

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

**JOSE HERNANDEZ, *Applicant***

**vs.**

**VALLEY TRANSIT AUTHORITY,  
permissibly self-insured, adjusted by TRISTAR RISK MANAGEMENT, *Defendants***

**Adjudication Number: ADJ9687495  
Oakland District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

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

Applicant seeks reconsideration of the Findings, Award and Order (FA&O) issued by the workers' compensation administrative law judge (WCJ) on April 6, 2020. By the FA&O, the WCJ found in relevant part that applicant's injury is not catastrophic pursuant to Labor Code<sup>1</sup> section 4660.1(c)(2)(B).

Applicant contends that the evidence and law support a finding that he is entitled to an increased permanent impairment rating for his psyche per section 4660.1(c)(2)(B).

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

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will rescind the FA&O and return this matter to the trial level for further proceedings consistent with this opinion.

**FACTUAL BACKGROUND**

Applicant claims injury to the lumbar spine and psyche on August 19, 2014 while employed as a senior track worker by the Santa Clara Valley Transit Authority.

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise stated.

This matter initially proceeded to trial on March 15, 2019. Informal minutes of hearing noted that all exhibits were admitted with no objections and that the matter was to be submitted as of March 29, 2019 on trial briefs. The WCJ issued an Amended Findings, Award and Order on July 1, 2019. Applicant sought reconsideration of the WCJ's July 1, 2019 decision. Reconsideration was granted and the matter returned to the trial level.

The matter proceeded to a mandatory settlement conference on December 10, 2019, at which the parties prepared a pre-trial conference statement. At a subsequent hearing on January 8, 2020, informal minutes of hearing were prepared stating that the "parties incorporate the 12/10/19 stipulations and issues for Trial and submission" and "all exhibits previously admitted." (Minutes of Hearing, January 8, 2020.) The matter was submitted for decision again.

The WCJ issued the FA&O as outlined above.

## **DISCUSSION**

### **I.**

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 [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 section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. 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.*)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Applicant's Petition was timely filed on April 27, 2020. Our failure to act was due to a procedural error and our time to act on applicant's Petition was tolled.

### **II.**

Decisions of the Appeals Board "must be based on admitted evidence in the

record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Furthermore, decisions of 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].) An adequate and complete record is necessary to understand the basis for the WCJ’s decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, former § 10566, now § 10787 (eff. Jan. 1, 2020).) “It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence.” (*Hamilton, supra*, at p. 475.)

To date, no formal minutes of hearing or summary of evidence have been prepared on this matter as required by WCAB Rule 10787. We are unable to address the contentions raised by applicant in his Petition in the absence of a proper record of the proceedings including, at a minimum, an outline of the parties’ stipulations, disputed issues to be adjudicated and identification of the exhibits.

Upon return of this matter to the trial level, the trier of fact should conduct further proceedings in order to prepare proper minutes of hearing and a summary of evidence per WCAB Rule 10787.

Therefore, we will rescind the FA&O and return this matter to the trial level 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, Award and Order issued by the WCJ on April 6, 2020 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

I CONCUR,

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**February 9, 2021**

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

**EMPLOYMENT DEVELOPMENT DEPARTMENT  
FROST LAW  
JOSE HERNANDEZ  
WITKOP LAW**

*AI/pc*

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