) However, in his April 20, 2021 report, treating psychologist Heath Hinze, Psy.D. writes that applicant expressed “no suicidal or homicidal ideation.” (April 20, 2021 report at p. 5.) We note that agreed medical evaluator psychiatrist John M. Stalberg, M.D., on whom who the WCJ based her psychiatric permanent disability findings, already diagnosed applicant with depressive disorder. (April 19, 2005 report at p. 2.) Although Dr. Hinze notes panic attacks as a new symptom, there is no discussion regarding how this new symptom is related to applicant’s over 20-year-old injuries.

Finally, with regard to temporary disability, this issue was not raised at trial in either case. In the specific injury case (ADJ3065118), applicant expressly stipulated that “he has been adequately compensated on this case for temporary disability.” (Minutes of Hearing and Summary of Evidence of October 7, 2019 trial at p. 2.)

As noted by the WCJ in the Report, applicant sustained serious industrial injuries causing substantial permanent disability and need for medical treatment. It was contemplated in all medical records relied upon by the WCJ that applicant would require ongoing treatment, and that his condition would never completely resolve. We are now over 20 years past the dates of injury and more than 17 years past the permanent and stationary date. Despite the fact that this matter was submitted before the previous, now-retired WCJ in January of 2020, the new WCJ assigned to the case afforded applicant the opportunity to present new evidence. Applicant has not submitted any actual credible evidence that the evidence relied upon by the WCJ is no longer

substantial. We therefore deny the applicant's Petition for Reconsideration. Since we deny the applicant's Petition on the merits, Liberty Mutual's request to dismiss the Petition for improper service is moot.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Amended Joint Findings and Award of September 2, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 26, 2021

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

**JOSE LUIS AYALA
BURGIS & ASSOCIATES
GOLDMAN, MAGDALIN & KRIKES
KIRK & MYERS**

DW/oo

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