

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

BLADIMIR SOTO, *Applicant*

vs.

TUTOR PERINI; ZURICH NORTH AMERICA, *Defendants*

**Adjudication Number: ADJ12401308
Pomona District Office**

**OPINION AND ORDER
DISMISSING PETITION
FOR RECONSIDERATION**

Applicant, in pro per,¹ seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on October 11, 2021, wherein the WCJ found in pertinent part that applicant did not sustain his burden of proof that he sustained an industrial injury to his gastrointestinal system, back, or leg.

As a preliminary matter, applicant's petition for reconsideration is untimely. There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10940(a), 10615(b).)

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979,

¹ Applicant filed a Notice of Dismissal of Attorney dated July 12, 2023.

984 [46 Cal.Comp.Cases 1008]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73].)

The petition in this matter was filed on July 12, 2023. This was more than 25 days after the service of the WCJ's October 11, 2021 decision and beyond whatever extension of time, if any, the petitioner might have been entitled to under WCAB Rule 10600. (Cal. Code Regs., tit. 8, § 10600.)

Based on our review of the record and for the reasons discussed below, we will dismiss the petition as untimely to the extent it seeks reconsideration. At the trial level it should be treated as timely petition to reopen. We provide the following brief discussion and note the following issues.

BACKGROUND

In July 2022, applicant claimed injury to various body parts while employed by defendant as a laborer on June 26, 2019. It is undisputed that applicant sustained injury AOE/COE in the form of a puncture wound to the abdomen. Applicant also claims injury to his gastrointestinal system, back, and leg.

Defendant provided benefits in the form of medical care and temporary disability indemnity. (Pre-trial conference statement, p. 2.)

At the MSC, the issues were 1) parts of body injured -- gastrointestinal, back, and leg; 2) attorney fees; and 2) whether the reports of primary treating physician (PTP) Stanley Majcher, M.D. constitute substantial medical evidence. (Pre-trial conference statement, p. 3.)

The matter proceeded to trial August 11, 2021, on the following issues: 1) parts of body injured -- gastrointestinal, back, and leg and 2) attorney fees. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 11, 2021 trial, p. 2.)

Applicant was present during the morning session, with the assistance of a Spanish interpreter, but did not testify. Defendant did not present any witnesses. The following exhibits were admitted into evidence:

Exhibit 1: Report of Dr. Majcher dated 1/13/21.²

Exhibit A: PQME reports of Dr. Barry Gwartz dated 3/23/20 and 7/3/20.

Exhibit B: Letter from Zurich to applicant regarding denial dated 8/28/19.

² It appears that other records that exist, but they were not in evidence.

The Appeals Board's record of proceedings is maintained in the adjudication file in EAMS, however "[d]ocuments that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings." (Cal. Code Regs., tit. 8, § 10803.)

Exhibit C: Transcript of applicant’s deposition for impeachment dated 2/7/20.

(MOH/SOE, p. 3.)

Panel Qualified Medical Evaluator (PQME) Barry Gordon Gwartz, M.D. noted that there is no substantial evidence to indicate that applicant’s right inguinal hernia, if present, was industrial, unless additional records indicate otherwise. (Exh. A, Dr. Gwartz’s July 3, 2020 supplemental report, p. 13 [emphasis added].)

DISCUSSION

Subject to the limitations of Labor Code³ section 5804, “[t]he appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of [Division 4] ... At any time, upon notice and after the opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.” (Lab. Code, § 5803.) What constitutes “good cause” must necessarily depend upon the facts and circumstances of each case and may consist of newly discovered evidence previously unavailable, a change in the law, or “any factor or circumstance unknown at the time the original award or order was made which renders the previous findings and award ‘inequitable.’” (*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 241-242 [48 Cal.Comp.Cases 587]; *Benavides v. Workers' Comp. Appeals Bd.* (2014) 227 Cal.App.4th 1496, 1500-1501 [79 Cal.Comp.Cases 483].)

Pursuant to section 5410, an injured worker who previously received workers’ compensation benefits, as applicant did here, is entitled to institute proceedings for benefits for “new and further disability” within five years of the date of injury. (Lab. Code, § 5410; *Sarabi, supra*, at 925.) Framed another way, the WCAB has jurisdiction to award additional benefits if a petition to reopen (Lab. Code, §§ 5803, 5804) or petition for new and further disability (Lab. Code, § 5410) is filed within five years of the date of injury. (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 925 [72 Cal.Comp.Cases 778].)

Section 3202 imposes an obligation of liberal construction in order to extend protection to injured employees and informality of pleadings in workers’ compensation proceedings before the Board has been recognized. (*Liberty Mutual Ins. Co. v. Workers' Comp. Appeals Bd.*

³ All further statutory references are to the Labor Code, unless otherwise noted.

(*Aprahamian*) (1980) 109 Cal.App.3d 148, 152 [45 Cal.Comp.Cases 866].) The courts have rejected pleading technicalities as grounds for depriving the Board of its continuing jurisdiction under Labor Code sections 5410, 5803, 5804 and 5805. (*Aprahamian, supra*, at 152-153.) Indeed, a letter written by a doctor at an employee's request, stating that an award was insufficient in view of the injury, has been regarded as the institution of proceedings under section 5410. (*Zurich Ins. Co. v. Workers' Comp. Appeals Bd. (Cairo)* (1973) 9 Cal.3d 848, 852 [38 Cal.Comp.Cases 500], citing *Beaida v. Workers' Comp. Appeals Bd.* (1968) 263 Cal.App.2d 204, 208-210 [35 Cal.Comp.Cases 245].)

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is “. . . one of ‘the rudiments of fair play’ assured to every litigant . . .” (*Id.*, at 158.) A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) The “essence of due process is simply notice and the opportunity to be heard.” (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986].) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties' rights to due process. (*Gangwish, supra*, at 1295, citing *Rucker, supra*, at 157-158.)

The Appeals Board also has a constitutional mandate to “ensure substantial justice in all cases” and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The “Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee.” (*McKernan, supra*, at 937-938.)

Moreover, the Appeals Board has the authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate

the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

Accordingly, we dismiss the petition as untimely to the extent it seeks reconsideration. However, upon return to trial level the WCJ should treat it as a timely filed petition to reopen. The WCJ may wish to consider holding a status conference to determine whether the record requires further development, or if further discovery is necessary, prior to holding a hearing on the petition to reopen.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the October 11, 2021 Findings and Order is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 11, 2023

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

**BLADIMIR SOTO
JIE CI DING
EMPLOYMENT DEVELOPMENT DEPARTMENT
LEWIS, BRISBOIS, BISGAARD & SMITH
TELERIA, TELLERIA & LEVY**

JB/cs

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