

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

SAMUEL ENRIQUE TEJADA CRUZ, *Applicant*

vs.

**COMMERCIAL CLEANING SYSTEMS; STARR INDEMNITY &
LIABILITY COMPANY, GALLAGHER BASSETT, *Defendants***

**Adjudication Numbers: ADJ11548913, ADJ11548920, ADJ11548921
Los Angeles District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks removal of the Joint Findings and Order (F&O) issued on March 8, 2021, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that good cause exists to reopen applicant's claims in case numbers ADJ11548913, ADJ11548920 and ADJ11548921. Based upon these findings, the WCJ granted applicant's petitions to reopen these claims.

Defendant contends that the evidence fails to establish that good cause exists to reopen applicant's claims because applicant willfully failed to appear for the July 29, 2019 trial on the issue of whether his alleged injuries arose out of and in the course of his employment (AOE/COE) and because the WCJ erred by admitting the report of qualified medical evaluator (QME) Lawrence Miller, M.D., into evidence. Defendant also contends that the WCJ lacked jurisdiction to reopen applicant's claims because applicant failed to seek reconsideration of the order dismissing applicant's claims.

We did not receive an Answer from applicant.

The WCJ filed a Joint Report and Recommendation on Removal (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition and the contents of the Report. Based on our review of the record and as discussed below, we will grant the Petition as one for reconsideration and affirm the F&O, except that we will amend to find that Dr. Miller's report constitutes evidence of good cause to reopen applicant's claims and order that the report be admitted into evidence.

FACTUAL BACKGROUND

While employed as a maintenance worker by defendant on February 21, 2018 and September 4, 2018, applicant allegedly sustained injury to his fingers (ADJ11548913) and to his head, bilateral hips and bilateral ankles (ADJ11548920). During the period of August 1, 2016 through September 4, 2018, applicant allegedly sustained cumulative injury to his hands, back, ankles, shoulders, arms, knees, legs, respiratory system and in the form of headaches and insomnia (ADJ11548921).

On July 29, 2019, the WCJ issued a notice of intent to dismiss applicant's claims on the grounds that applicant failed to appear for trial. (Notice of Intent, July 29, 2019.)

On August 14, 2019, applicant filed an objection to the notice of intent, alleging that his failure to appear at trial was the result of lack of communication. (Objection to Notice of Intent, August 14, 2019, p. 2.)

On September 6, 2019, the WCJ ordered the dismissal of applicant's claims without prejudice based upon his failure to appear at trial. (Order Dismissing Case, September 6, 2019.)

On September 16, 2019, applicant filed an objection to the order dismissing his claims and a petition to reopen his claims, alleging in both filings that his claims should be reopened based upon Labor Code sections 5803, 5804, and 5810. (Objection to Order Dismissing Case, September 16, 2019, p. 2; Petition to Reopen, September 16, 2019, p. 2.)

On November 13, 2019, applicant filed a declaration of readiness to proceed regarding the issues raised by his petition to reopen. (Declaration of Readiness to Proceed, November 13, 2019, pp. 1-7.)

On March 4, 2020, the parties appeared for a mandatory settlement conference and the WCJ took the matter off calendar, ordering the parties to "submit trial brief[s] good cause to reopen LC 5803 with[in] 15 days." (Minutes of Hearing, March 4, 2020.)

On August 11, 2020, applicant filed a declaration of readiness to proceed requesting a hearing on the status of his petition to reopen. (Declaration of Readiness to Proceed, August 11, 2020, pp. 1-7.)

On August 21, 2020, the WCJ ordered that applicant's claims be reopened. (Joint Findings and Order on Applicant's Petition to Reopen, August 21, 2020.)

On September 14, 2020, defendant filed a petition for removal of the WCJ's order reopening applicant's claims. (Petition for Removal, September 14, 2020.)

On November 13, 2020, we rescinded the order reopening applicant's claims on the grounds that the record did not show that defendant had an opportunity to be heard in opposition to the petition to reopen. (Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, November 13, 2020.)

On February 1, 2021, the parties filed a pre-trial conference statement, identifying the issue for trial as "whether [the] petition to reopen constituted good cause to reopen claim[s]" and proposing various exhibits, including the QME report of Dr. Simpkins dated August 14, 2019 and the QME report of Dr. Miller dated May 14, 2019. (Pretrial Conference Statement, February 1, 2019, pp. 6, 9.)

On February 2, 2021, the matter proceeded to trial on the issue of whether good cause exists to reopen applicant's claims. (Minutes of Hearing (Reporter), February 2, 2021, p. 3:15-17.)

The WCJ admitted the QME Report of Dr. Simpkins dated August 14, 2019 (and issued on October 2, 2019) into evidence as Exhibit Number 1 and marked the QME Report of Dr. Miller dated May 14, 2019 for identification as Exhibit Number 2, stating that defendant objected to Dr. Miller's report on the grounds that it had not been listed on the pre-trial conference statement of the AOE/COE trial and that the objection would be ruled upon at the time of decision. (*Id.*, pp. 3:21-4:4.)

In the Joint Opinion on Decision, the WCJ stated:

Evidentiary Objection and Ruling

Defendant objects to the admission of the report of Dr. Miller (Exhibit 2) as evidence of good cause to Reopen the claim. In support of its argument, Defendant asserted that QME Dr. Miller cannot be relied upon because it [is] not listed in the PTCS for the AOE/COE trial set 7/9/2019 and at the time of scheduled AOE/COE trial, there was no QME report to substantiate injuries.

Defendant is well aware of the existence of the QME report. The record indicates that defendant filed a DOR for Priority Hearing. At the hearing on March 27, 2019, Defendant sought to compel evaluation of Applicant by Dr. Miller. MOH/SOE 3/27/2019. EAMS69812130. An Order Compelling Attendance at Medical Evaluation by Dr. Miller at a date and time to be arranged by defendant issued. EAMS69812132. The argument raised in open court that “at the time of scheduled AOE/COE trial, there was no QME report to substantiate injuries” is inaccurate. Defendant arranged for Applicant’s med/legal evaluation with Dr. Miller. Defendant being aware of the existence of the QME report, there is no prejudice to defendant.

The admission of Exhibit 2 to determine if there is evidence of good cause to Reopen the claim is necessary. The objection to the admissibility of the report of Dr. Miller, Exhibit 2, is overruled. Exhibit 2 is admitted into evidence.
(Joint Opinion on Decision, March 8, 2021, pp. 4-5.)

In the Report, she stated:

An Order Dismissing the above cases, *without prejudice*, issued on 9/6/2019. Within 10 days, on 9/26/2019, Applicant filed a Petition to Reopen. . . .

A. JURISDICTION

. . .
[T]he dismissal on September 6, 2019 was *without prejudice*. In *Nolan v WCAB* (1977) 70 Cal. App 3d 122, the Court of Appeal, stated that when a party files a petition to reopen after a case has been dismissed without prejudice, the request to reopen is a request to have the original claim adjudicated. The WCAB retains its original jurisdiction to adjudicate this claim. *Nolan v WCAB* 70 Cal. App 3d at 127-129. [“]A petition to reopen filed by a party within five years... preserves the jurisdiction of the Appeals Board.” *Bland v WCAB* (1970) 3 Cal 3d 324, 330.

B. QME REPORTS ARE EVIDENCE OF GOOD CAUSE TO REOPEN

The Order dismissing issued after applicant failed to appear at Trial on 7/29/2019, and his attorney failed to get a hold of his client. EAMS70746339.

There is evidence presented that the QME Albert Simpkins evaluated the Applicant on August 14, 2019. Exhibit 1. Although

Dr. Simpkins evaluated the Applicant on August 14, 2019, and the report was not signed until October 3, 2019. This is clear evidence that the applicant is actively participating in the prosecution of this case at the time of the September 6, 2019 dismissal.

According to the QME Albert Simpkins, applicant had a work-related injury on 2/21/2018 due to laceration of the middle finger. As to the 9/4/2018, QME Albert Simpkins finds some discrepancy and leaves it to the trier of fact to determine if an injury occurred. Dr. Simpkins finds that Applicant has a combined 24% WPI. Exhibit 1 p. 24.

...

Applicant was evaluated by QME Miller on 5/29/2019. Over defendant's objection, the report was admitted into Evidence as Exhibit 2. QME Miller, on page 16 states that "there is evidence to support his claims of a sleep-related breather disorder with a documented moderate obstructive sleep apnea." He finds that the sleep apnea is likely industrial. Exh 2 p 17. But what is more important to note that he recommended "formal neuropsychological evaluation and formal brain MRI." Exh 2 p 17-18.

C. DEFENDANT'S ASSERTION THAT APPLICANT'S FAILURE TO ATTEND TRIAL IS BAD FAITH CONDUCT IS BELIED BY EVIDENCE OF MEMORY LOSS

Here, we have a QME who indicates that the applicant had sleep-related breathing complaints and obstructive sleep apnea related to solvent exposure at his employment. Exh 2 p. 19. The QME documents depression, personality change, headaches, and obstructive sleep apnea. Exh 2 p 19. The QME deferred the "depression, headaches, concentration and memory issues" to formal neuropsychological testing. Exh 2 p. 18. Thus, defendant's claims of bad faith is belied by the medical evidence provided by QME Miller (Exh 2) that applicant had concentration and memory issues. Defendant compelled Applicant's attendance at a medical legal evaluation by Dr. Miller and now objects to the admission of this report.

There is NO bad faith found on the part of the Applicant.
(Report, pp. 2-4.)

DISCUSSION

A petition for reconsideration is the mechanism by which a party may challenge a final order, decision, or award. (Labor Code § 5900¹.) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; or determines a “threshold” issue that is fundamental to the claim for benefits. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075, [65 Cal.Comp.Cases 650, 650-651, 655-656].) The Court of Appeal has given examples of threshold issues to include “whether the injury arises out of and in the course of employment, the territorial jurisdiction of the appeals board, the existence of an employment relationship or statute of limitations issues.” (*Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 (citations omitted.) “Such issues, if finally determined, may avoid the necessity of further litigation.” (*Id.*) (internal quotation marks and citations omitted).)

By contrast, removal may be requested to challenge interim and non-final orders issued by a WCJ. (*Cortez v. Workers’ Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleeman v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 275, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].)

Here, defendant filed the Petition seeking removal. However, the F&O determined an issue fundamental to applicant’s claims for benefits, i.e., the issue of whether applicant’s claims should be reopened. Thus, the F&O constitutes the determination of a threshold issue for which defendant should have sought reconsideration. Accordingly, we will treat the Petition as one for reconsideration and grant the Petition as one for reconsideration.

Turning first to defendant’s argument that the evidence fails to establish that good cause exists to reopen because applicant willfully failed to appear for the July 29, 2019 trial on the AOE/COE issue, we note that the Petition cites no authority, and we are aware of none, to support the contention that applicant may forfeit his claims based upon his alleged willful failure to appear. Defendant alleges applicant’s conduct falls within the definition of bad faith tactics set forth in WCAB Rule 10421, but that rule authorizes the WCJ to impose monetary—and only monetary—

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

sanctions. (Cal. Code Regs., tit. 8, former § 10561, now § 10421 (eff. Jan. 1, 2020); see also § 5813.) WCAB Rule 10421 also requires the filing of a petition for sanctions and a hearing thereon before sanctions may be imposed. Hence, we are unable to discern legal support for defendant's argument that applicant's alleged conduct with respect to the AOE/COE trial may show that the petition to reopen is unsupported by good cause.

Moreover, we agree with the reasoning of the WCJ, as stated in the Report, that defendant's argument that applicant willfully failed to appear at trial is belied by Dr. Miller's report opining that applicant has concentration and memory issues. (Report, p. 4.)

Accordingly, we are unable to discern legal or evidentiary grounds to support defendant's contention that the evidence fails to establish good cause to reopen applicant's claims because applicant willfully failed to appear at trial.

We next address defendant's contention that the WCJ erred by admitting Dr. Miller's report into evidence. Here, as stated in the Joint Opinion on Decision, the record shows that defendant successfully petitioned for an order compelling applicant's examination by Dr. Miller and could not have been subject to undue surprise or prejudice when applicant identified the report and proffered it as evidence for the purpose of demonstrating that good cause exists to reopen his claims. (Report, p. 3; Pre-Trial Conference Statement, February 1, 2021, p. 9; Minutes of Hearing (Reporter), February 2, 2021, pp. 3:21-4:4.) Based upon this record, we agree with the reasoning of the WCJ, as stated in the Report, that Dr. Miller's report constitutes evidence of good cause to reopen applicant's claims. (Report, p. 3.) Accordingly, we discern no error in the WCJ's admission of Dr. Miller's report into evidence. (Opinion on Decision, March 8, 2021, p. 5.)

We next address defendant's contention that the WCJ lacked jurisdiction to reopen applicant's claims because applicant failed to seek reconsideration of the order dismissing them. Here, as stated in the Report, applicant's claims were dismissed without prejudice, i.e., without a determination on the merits. (Report, p. 2.) Therefore, applicant was not foreclosed from seeking to reopen them so long as he did so before the expiration of the statutory period.

Although defendant argues that *Yang v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 607 supports its position that the WCJ lost jurisdiction when applicant failed to seek reconsideration of the dismissal order, that case involved a determination on the merits that the applicant was not an employee at the time of alleged injury. Because the applicant was determined not to be the defendant's employee and no petition for reconsideration was filed on

that decision, the WCAB determined that it lacked jurisdiction to consider applicant's petition to reopen two years later. No similar facts are before us here. Consequently, we are unable to discern legal support for the argument that applicant's failure to file a petition for reconsideration forecloses the WCJ from exercising jurisdiction over his petition to reopen.

Accordingly, we are unable to discern merit to defendant's contention that the WCJ lacked jurisdiction to reopen applicant's claims.

Having failed to discern merit to the contentions in the Petition, we note that the F&O does not explicitly set forth the WCJ's finding that Dr. Miller's report constitutes evidence to reopen applicant's claims or order that the report be admitted into evidence. Accordingly, we will amend the F&O to reflect the WCJ's decision in this regard.

Accordingly, we will grant the Petition as one for reconsideration and affirm the F&O, except that we will amend to find that Dr. Miller's report constitutes evidence of good cause to reopen applicant's claims and to order that the report is admitted into evidence.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Joint Findings and Order issued on March 8, 2021 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration, that the Joint Findings and Order issued on March 8, 2021 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

ADJ11548913

3. Exhibit 2 is admitted in evidence.
4. Based on the evidence presented, it is found that good cause exists to reopen applicant's claim, ADJ11548913.

ADJ11548920

3. Exhibit 2 is admitted in evidence.
4. Based on the evidence presented, it is found that good cause exists to reopen applicant's claim, ADJ11548920.

ADJ11548921

3. Exhibit 2 is admitted in evidence.
4. Based on the evidence presented, it is found that good cause exists to reopen applicant's claim, ADJ11548921.

ORDERS

IT IS ORDERED that the QME Report of Dr. Miller dated May 14, 2019 is admitted into evidence as Exhibit Number 2.

IT IS FURTHER ORDERED that Applicant's Petition to Reopen in ADJ11548913 is granted, that the Petition to Reopen in ADJ11548920 is granted, and that the Petition to Reopen in ADJ11548921 is granted.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 25, 2021

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

**SAMUEL ENRIQUE TEJADA CRUZ
INNOVATIVE MEDICAL MANAGEMENT
LAW OFFICES OF RAMIN YOUNESSI
LAW OFFICES OF SCHLOSSBERG & UMHOLTZ
TRI CITY HEALTH GROUP**

SRO/ara

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