

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

TIFFANY NELSON, *Applicant*

vs.

**HUMAN RESOURCES CONSULTANTS, INC.;
PRO CENTURY INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ9910849 (MF); ADJ9914286
Sacramento District Office**

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration (Petition) to provide an opportunity to further study the legal and factual issues raised by the Petition. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Amended Findings and Award (F&A) issued on May 6, 2021 in ADJ9910849, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that applicant, while employed as a clerical assistant on May 16, 2014, sustained industrial injury to the bilateral shoulders. Applicant further seeks reconsideration of the Findings and Order (F&O) issued on April 23, 2021 in ADJ9914286, wherein the WCJ found in pertinent part that applicant, while employed as a clerical assistant from May 15, 2013 through May 15, 2014, did not sustain injury arising out of and in the course of employment (AOE/COE) and ordered that applicant take nothing.

Applicant contends that the report of applicant's vocational rehabilitation expert was improperly excluded from evidence at the time of trial.

We have reviewed defendant's Answer. The WCJ has retired, and no Report and Recommendation on Petition for Reconsideration (Report) has been filed.

We have considered the Petition for Reconsideration, and the Answer, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&A in ADJ9910849 and the F&O in ADJ9914286, and return this matter to the district office for further proceedings consistent with this opinion.

FACTS

In Case No. ADJ9910849, applicant claimed injury to both shoulders while employed as a clerical assistant on May 16, 2014 by defendant.

In Case No. ADJ9914286, applicant claimed injury to both shoulders while employed by defendant as a clerical assistant during the period May 15, 2013 through May 15, 2014.

On September 8, 2020, applicant filed a Declaration of Readiness to Proceed (DOR), for a mandatory settlement conference (MSC), and requested a "Rating MSC" based on the medical report of Harry Khasigian, M.D. Defendant filed no objection to the DOR.

However, it does not appear that a rating issued prior to, or at the time of the MSC. The November 12, 2020 minutes indicate that: "Parties need a new rating, DEU will issue such. Rating to include 6/26/20 and 9/9/20. Please do not schedule until after 1/1/2021." The matter was continued to a further MSC and set for January 28, 2021.

The January 28, 2021 minutes indicate that: "Parties got new DEU rating since last conf. Applicant later requested a V.R. report and a supplemental report from the QME. Applicant filed the DOR on 9/8/20. No good cause for further discovery, set for trial over applicant's objection." Applicant's request for an order taking the matter off calendar was denied, and the matter was set for trial on March 16, 2021. The parties completed a pre-trial conference statement (PTCS) placing in issue injury AOE/COE, parts of body injured including the bilateral shoulders, the permanent and stationary date, need for further medical treatment, liability for self-procured medical treatment, the liens of applicant's counsel for funds advanced to the vocational expert, the lien of Frank Diaz for vocational expert reporting, and attorney fees. The following statements are handwritten under the Other Issues section: "[Applicant] objection to moving forward without VR Experts and supplemental Khasigian report; Payment of Expert Fees for Report and Generation of Report; whether Khasigian reporting is substantial evidence upon which a decision can be made." (January 28, 2021 Pre-Trial Conference Statement at p.3.)

Trial was held on March 16, 2021. The parties stipulated that applicant sustained injury to her bilateral shoulders on May 16, 2014 (ADJ9910849), but raised the issue of AOE/COE and body parts with respect to the claimed injury from May 15, 2013 through May 15, 2014 (ADJ9914286). Among the issues framed for decision were permanent disability and apportionment, the lien of applicant's counsel for monies advanced as part of a vocational expert

evaluation, and costs associated with “vocational expert fees.” (March 16, 2021 Minutes of Hearing/Summary of Evidence (MOH) at 3:18.)

Applicant offered into evidence the vocational expert reporting of Diaz & Company, dated February 10, 2021. The MOH state that:

Defendant objected to Applicant's Exhibit 3 on the ground that the reporting was procured subsequent to the MSC and is, therefore, inadmissible; said report was also not listed on the Pretrial Conference Statement, and, therefore, is inadmissible as a matter of law pursuant to several appellate decisions. Furthermore, beyond the obvious procedural concerns, defendant also alleges that said report is irrelevant and does not amount to substantial evidence. The Court sustained the objection that it was not listed at the time of the Mandatory Settlement Conference. (March 16, 2021 Minutes of Hearing/Summary of Evidence at 4:7.)

As relevant herein, applicant testified with respect to her injuries, and her evaluation by the QME. She further testified to her evaluation by vocational expert Mr. Diaz, which took place over two meetings, each lasting two hours. (*Id.* at 6:16.)

The WCJ issued two decisions on April 23, 2021. In Case No. ADJ9910849, the WCJ found in relevant part that applicant sustained injury to her bilateral shoulders with permanent disability of 19%, and the need for future medical care. In his opinion, he stated that his decision was based on the opinions of QME Dr. Khasigian. In Case No. ADJ9914286, the WCJ found that applicant did not sustain injury and stated that his conclusion was based on the opinions of QME Dr. Khasigian, and ordered that applicant taken nothing by way of that claim.

In her Petition for Reconsideration, applicant contends that it was error for the WCJ to exclude the February 10, 2021 vocational expert report of Diaz & Company. (Petition for Reconsideration at 2:7.)¹ Applicant maintains that the November 12, 2020 MSC was requested for purposes of obtaining a consultative rating, that the ratings were not complete as of the November 12, 2020 MSC, and that the matter was continued to an additional MSC on January 28, 2021 to allow the consultative ratings to address all relevant reports. At the January 28, 2021 MSC, applicant objected to the closure of discovery, indicating that she had been evaluated by a vocational expert, and that a report was pending. However, applicant’s request to be taken off

¹ The WCJ issued an Amended F&A on May 6, 2021. To the extent that applicant refers to the original decision of April 23, 2021 rather than the amended decision of May 6, 2021, her Petition is timely filed, and any confusion as to the dates appears to be harmless error.

calendar was denied, and the matter was set for trial over her objection. (Petition for Reconsideration at 3:16.) She asserts the decision to close discovery pursuant to Labor Code section 5502 necessarily involves a factual determination, and that the record reflects applicant's continuing efforts to obtain vocational expert reporting:²

Counsel for the applicant had explained to the court and the defendants that the Vocational Evaluation had taken place and the report was imminent. The report was received one week after the matter was scheduled for trial on 3/16/21. In the Stipulations and Issues, the evidentiary aspect of the applicant's case noted that the report of Frank Diaz was being solicited but it was unknown as to when it would arrive. Another issue that was raised was the payment for the retainer fee for the Vocational Evaluation. (Petition for Reconsideration at 6:16.)

Defendant's Answer responds that the applicant has failed to establish that the report of the vocational expert could not have been obtained prior to the closure of discovery through the exercise of reasonable diligence. Defendant further avers the Appeals Board may not develop the evidentiary record where such development would circumvent the mandated closure of discovery under section 5502.

DISCUSSION

Among the issues raised at trial were the lien of applicant's counsel for vocational evaluation costs advanced and the costs related to vocational expert fees. (March 16, 2021 Minutes of Hearing/Summary of Evidence at 3:15-18.) These issues were not addressed in either the F&A in Case No. ADJ9910849, or in the F&O in Case No. ADJ9914286.

Section 5313 provides:

The appeals board or the workers' compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.

In *Hamilton v. Lockheed Corp.*, 66 Cal. Comp. Cases 473, 476 [2001 Cal. Wrk. Comp. LEXIS 4947, *9-10] (en banc), we held:

² All further statutory references are to the Labor Code unless otherwise stated.

The WCJ is also required to prepare an opinion on decision, setting forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on. (Lab. Code § 5313.) The opinion enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful. (See *Evans v. Workers' Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755, 68 Cal. Rptr. 825, 826, 33 Cal. Comp. Cases 350, 351 [441 P.2d 633].) For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record.

The WCJ is required to “dispose of all issues raised,” and a failure to do so requires that we return this matter to trial level for further proceedings. (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543 [47 Cal.Comp.Cases 145, 155.]) We further observe that the reporting of the vocational expert should have been admitted into evidence if for no other reason than to evaluate the issue of applicant’s attorney’s lien against compensation and the issue of vocational expert litigation costs. (*Costa v. Hardy Diagnostic* (2007) 72 Cal.Comp.Cases 1492, 1497 [Appeals Bd. en banc].)

Additionally, we find merit to applicant’s arguments with respect to the procedural history in this matter. Applicant’s September 8, 2020 DOR requested a “Rating MSC,” to be set on November 12, 2020. The minutes from the November 12, 2020 hearing confirm that the rating was attempted, but “parties need a new rating” and that the rating would need to include two reports from the QME. (November 12, 2020 Minutes of Hearing.) The parties jointly requested a continuance, and that WCJ instructed that the matter not be set for hearing until after “1/1/2021.”

In the verified Petition for Reconsideration, applicant avers that “[a]t that time, notice was given of the ongoing Vocational Evaluation and the matter was not to be scheduled until after 1/1/2021.” (May 12, 2021 Petition for Reconsideration at 3:13.) Defendant correctly observes that there is no reflection in the record of why the matter was not to be set until after January 1, 2021, and no indication of an ongoing vocational expert evaluation. (May 27, 2021 Answer to Petition for Reconsideration at 4:12.) However, at the January 28, 2021 MSC, the minutes reflect that following the November 12, 2020 ratings MSC, “applicant later requested a V.R. report and a supplemental report from the QME.” (January 28, 2021 Minutes of Hearing.) Discovery was closed over applicant’s objection, and the matter set for trial. Among the issues specifically raised by applicant in the pre-trial conference statement was an objection to the matter moving forward without the reporting of the vocational expert. (January 28, 2021 Pre-Trial Conference Statement at p.4.)

It thus appears that applicant requested an MSC for the sole purpose of obtaining a consultative rating, and when the rating had not yet been completed as of the MSC date, the matter was continued for the express purpose of completing the requested ratings. Once the consultative ratings were accomplished, applicant advised the court of the pending vocational rehabilitation process and requested the matter be taken off calendar. The WCJ overruled the objection and ordered discovery closed and the matter set for trial, notwithstanding pending reports from both the vocational rehabilitation expert and also QME Dr. Khasigian. The applicant's objections were further memorialized in the Pre-Trial Conference Statement, and are now reiterated in the Petition for Reconsideration.

On this record, we conclude that the applicant acted with reasonable diligence in seeking additional evidence in the form of vocational reporting. Applicant initiated the process of obtaining the vocational reporting prior to the closure of discovery, and provided timely notice to the parties and to the WCJ of the pendency of such reporting. The process of obtaining the vocational reporting was substantially under way when the matter returned to an MSC, which had been previously continued for the purpose of obtaining a DEU rating. Thus, applicant should not have been precluded from obtaining and finalizing that evidence. Moreover, since the parties should have been afforded a reasonable opportunity to complete discovery in the response to the requested vocational expert reporting, discovery was closed prematurely at the January 28, 2021 MSC.

Additionally, because the admission of the vocational expert reporting at trial was necessary to adjudicate the issues raised by the parties, so that the issues may not have been fully addressed in the trial decisions in this matter, it is necessary to rescind the decisions in both cases. We note that the record is unclear as to whether there was notice to defendant of the pending vocational expert evaluation until the MSC on January 28, 2021. As appropriate, due process requires that the WCJ consider whether defendant should be allowed to obtain rebuttal reporting at their discretion and whether other discovery should be obtained. Once both parties have finalized their reporting, the parties will be in a position to "guarantee a productive dialogue leading, if not to expeditious resolution of the whole dispute, to thorough and accurate framing of the stipulations and issues for hearing." (*San Bernardino Community Hosp. v. Workers Compensation Appeals Bd. (McKernan)*, 74 Cal. App. 4th 928 [64 Cal. Comp. Cases 986].)

Accordingly, we rescind the F&A and the F&O and return the matter to the trial level for further proceedings. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED, as the **DECISION AFTER RECONSIDERATION** of the Workers' Compensation Appeals Board, that the Amended Findings and Award dated May 5, 2021 in ADJ9910849, and the Findings and Order dated April 23, 2021 in ADJ9914286 are **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

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 20, 2021

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

**TIFFANY NELSON
METZINGER & ASSOCIATES
BRADFORD & BARTHEL**

SAR/abs

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