

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

JUAN LOPEZ, *Applicant*

vs.

**BARRETT BUSINESS SERVICES, INC. permissibly self-insured,
administered by CORVEL CORPORATION, *Defendants***

Adjudication Numbers: ADJ7745966, ADJ7909061

Van Nuys District Office

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Applicant seeks reconsideration of the Findings, Award and Order (F&A) in case number ADJ7745966, issued by the workers' compensation administrative law judge (WCJ) on May 22, 2023, wherein the WCJ found that applicant sustained injury arising out of and in the course of employment (AOE/COE) to his cervical spine, thoracic spine, lumbar spine, shoulders, and in the form of GERD (gastroesophageal reflux disease); the WCJ also found that applicant did not sustain injury AOE/COE to his lungs or in the form of HIV (human immunodeficiency virus).

Applicant also seeks reconsideration of the Findings and Order (F&O) in case number ADJ7909061, issued by the WCJ on May 22, 2023, wherein the WCJ found that applicant did not sustain injury AOE/COE, to his heart and blood system nor in the form of HIV or GERD.

Applicant contends that based on the November 21, 2016 report from internal medicine cardiology qualified medical examiner (QME) Mark Lensky, M.D., the record should be further developed regarding applicant's HIV injury claim.

We received a Joint Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.¹

BACKGROUND

Applicant claimed injury to his cervical, thoracic, and lumbar spine, to his shoulders and arms, to his heart and lungs, and in the form of hypertension, HIV, and GERD , while employed by defendant as a laborer during the period from December 23, 2009, through December 23, 2010 (ADJ7745966). Applicant also claimed injury to his heart and blood system, and in the form of HIV and GERD while employed by defendant on September 13, 2010 (ADJ7909061).

In his Report, the WCJ lays out a detailed history of the on-going litigation of this matter (from December 2014 to the present), including a number of times when the matter was continued or ordered off calendar for development of the record. (Report, pp. 1 – 2.) The WCJ noted that in late 2018, he ordered that applicant be examined by an Internal Medicine-Infectious Disease or an Internal Medicine – Hematology QME. (Report, p. 2.) The matter was again continued various times and based on our October 28, 2022, Opinion and Order Granting Removal and Decision After Removal (Opinion and Order), the matter was tried and submitted for decision on May 10, 2023. (Report, p. 3.)

DISCUSSION

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].) However, if a party fails to meet its burden of proof by obtaining and introducing competent evidence, it is not the job of the Appeals Board to rescue that party by ordering the record to be developed. (Lab. Code, § 5502; *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64

¹ We previously issued an Opinion and Order Denying Petition for Removal on August 22, 2018; an Opinion and Order Denying Petition for Reconsideration on August 29, 2019; and an Opinion and Order Granting Removal and Decision After Removal on October 28, 2022. Commissioner Lowe was a member of the August 22, 2018, and August 29, 2019, panels; Commissioner Sweeney was a member of the August 22, 2018, and October 28, 2022, panels. Both Commissioners have since retired, and other panel members have been assigned in their place. We issued prior Opinions as early as January 21, 2014, and the Commissioners who no longer serve on the Appeals Board have been replaced by other panelists.

Cal.Comp.Cases 986]; *Telles Transport Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290].) The duty to develop the record must be balanced with the parties' obligation to exercise due diligence to complete necessary discovery. (*San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (McKernan)*, *supra.*)

In our October 28, 2022, Opinion and Order we noted that, "In this case, the parties have submitted the case for decision three times and the WCJ has vacated submission three times. ... The medical record has not been developed as directed by the WCJ despite ample opportunity to do so." (Opinion and Order, p. 1.) Our review of the entire record (for the period from January 2011, to the present) clearly indicates that applicant was repeatedly given the opportunity to develop the record in support of his injury claims. As noted above, it is not our responsibility to rescue a party by ordering the record to be developed when that party has previously been provided ample opportunity to further develop the record. Thus, applicant has not shown good cause, under the circumstances of this matter, to yet again, delay final resolution of applicant's injury claims through further development of the record. Therefore, we will not disturb the WCJ's F&A.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings, Award and Order issued by the WCJ on May 22, 2023, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ NATALIE PALUGYAL, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 14, 2023

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

**JUAN LOPEZ
EQUITABLE LAW FIRM APLC
HINSHAW & CULBERTSON**

TLH/mc

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

**JOINT REPORT AND RECOMMENDATION OF WORKERS'
COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION FOR
RECONSIDERATION**

INTRODUCTION:

On June 16, 2023, Applicant filed a timely, Petition for Reconsideration. The petition was signed by the Michael H. Moghtader and verified by Hearing Representative Shahpoor Asher. The Petition contends that the WCJ's decision is not supported by substantial evidence and the record should be developed.

STATEMENT OF RELEVANT FACTS:

On December 11, 2014, this case was assigned to the undersigned by the presiding judge because WCJ John Gutierrez had retired, and the case had been remanded by the appeals unit on the issue of AOE/COE. The parties waived Labor Code § 5700 and the undersigned issued an opinion finding the injury arose out of and in the course of employment. At the time, Shahpoor Asher was the Hearing Represented on the case for the Brown and Associates. A petition for reconsideration was filed and on May 14, 2015, the appeals unit issued an opinion and order dismissing the petition for reconsideration.

At an MSC on September 22, 2016; defendant requested the matter be set for trial on all issues and Mr. Asher requested a continuance. The matter was continued. The parties appeared at the continued MSC on November 17, 2016, Defendant requested discovery be closed and the matter set for trial on all issues. The undersigned WCJ took the matter off calendar for a PQME appointment.

Another DOR was filed. At the resulting MSC the matter was set for trial. The first trial date was February 6, 2018, the applicant did not appear, and defendant waived cross-examination of the Applicant and requested the matter be submitted on the documentary evidence. Applicant, by way of his hearing representative Shahpoor Asher requested a continuance because Applicant's testimony was critical to his case. The undersigned WCJ granted a continuance. On April 24, 2018, the parties appeared, the matter was pending submission to allow post-trial briefs and submitted on May 14, 2018. On June 15, 2018, the undersigned WCJ vacated submission in part because the internal PQME deferred to an expert in infectious disease. On July 9, 2018, Defendant filed a petition for removal and on August 22, 2018 the petition was denied.

At the second status conference after the submission was vacated the court issued an order for a panel qualified medical examiner in Infectious Disease and if there are not three infectious disease doctors serving as PQMEs in California, then in the alternative a panel qualified medical examiner in Hematology. On February 7, 2019, the parties appeared for a status conference, defense attorney reported that the medical unit never received the order for an additional panel; the additional panel is against her client's interest, and she was not going to send the order to the medical director. Applicant's hearing representative guessed his office did not send it and that he did not know what happened. The court continued the status conference.

At the next status conference on May 2, 2019, the parties agreed to submit on the existing record. On June 10, 2019, the undersigned WCJ issued a partial findings and orders. The findings included that the record needed further development on apportionment between dates of injury; the industrial nature of HIV; temporary disability outside of the period January 7, 2011 to August 7, 2011; and the industrial nature and impairment of body parts heart and lungs. On July 1, 2019, the defendant filed a petition for removal. On August 29, 2019, the Appeals unit denied the petition for removal.

The parties appeared for an MSC on March 17, 2021. Applicant's hearing representative had switched firms and took this case with him. The new attorney of record was Equitable Law Group. The MSC was continued. The parties again appeared on June 17, 2021, a medical report by Dr. Voss was filed. Mr. Asher said he could not proceed because he had not yet received the file from Brown & Associates. A continuance was granted. At the continued MSC on August 19, 2021, the parties supplemented the existing record with the report of Dr. Vyas and the matter was submitted. On October 6, 2021, the court realizing the report submitted was not the internal medicine report the court had been waiting for and vacated the submission. On October 25, 2021, Defendant filed a petition for removal. On October 28, 2022, the Appeals unit granted the petition for removal.

On May 10, 2023, the matter was tried and submitted. On May 22, 2023, the undersigned issued a Finding and Award which found Applicant failed to meet his burden to show industrial injury on the disputed body parts. It is from this finding that Applicant seeks relief.

DISCUSSION:

THE UNDERSIGNED WCJ CONCURS WITH THE OPINION AND ORDER DATED OCTOBER 28, 2022, GRANTING DEFENDANT’S PETITION FOR REMOVAL

The Opinion and Order dated October 28, 2022, states:

“In this case, the parties have submitted the case for decision three times and the WCJ has vacated submission three times. This is defendant’s third petition for removal. The medical record has not been developed as directed by the WCJ despite ample opportunity to do so.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].) However, the duty to develop the record must be balanced with the parties’ obligation to exercise due diligence to complete necessary discovery prior to a mandatory settlement conference. (See *San Bernardino Community Hosp. v. Workers’ Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp. Cases 986].)”

For the above reasons, the Applicant should not be given further leave to develop the record.

RECOMMENDATION:

The undersigned WCJ respectfully recommends that Applicant's Petition for Reconsideration dated June 16, 2023, be denied.

Dated: June 27, 2023

M. Victor Bushin
Workers' Compensation Administrative Law Judge

Filed and Served by mail on all parties
on the Official Address Record
By: Ruzan Bldryan