WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ALLEN LEVRAULT, *Applicant*

vs.

MILKWAUKEE BREWERS; MIAMI MARLINS; ACE AMERICAN INSURANCE/CHUBB, administered by GALLAGHER BASSETT SERVICES; SEATTLE MARINERS; ACE AMERICAN INSURANCE/CHUBB, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES; OAKLAND A'S; USF&G, administered by GALLAGHER BASSETT SERVICES; FEDERAL INSURANCE c/o CHUBB/MILKWAUKEE BREWERS; ZENITH for FAIRMONT, MILWAUKEE BREWERS; CONTINENTAL CASUALTY COMPANY by CNA CLAIMS PLUS/MILWAUKEE BREWERS, *Defendants*

Adjudication Number: ADJ8763377
Santa Ana District Office

OPINION AND DECISION
AFTER RECONSIDERATION

We granted reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant sought reconsideration[1] of the July 17, 2018 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) concluded that there was no subject-matter jurisdiction over the Seattle Mariners ("Mariners"), and that applicant cannot recover against the Miami Marlins ("Marlins") based upon the reciprocity provisions of former Labor Code section 3600.5(b).[2] Applicant contends that the WCJ erred in finding reciprocity under section 3600.5(b), because Florida's reciprocity statute was not in effect at the time of his employment with the Marlins, and also that the WCJ should have admitted medical records submitted after the Mandatory Settlement Conference ("MSC").[3]

We received an Answer from the Marlins. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be

[1] We grant applicant's concurrently filed petition to permit a filing of longer than 25 pages.
[2] Further references are to the Labor Code unless otherwise stated.
[3] The Petition for Reconsideration does not contest the lack of subject-matter jurisdiction over the Mariners.

denied. After consideration of the Petition, the Answer, and the contents of the Report, for the reasons discussed below we will rescind the F&O and return the matter to the WCJ for further proceedings.

FACTS AND PROCEDURAL HISTORY

Applicant claims a cumulative trauma industrial injury sustained while employed as a professional baseball player by defendant and others during the period from June 10, 1996 to June 27, 2003. According to the stipulations of the parties, applicant's playing history during the cumulative trauma period was as follows:

Milwaukee Brewers	June 10, 1996 to February 1, 2002
Oakland Athletics	February 1, 2002 to October 15, 2002
Miami Marlins	December 12, 2002 to October 15, 2003
Seattle Mariners	April 14, 2004 to May 18, 2004

(Minutes of Hearing/Summary of Evidence (MOH/SOE), 10/12/2017, at p. 3.)[4] While employed by these employers, applicant also played for several California-based minor league affiliates: the Stockton Ports ("Ports") in 1998, and the Sacramento River Cats ("River Cats") in 2002. (Transcript, 11/22/2017, at p. 12.) Applicant also played briefly for the Joliet Jackhammers ("Jackhammers") and the Elmira Pioneers ("Pioneers"), and for a number of teams located in the Dominican Republic, Puerto Rico, and Venezuela, as described in more detail below.

The matter proceeded to trial on October 12, 2017, both on the issue of jurisdiction, and on the substantive issues of applicant's entitlement to benefits. (MOH/SOE, 10/12/2017. at p. 4.) Issues and stipulations were recorded, and exhibits admitted, but no testimony given at this date, with some exhibits marked for identification only pending a ruling on admissibility, in particular medical records dated after the Mandatory Settlement Conference on May 11, 2017. (*Id.* at pp. 3–9.) On the same day, applicant entered into a Compromise and Release agreement with the Milwaukee Brewers ("Brewers"), resolving his claim against them for the sum of $3,000.

The trial proceeded on November 22, 2017. (Transcript, 11/22/2017, at p. 1.) Applicant testified, initially about the worsening of his medical complaints from 2013 until the date of trial.

[4] The parties requested and obtained transcripts for the second and third days of trial, November 22, 2017 and February 15, 2018, but not for the original hearing date of October 12, 2017. Accordingly, this decision cites to the MOH/SOE for October 12, 2017, but to the trial transcripts for the two latter trial dates.

(*Id.,* at pp. 5–11.) Subsequently, applicant testified that he was a right-handed pitcher during his career as a professional athlete. (*Id.* at p. 11.) He did not sustain any injuries in high school or college prior to his professional career. (*Ibid.*)[5] Applicant began playing professional baseball for the Brewers. (*Ibid.*) Applicant's duties as a professional athlete included time spent in California playing for two California-based Minor League affiliates of the Athletics and Brewers, the Ports and the River Cats, for the Athletics and the Brewers directly, and for the Mariners. (*Id.* at pp. 11–13.) Applicant testified that he suffered wear and tear injuries to a wide variety of body parts in California, and received medical treatment for those injuries. (*Id.* at pp. 14–16.) Applicant missed about a month on the "disabled list" while playing for the River Cats in June or July of 2002 due to right shoulder tendonitis. (*Id.* at p. 16.) Applicant's last game in California was for the Marlins; he received medical treatment after that game as well. (*Id.* at pp. 17–19.)

Applicant testified that at no point during his career was he given notice to file a workers' compensation claim by any team official. (*Id.* at p. 30.) In 2005, the Marlins reimbursed him for a surgery he paid for out of pocket; he did not consider the payment a workers' compensation settlement, just reimbursement, and prior to filing his California workers' compensation claim, applicant was not aware that payment was considered a workers' compensation payment. (*Id.* at pp. 54–55.) Applicant found out about his right to file a compensation claim from another player, and filed his claim a week or two later. (*Id.* at p. 59.) At the time, he had "no clue" what a cumulative trauma claim was. (*Ibid.*)

After his career as a professional baseball player, applicant worked some construction jobs, then as a welder, and as of the time of trial was employed as a superintendent at General Dynamics, where he supervised workers building submarines. (*Id.* at pp. 57–58.) Applicant believed his injuries "absolutely" stemmed from his professional baseball career, not from post-career employment. (*Id.* at p. 58.)

Applicant was released from his contract with the Mariners after they received an MRI from the Marlins showing applicant had a torn labrum in his right shoulder. (*Id.* at p. 75.) After that time, he played for the Jackhammers and the Pioneers in 2005, for about a month each. (*Id.*

[5] Under cross examination, applicant testified that he sustained a minor injury to his arm in 1993 while exiting a car, but that the injury resolved quickly, without any medical treatment, and he was pitching that same day with no problems. (*Id.* at pp. 62–63.)

at pp. 80–82.) During his career, applicant played winter baseball in a number of seasons, for teams located in the Dominican Republic, Puerto Rico, and Venezuela. (*Id.* at pp. 82–86.)

The trial resumed for its final day on February 15, 2018. During his professional career, applicant occasionally worked for a construction company called Shawmut Metals, cutting rebar. (Transcript, 2/25/2018, at pp. 7–8.) Applicant sustained one injury while working for Shawmut Metals, a bruised foot that resolved within two days. (*Id.* at p. 8.)

Applicant initially testified that he "played" about 15 games for the Marlins in California. (*Id.* at p. 11.) Under cross-examination, applicant explained that while he only pitched in two of those games, he warmed up and trained for all of them. (*Id.* at pp. 11–12.) Under further cross-examination, applicant agreed that the game logs showed the Marlins played only six games during the relevant period, not 15; he had mistakenly thought they had played against another team during that period. (*Id.* at pp. 12–19.)

At the time he ended his professional career in 2005, applicant was aware of wear and tear injuries to most of his body parts. (*Id.* at pp. 20–26.) Applicant did not seek care for these injuries because he didn't have insurance. (*Id.* at p. 26.) Applicant did get medical treatment in 2006 for a torn shoulder sustained during his playing career. (*Id.* at p. 28.)

Applicant was never told to report injuries he sustained during his career. (*Id.* at p. 29.) He did report specific injuries he sustained, because they impacted his ability to pitch. (*Id.* at p. 30.)

Applicant was not aware that the claim he filed in Florida in July 2004 to get reimbursement for his shoulder surgery was a workers' compensation claim. (*Id.* at pp. 30–37.) Applicant believed he was just getting reimbursed for surgery for a work-related injury; he was not aware that he had a right to file a workers' compensation claim. (*Id.* at pp. 37–38.) He believed his agent told him about the ability to file the claim; he was asking around at the time trying to figure out how he could get the surgery paid for and continue his rehabilitation. (*Id.* at p. 38.) Applicant was not sure what the Petition for Benefits meant when it stated it was seeking benefits in the form of unpaid compensation from June 25, 2004 onwards. (*Id.* at p. 41.) Applicant did recall a mediation related to that claim; after being shown Exhibit N, he agreed it occurred on April 26, 2005. (*Id.* at p. 42.) Applicant remembered settling his claim at the mediation, for a total of $39,250.00. (*Id.* at pp. 42–43.)

In 2011, applicant filed a personal injury lawsuit for a left shoulder and lower back injury he sustained in a motor vehicle accident. (*Id.* at p. 43.) He settled that claim; he didn't remember who referred him to an attorney or how he found out he could file a lawsuit. (*Id.* at pp. 44, 49.) The injury resulted in surgery on his left shoulder. (*Id.* at p. 49.) Applicant was involved in two further car accidents in February 2017 and February 2018; in both cases he hit deer, but was not injured himself. (*Id.* at p. 50.)

In addition to the right elbow injury, applicant also injured his left ankle twice in high school, once playing basketball, and once playing soccer. (*Id.* at pp. 45–46.) The basketball injury required wrapping for about five days, and occurred in 1990. (*Id.* at p. 46.) Applicant didn't remember exactly when the soccer injury happened, but it probably required four or five days of ice and wrapping. (*Id.* at p. 47.) Applicant might have sustained a swollen hand and fingers after sliding into second base while playing in a tournament in high school. (*Ibid.*) Applicant wasn't sure whether he fell off a bike and injured his left hand in 1983, but he did remember he had a cast on his wrist as a child. (*Id.* at pp. 47–48.)

Applicant never played baseball recreationally after his retirement. (*Id.* at p. 51.) Applicant coached middle school baseball for one season, between eight and twelve years before the date of trial. (*Ibid.*) He did not hit or pitch as part of that coaching, and he did not notice it causing any physical complaints. (*Id.* at p. 52.)

Applicant knew the original trial date was scheduled for July 17, 2017. (*Id.* at p. 57.) He bought a ticket a few months before. (*Ibid.*) He then underwent right shoulder surgery five days prior to that trial date; the surgery was already scheduled at the time he purchased the ticket. (*Id.* at p. 58.) He did not tell the doctors he had a trip five days later. (*Ibid.*) The doctors advised him to keep his arm in a sling for seven weeks after the surgery; they didn't say anything about travel, and applicant didn't ask. (*Ibid.*)

Applicant's constant burping and acid reflux started about six months before the February 2018 trial date. (*Id.* at p. 59.) He suffered from heartburn for a long time – perhaps five or ten years - but it had worsened in the recent past. (*Id.* at pp. 58–61.) Applicant's depression began after his baseball career ended; he wasn't sure exactly when. (*Id.* at p. 62.) When applicant told a nurse in 2010 that he was drinking 17 beers a day, he was exaggerating; it was more like 17 beers a week. (*Id.* at pp. 63–64.)

On redirect examination, applicant confirmed that he had been told by doctors that his injuries were a result of his professional baseball career. (*Id.* at p. 67.) Applicant did not know what cumulative trauma was. (*Ibid.*) The first time he heard the term was after 2013. (*Id.* at p. 68.) Applicant was not told by any doctors that his injuries were due to his professional baseball career or to cumulative trauma prior to filing his California workers' compensation case. (*Ibid.*)

After applicant's 2006 surgery, he continued to rehabilitate and tried to contact teams to prolong his career. (*Id.* at p. 70.) Applicant would have continued his career if any team had been willing to hire him. (*Ibid.*)

With regard to applicant's Florida case, applicant contacted an attorney to try to get paid back for the costs of the surgery, and the settlement ultimately involved paying only applicant's medical bills and out-of-pocket expenses. (*Id.* at pp. 72–75.) Presented with a copy of the settlement document, applicant confirmed that he did not see anything stating he had settled any entitlement to temporary disability, permanent disability, or future medical care. (*Id.* at pp. 75–77.) A box on the settlement to check for "petition for benefits" was left unchecked. (*Id.* at pp. 77–78.) Applicant confirmed he had signed the Petition for Benefits filed in Florida by his attorney, but that he had not reviewed it prior to signing; he was told to sign it by his attorney, and he did. (*Id.* at p. 83.)

Applicant's sleep study was initiated on the prompting of his wife. (*Id.* at p. 78.) It recommended he get a CPAP machine, but applicant couldn't afford the cost; if he could afford it, he would buy it. (*Ibid.*)

Applicant first learned that his stomach problems were connected to his professional career in 2017. (*Id.* at p. 79.) The only time he was hospitalized for anxiety or heart issues was in May of 2017; this was around the same time that his wife told him he should take medication for his psychiatric problems. (*Ibid.*) Applicant felt his psychiatric problems were getting progressively worse, not better, as of the date of the hearing. (*Ibid.*)

Post-trial briefing focused on whether applicant's claims against the Marlins and Mariners were barred by the reciprocity provisions of section 3600.5(b). In particular, the parties' argument centered on the fact that Florida's extraterritoriality law became effective in 2011, after applicant's period of employment with the Marlins, but prior to the filing of his California claim in 2013. Applicant's post-trial brief also devoted significant space to arguing that medical records submitted after the Mandatory Settlement Conference were admissible.

On July 17, 2018, the WCJ issued her Findings and Order, concluding that the court could not exercise jurisdiction over any of applicant's "viable employers," with all other issues moot. (F&O, at p. 2.) The Opinion on Decision makes clear that the WCJ's conclusion was based upon a judgment that 3600.5(b) barred applicant's claim against the Florida Marlins. (Opinion on Decision, at pp. 8–10.) The OOD also makes clear that the WCJ would have found inadmissible applicant's medical records related to his post-MSC surgery, on the basis that they were obtained after the MSC discovery cut-off. (*Id.* at pp. 3–4.) In the Report, the WCJ stated that the factor of "utmost importance" to her decision to find the medical records inadmissible was that:

> [T]he date of two of the reports he is now requesting to introduce are the same date of the first trial setting, July 20, 2017. It was represented to this Court that applicant could not travel to California for his trial due to surgery three days prior. Despite this representation, applicant did travel to California for three QME evaluations.

(Report, at p. 7.)

This Petition for Reconsideration followed.

DISCUSSION

Under California's workers' compensation law, benefits are to be provided for industrial injuries when the statutory conditions of compensation are met. (Cal. Const., art. XIV, § 4; §§ 3600 et seq., 5300 and 5301.) The statutes establishing the scope of the WCAB's jurisdiction reflect a legislative determination regarding California's legitimate interest in protecting industrially-injured employees. (*King v. Pan American World Airways* (9th Cir. 1959) 270 F.2d 355, 360 [24 Cal.Comp.Cases 244], cert den., 362 U.S. 928 (1960) ["The [California Workmen's Compensation] Act applies to all injuries whether occurring within the State of California, or occurring outside the territorial boundaries if the contract of employment was entered into in California or if the employee was regularly employed in California."].)

In general, the WCAB may assert its subject matter jurisdiction in a given workers' compensation injury claim when the evidence establishes that an employment related injury, which is the subject matter, has a significant connection or nexus to the State of California. (See §§ 5300, 5301; *King, supra,* 270 F.2d at 360; *Federal Insurance Co. v. Workers' Comp. Appeals Bd.* (*Johnson*) (2013) 221 Cal.App.4th 1116, 1128).) Whether there is a significant connection or

nexus to the State of California is best described as an issue of due process, though it has also been referred to as a question of subject-matter jurisdiction. (*New York Knickerbockers v. Workers' Comp. Appeals Bd.* (*Macklin*) (2015) 240 Cal.App.4th 1229, 1238; *Johnson, supra,* 221 Cal.App.4th at 1128.)

In addition to injuries occurring in California, the WCAB can also assert subject matter jurisdiction over injuries occurring outside this state in certain circumstances. Section 3600.5, subdivision (a) states: "If an employee who has been hired or is regularly working in the state receives personal injury by accident arising out of and in the course of employment outside of this state, he or she, or his or her dependents, in the case of his or her death, shall be entitled to compensation according to the law of this state." (§ 3600.5(a).) Similarly, section 5305 states: "The Division of Workers' Compensation, including the administrative director, and the appeals board have jurisdiction over all controversies arising out of injuries suffered outside the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state." (§ 5305.)[6]

It has long been recognized that a hiring or regular employment in California within the meaning of sections 3600.5(a) and 5305 provides this state with sufficient connection to the employment to support adjudication of a claim of industrial injury before the WCAB. (*Alaska Packers Assn. v. Industrial Acc. Com.* (*Palma*) (1934) 1 Cal.2d 250, affd. (1935) 294 U.S. 532 (*Palma*); *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 27 [64 Cal.Comp.Cases 745] ["an employee who is a professional athlete residing in California, such as Bowen, who signs a player's contract in California furnished to the athlete here by an out-of-state team, is entitled to benefits under the act for injuries received while playing out of state under the contract"]; *Johnson, supra,* 221 Cal.App.4th at p. 1126.)

However, additional subdivisions of section 3600.5 limit this general principle in specific circumstances. Because applicant's claim was filed prior to September 15, 2013, the relevant subdivision here is former section 3600.5(b), which states:

> (b) Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this division while such employee is temporarily within this state doing work for his employer if such employer has furnished workmen's

[6] The residency requirement of section 5305 has long been recognized as unconstitutional. (See *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 20, fn. 6 [64 Cal.Comp.Cases 745].)

> compensation insurance coverage under the workmen's compensation insurance or similar laws of a state other than California, so as to cover such employee's employment while in this state; provided, the extraterritorial provisions of this division are recognized in such other state and provided employers and employees who are covered in this state are likewise exempted from the application of the workmen's compensation insurance or similar laws of such other state.

(Former § 3600.5(b).)

Because Florida passed its reciprocity statute in 2011, after applicant's injurious exposure but prior to the filing of his California compensation claim, the parties' disagreement focuses on whether former section 3600.5(b)'s reciprocity requirements must be satisfied at the time of the injurious exposure, or whether it is sufficient that reciprocity exists at the time a claim is filed.[7]

The fundamental purpose of statutory interpretation is to ascertain the Legislature's intent in order to effectuate the law's purpose. (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Interpretation begins "with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent." (*People v. Watson* (2007) 42 Cal.4th 822, 828.) The plain meaning controls if there is no ambiguity in the statutory language. (*People v. King* (2006) 38 Cal.4th 617, 642.) If, however, the language is susceptible to more than one interpretation, consideration must be given to other factors, such as the purpose of the statute, the legislative history, and public policy. (*Ibid.*) If a statute is amenable to more than one interpretation, the interpretation that leads to a more reasonable result should be followed. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

We are directed to interpret statutory language "consistently with its intended purpose, and harmonized within the statutory framework as a whole." (*Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 575, 585 [75 Cal.Comp.Cases 817].) "Statutory language should not be interpreted in isolation, but must be construed in the context of the entire statute of which it is a part, in order to achieve harmony among the parts." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 903.)

[7] Applicant further contests whether Florida's reciprocity statute satisfies the requirements of section 3600.5(b). We do not address this argument further due to our resolution of the issue in applicant's favor on other grounds, as described below.

Here, the plain language of former section 3600.5(b) requires that the conditions for application of the exemption – including the reciprocity provisions of subdivision (b)(1)(A) & (B) - apply "*while such employee is temporarily within this state doing work for his or her employer*[.]" (former § 3600.5(b)(1), emphasis added.)[8] It is undisputed that Florida's reciprocity statute did not exist at the time applicant was temporarily within this state while working for a Florida employer. Accordingly, the exemption is not applicable to applicant's claim.

This result is in accord with our past holdings. As the panel in *Roberts v. Tampa Bay Lightning* explained:

> Section 3600.5(b) on its face requires that the conditions required by that statute must exist, "while the employee is temporarily within this state doing work for his or her employer." In that Florida did not have a statute that reciprocated the provisions of section 3600.5(b) at the time applicant incurred injurious exposure while working in California, the Panthers are not entitled to the section 3600.5(b) exemption from California's workers' compensation law. It does not matter that the Florida statute includes a provision that states that it is effective as to claims made on or after July 1, 2011. While that provision may apply to claims made under Florida law, the Florida legislature has no jurisdiction or authority to change the content or scope of California's statutes. The Panthers cannot now claim an after-the-fact exemption from California law based upon a Florida statute that was not in existence during the time it employed applicant.

(*Roberts v. Tampa Bay Lightning* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 404, at *17–18; see also *Love v. Tampa Bay Buccaneers* (2015) 2015 Cal. Wrk. Comp. P.D. Lexis 668; *Favell v. Colorado Rockies* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 352.)

In the Opinion on Decision, the WCJ made clear that even if subdivision (b) of section 3600.5 does not apply to applicant's claim, she would have found the claim barred by *Johnson*, *supra,* 221 Cal.App.4th at 1128, because applicant's employment with the Marlins did not constitute a significant connection or nexus with the State of California. (Opinion on Decision at pp. 4–6.) However, *Johnson* requires a significant connection or nexus between this state and the applicant's claimed injury, not between this state and the applicant's employment with any particular employer during the cumulative trauma period. (*Johnson, supra,* 221 Cal.App.4th at 1128 ["If this state lacks a sufficient relationship with Johnson's *injuries*, to require the petitioner—

[8] The post-September 15, 2013 version of section 3600.5(b) uses the functionally identical language: "while the employee is temporarily within this state doing work for his or her employer[.]" (§ 3600.5(b).)

the employer—to defend the case here would be a denial of due process such that the courts of this state do not have authority to act."] (emphasis added); *see also Worrell v. San Diego Padres* (2020) 85 Cal.Comp.Cases 246, 254 ["However, we must clarify that under the holding *of Johnson, supra,* 221 Cal.App.4th at 1128, the question is not whether there is a sufficient nexus between any one employer and the state of California, but between the applicant's injuries and the State of California[.]"].)

Here, applicant testified – and defendants do not contest – that he was regularly employed in California during 1998 and 2002 while playing for the Ports and the River Cats, minor league affiliates of the Brewers and the Athletics respectively. (Transcript, 11/22/2017, at pp. 12; 67–68.) This constitutes a sufficient relationship between applicant's injuries and the State of California to satisfy the *Johnson* due process requirement of a significant nexus between applicant's injuries and this state.

Finally, we turn to the admissibility of applicant's post-surgery medical reports relating to his July 2017 surgery, which occurred after the MSC. Section 5502, subdivision (d)(3) provides that if the dispute over a claim is not resolved at the MSC, "the parties shall file a pretrial conference statement . . . listing the exhibits and disclosing witnesses. Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference."

Nevertheless, it is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To be substantial evidence a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).

According to the WCJ, the most important reason she decided to find these reports inadmissible was a belief that applicant's attorney had misled the court about applicant's ability to

appear for the original July 2017 trial date; the WCJ continued the matter as a result of representations from applicant's attorney that applicant could not travel to California for trial because of his recent surgery, but applicant did in fact travel to California during that very period to obtain the post-surgery QME reports in question.

Although we sympathize with the WCJ's frustration at what appears to have been at the very minimum extremely questionable representations from applicant's counsel, we disagree that the remedy here was to refuse to admit medical evidence that appears undoubtedly relevant to assessing applicant's level of disability. If the WCJ believed that applicant's attorney had misled the court in order to obtain a continuance of the trial under false pretenses, the remedy for that was sanctions against applicant's attorney, pursuant to section 5813.

The WCJ also reasoned that the medical reports should not be admissible because applicant was aware of his shoulder pain that led to his surgery prior to the time he sought to have the matter set for trial, which in the WCJ's view meant that he could have either obtained the surgery prior the MSC discovery cut-off or held off on setting the matter for trial at all until after the surgery and any post-surgery reports had been completed. We cannot tell from the record before us whether this was the case; the fact that applicant had shoulder pain as early as January 2017 which ultimately led to surgery in July 2017 does not appear clear evidence that applicant's decision to pursue surgery could have been made in January, or that such surgery could actually have been scheduled in time to obtain QME reports prior to the MSC. More importantly, even if that had been possible, section 5502(d)(3) refers to *medical evidence* that "could not have been discovered by the exercise of due diligence prior to the settlement conference," not to surgery that could have been scheduled prior to the MSC. Here, it was not possible to obtain the post-surgery medical reports in question prior to the settlement conference because the surgery did not actually occur prior to the settlement conference. To the extent that the WCJ believed that this fact was attributable to bad-faith tactics by applicant's attorney, the remedy was again to be found under section 5813, not section 5502.

In light of the above, we do not believe the WCJ's decision to refuse to admit applicant's post-surgery QME reports can be affirmed. On remand, these reports should be admitted, along with any other development of the record that may be necessary to ensure that any resulting award is based upon substantial evidence.

Accordingly, because we conclude that neither section 3600.5(b) nor *Johnson* precludes applicant's claim, we will rescind the WCJ's F&O and return the matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 17, 2018 Findings and Order is **RESCINDED** and the matter **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 13, 2022

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

ALLEN LEVRAULT
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK
GLENN, STUCKEY & PARTNERS

AW/ara

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