WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RONALD WADE, *Applicant*

vs.

BLACKSTONE CONSULTING, INCORPORATED;
NORTH RIVER INSURANCE COMPANY, administered by CRUM & FORSTER,
Defendants

Adjudication Number: ADJ13504941
Long Beach District Office

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.

In addition, we find it necessary to admonish applicant's attorney Keith Seagull for failing to include his state bar number with his name on the heading of the Petition for Reconsideration contrary to the Rules of the Administrative Director (AD), Rule 10205.12(a)(4) and for failing to support his arguments with specific references to the record. (Cal. Code Regs., tit. 8, § 10842(b)(2).) Future violations may lead to the imposition of sanctions. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10561.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 30, 2022

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

RONALD WADE
LAW OFFICE OF KEITH SEAGULL
McNAMARA DRASS
EMPLOYMENT DEVELOPMENT DEPARTMENT

PAG/*cs*

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

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

I
INTRODUCTION

1.	Applicant's Occupation:	Security Officer
	Applicant's Age:	39 on DOI
	Date of Injury:	December 1, 2018
	Parts of Body Claimed:	Neck, left shoulder, and left knee
2.	Identity of Petitioner:	Applicant
	Timeliness:	Yes
	Verification:	Yes
3.	Date of Findings and Order	October 31, 2022
4.	Petitioner's Contentions:	That the Applicant sustained injury and that Applicant's claims are not barred by the Statute of Limitations, despite being filed approximately two years post injury.

II
STATEMENT OF THE CASE AND FACTS

It is undisputed that on December 1, 2018 the Applicant was chasing an individual while performing his job duties as a security officer and fell down. It is further undisputed that the Applicant declined medical treatment the day of the incident. It is undisputed that the Applicant continued to work with no lost time and sought no medical treatment for the incident.

The Applicant continued to work with the instant employer for another year, until work restrictions from his civil lawsuit against another employer prevented him from continuing to work. The Applicant filed the Application for Adjudication for this incident approximately two years later. Among the reasons for waiting, the Applicant stated that he wished to finish his legal actions against other entities before beginning this one.

After accommodating some calendar issues and an illness by the undersigned, the matter came around for trial on September 6, 2022. The parties did not object to the issues raised for determination, nor did any party challenge the MOH & SOE. The Findings and Order (F&O)

issued on October 31, 2022. Applicant, through counsel, filed a timely Petition for Reconsideration (Petition), dated November 17, 2022, challenging the F&O.

III
DISCUSSION

The Petition is noncompliant with the Regulations

Any pleading filed with the WCAB must include the name and State Bar Number (SBN) of the attorney filing said pleading.[1] This is a mandatory requirement through the use of the word "shall."

The Petition fails to disclose the SBN of the attorney filing it. Moreover, the caption for the Petition fails to disclose the name of the attorney filing it, which runs afoul of the California Rules of Court.[2]

Petitions for Reconsideration must support evidentiary statements with specific references to the record.[3] This is a mandatory requirement through the use of the word "shall."

The Petition contains only three citations to the record. Only two of those citations are correct. The Petition, on page 3, line 14, contains a citation to the MOH & SOE which does not support the assertion contained therein. Moreover, wherever else the Petition references medical reports or other assertions, there are no citations in support of the same.

The Applicant did not meet his burden of proof on the issue of injury AOE/COE

It is well established that a specific injury needs to cause disability or need for medical treatment.[4] An Applicant has the burden of proof by a preponderance of the evidence to establish that an injury occurred.[5] Moreover, it is well established that medical opinions must be based on substantial medical evidence.[6] Part of substantiality includes the factual accuracy of what is presented therein, as well as the credible testimony of witnesses in support of said facts. The trial judge is afforded great latitude in credibility determination.[7]

Regarding the finding of no injury, the Petition takes issue finding that Dr. Haronian's opinions are not substantial. The Petition seeks to blame Applicant's prior attorney for the wrong

[1] CCR § 10520(a)
[2] California Rules of Court 2.111(1)
[3] CCR § 10945(b)
[4] Labor Code §3208.1(a)
[5] Labor Code §§ 5705, 3202.5
[6] Escobedo v. Marshalls, CNA Ins. Co., 70 Cal. Comp. Cases 604, 620 (W.C.A.B. April 19, 2005)
[7] See Garza v. Workers' Comp. Appeals Bd., 3 Cal. 3d 312; *see also* Schmidt v. Superior Court, 44 Cal. App. 5th 570

date of injury appearing at times in the treating doctor reports.[8] The undersigned notes that Applicant's current counsel had ample opportunity to correct these issues, either by way of supplemental report or by deposition, but did not. Instead, Dr. Haronian's reports are offered into evidence without modification or comment by the party now taking issues with the deficiencies therein. The undersigned again notes that Dr. Haronian states, unequivocally, that the Applicant was injured on December 1, **2019**. (Applicant's Exhibit 1, Report of Dr. Haronian, 1/5/21 at p. 7, emphasis added). In the very same report, Dr. Haronian says the Applicant relays a history of injury in **2018**. (Id. at p. 1, emphasis added). The heading of this report discusses injury in **2019**. (Id.).

The undersigned did not find the Applicant credible. This determination was made based on the undersigned's ability to observe the witness making his statements while testifying, in connection with his demeanor while making them.[9] In addition to observing the Applicant's demeanor when testifying, the undersigned noted inconsistencies in the medical reporting. Applicant tells the PQME that he sought treatment for the alleged injury, but that treatment was delayed because of COVID-19. (Joint Exhibit 1, Report of PQME Dr. Smith, 5/12/21 at p. 3). This is objectively controverted by the fact that the Applicant was actively treating with Dr. Wilker for his other ongoing legal injury claims, during COVID-19 concerns, and receiving work restrictions from his other ongoing legal proceedings from March 2020 to August 2020. (MOH & SOE, Page 5, Lines 8-10). The Petition makes mention of taking judicial notice that virtually all medical treatment was suspended and delayed due to COVID-19. (Petition, Page 3, Lines 20-21). It should be noted that no motion was made at trial to take judicial notice of this. The undersigned also notes that during COVID-19 many medical practitioners still conducted in person exams or offered telehealth exams. As noted above, this assertion that medical care was unavailable is again rebutted by the fact that the Applicant was able to avail himself to medical care to obtain work restrictions from March 2020 to August 2020.

As noted in the Opinion on Decision, the Applicant relays different versions of the incident's severity. (Opinion on Decision, Page 2, Paragraph 3). Applicant testified that he did not feel injured at the time of the incident due to adrenaline. (MOH/SOE, 9/6/22, Pages 4-5, Lines 25, 1-2). This is contradicted by Applicant telling Dr. Haronian that he felt immediate pain to the

[8] The undersigned again notes that these references are not supported by citation to the record per CCR § 10945(b)
[9] Garza at 318-319; Schmidt at 582.

claimed parts of body. (Applicant's Exhibit 1, Report of Dr. Haronian, 1/5/21 at p. 2). These two statements are inconsistent on their face and are not reconciled anywhere in the record.

Additionally, various medical records from the other proceedings are introduced, without objection from the Applicant, which contain no mention of the 2018 incident at issue herein. (Joint Exhibit 5 & Joint Exhibit 8, Bates Stamp Page 25). It is of concern that the Applicant, when seeking medical care for his other injuries that have overlapping parts of body, does not mention the 2018 incident with the instant employer. There are two logical conclusions for this issue. One is that the Applicant was not being truthful to Dr. Wilker when seeking treatment; this does not help the Applicant's credibility. The other is that the incident herein truly was relatively minor and did not arise to the level of injury, as it appeared from initially declining medical treatment and not pursuing further care; this does not help establish that there was a compensable injury. Neither conclusion is favorable to the Applicant sustaining his burden of proof and no other explanation is offered to resolve the issue.

The PQME reporting of Dr. Michael Smith is not substantial evidence on the issue of AOE/COE. The doctor ultimately defers to the trier of fact as to whether an injury occurred. (Joint Exhibit 3, Report of PQME Dr. Smith, 10/12/21 at p. 3). Applicant as well has a subsequent incident on May 3, 2021, at a casino, where he had to seek medical attention for bilateral shoulder complaints. (Joint Exhibit 5, Bates Stamp Page 93). Instead of addressing those records and providing analysis, the PQME simply states that surgery is needed. (Joint Exhibit 4, Report of PQME Dr. Smith, 4/12/22 at p. 5). This is contradictory to the preceding report that defers to the trier of fact for causation, and it appears as if the doctor might not have even read or recalled his prior determinations. This is not substantial medical evidence.

Lastly, the Petition makes mention of the Sub Rosa video shown during the proceedings. (Defendant's Exhibit C). The undersigned notes that Applicant's counsel objected to the video, but said objection was seemingly to the weight of the evidence and not the admissibility. The undersigned admitted the evidence over this objection, noting as much. (MOH & SOE, Page 3, Lines 15-19). Applicant's counsel did not challenge this ruling further. Applicant's counsel also apparently agreed in sending the video to the PQME. More importantly, the undersigned notes that the surveillance video played no part in the findings issued in the F&O. The undersigned does not mention the video, or the investigation report, in the Opinion on Decision. Additionally,

Applicant's own testimony corroborates activity levels seen in the video. (MOH & SOE, Page 6, Lines 21-24).

Given the numerous inconsistencies found in the evidence, along with the undersigned determinations that the Applicant was not a credible witness after observing his testimony, the finding that the Applicant did not sustain his burden of proof by proving up injury should remain undisturbed.

Statute of Limitations

Proceedings for the collection of benefits must commence within one year of the date of injury or the last date on which medical benefits were furnished.[10] The employee bears the initial burden of notifying the employer of an injury, unless such notice is unnecessary because the employer already knows of the injury or claimed injury from other sources. The employer then has the burden to inform the worker of possible compensation rights and provide a claim form.[11] Failing to provide a claim form tolls the statute of limitations (SOL) during the time the employee actually remains unaware of his possible rights.[12] Providing a claim form is not required when an applicant does not lose time from work and does not require medical treatment beyond first aid.[13] Defendant has the burden of proof on this affirmative defense.[14]

It is undisputed the Applicant tripped and fell at work. It is undisputed that the Applicant reported to his employer that he did not need medical attention. It is undisputed that the Applicant did not miss time from work following this incident. It is undisputed that the Applicant filed the Application one year and nine months post-incident. It is well established in these instances that the employer does not have the burden to provide a claim form where the incident is benign, there is no treatment beyond first aid, and the employee does not miss time from work.[15] That is exactly what happened here. There is no evidence presented that the employer was on notice that this incident was anything more than a trip and fall resulting in further medical care or lost time from work. The Petition asserts that the SOL was tolled until the date of knowledge, but the obligation to provide claim form was not triggered. Moreover, Defendant established that the Applicant had knowledge of workers' compensation procedures. (MOH/SOE, 9/6/22, Page 6, Lines 9-10). It was

[10] Labor Code §5405
[11] Labor Code §§5401, 5402; Honeywell v. Workers' Comp. Appeals Bd. (Wagner) (2005) 35 Cal.4th 24
[12] Reynolds v. Workers' Comp. Appeals Board (1974) 12 Cal.3d 726, 730
[13] Labor Code §5401(a)
[14] Labor Code §5409; Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Martin)(1985) 39 Cal.3d 57
[15] *See* Wheldon v. Golden Empire Transit, 2012 Cal. Wrk. Comp. P.D. LEXIS 496

also presented that the Applicant has prior workers' compensation claims. The WCAB has given consideration to an Applicant's sophistication with workers' compensation proceedings when analyzing the SOL issue.[16] The undersigned also notes that the Petition takes issue with this analysis, but it should be noted that the Applicant had Due Process and had the opportunity to clarify this statement at trial during testimony. No further inquiry was sought.

The undersigned also must note the Applicant's testimony that he did delay his claim's filing while other legal proceedings concluded. (MOH & SOE, Page 5, Lines 5-9). It should be noted that the SOL is present to require "diligent prosecution" of claims.[17] Additionally, the SOL's purpose in workers' compensation cases is to have an early adjudication of disputed issues, while competent evidence is available, in order to protect against false claims or those based on remote and unsatisfactory speculation.[18]

Lastly, the Petition alleges that the first time the SOL defense was raised was on the Pre-Trial Conference Statement (PTCS). (Petition, Page 2, Lines 2-3). This is not accurate. Defendant filed an Answer on September 4, 2020 raising all affirmative defenses available to it. (EAMS DOC ID #33687085). The Petition also alleges that Defendant did not deny the claim until December 12, 2020. This is not accurate.[19] The Answer is dated September 4, 2020 and indicates "AOE/COE DENIED" under the area for "Injury." Moreover, the undersigned went over the PTCS at length with the parties. From there, the undersigned read into the record the stipulations and issues, which included Defendant's assertion that there was an SOL defense. The undersigned then asked the parties if the "stips and issues" were accurate and no objection was tendered. Once the MOH & SOE were served, no objection was tendered to the SOL defense being raised therein.

Given the purpose of the SOL, the Applicant's own reports about intentionally delaying this claim's filing, and the totality of the circumstances herein, the undersigned must conclude that the claim is barred by the SOL as the Application was filed more than one year from the date of injury.

---

[16] *See* Rudd v. Oakland Raiders & ACE/USA Administered, 2011 Cal. Wrk. Comp. P.D. LEXIS 243
[17] Bassett-Mcgregor v. Workers' Comp. Appeals Bd., 205 Cal. App. 3d 1102, 1115
[18] Id.
[19] The undersigned respectfully defers to the WCAB to determine if these verifiable misrepresentations warrant admonishment or even sanctions.

IV

CONCLUSION

For the foregoing reasons, the undersigned respectfully recommends that the Petition for Reconsideration be DENIED.

Additionally, the undersigned respectfully defers to the Workers' Compensation Appeals Board to review Footnote 19 and determine if further action is warranted.

DATE: December 1, 2022

Michael Joy

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE