

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

**KEVIN McCLAIN, *Applicant***

**LOS ANGELES RAMS; WASHINGTON FEDERALS; HOUSTON GAMBLERS;  
NORTH RIVER INSURANCE COMPANY; CALIFORNIA INSURANCE GUARANTEE  
ASSOCIATION, For FREMONT INSURANCE COMPANY, In Liquidation, *Defendants***

**Adjudication Number: ADJ9069066  
Santa Ana District Office**

**OPINION AND ORDER  
DENYING PETITION FOR RECONSIDERATION**

Defendant California Insurance Guarantee Association (CIGA) seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact of January 27, 2022 wherein it was found that while employed as a professional gridiron football player applicant sustained two separate cumulative injuries. The WCJ found "The first cumulative trauma injury is for the period June 15, 1975 through November 10, 1979 while applicant was employed by the [Los Angeles] Rams and the second cumulative trauma injury is for the period April 29, 1983 through the 1984 season while applicant was employed by the Washington Federals and the Houston Gamblers." The only issue for adjudication at trial was whether applicant sustained one or two periods of cumulative injury. (Minutes of Hearing and Summary of Evidence of August 16, 2021 trial at p. 2.)

CIGA contends that the WCJ erred in finding two separate industrial cumulative injuries. We have received an Answer from the applicant. We do not have the benefit of the report contemplated by Appeals Board Rule 10962 (Cal. Code Regs., tit. 8, § 10962) because the WCJ who issued the decision has retired. Nevertheless, because the requirement of a report is "directory rather than mandatory," the lack of a report is no impediment to the issuance of our decision. (*California Highway Patrol v. Workers' Comp. Appeals Bd. (Clark)* (1986) 178 Cal.App.3d 1016, 1019-1021 [51 Cal.Comp.Cases 123]; *United Merchandising Corp. v. Workers' Comp. Appeals Bd. (Katz)* (1987) 52 Cal.Comp.Cases 353 [writ den.]

As explained below, we will deny CIGA's Petition.

Preliminarily, we note that the Appeals Board has 60 days from the filing of a petition for reconsideration to act on that petition. (Lab. Code, § 5909.) CIGA's Petition was timely filed on February 21, 2022. However, the Petition did not come to the attention of the Appeals Board until after the expiration of the statutory time period. Consistent with fundamental principles of due process, therefore, and in keeping with common sensibilities, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a petition for reconsideration begins no earlier than the Appeals Board's actual notice of the petition for reconsideration. (See *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd. (Felts)* (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622].) In this case, the Appeals Board received actual notice of the Petition for Reconsideration on June 30, 2022, making this decision timely.

Turning to the merits, in this matter both reporting physicians qualified medical evaluator orthopedist Theodore Georgis, Jr., M.D. and qualified medical evaluator Michael J. Einbund, M.D. opined that applicant sustained two separate cumulative injuries. Dr. Georgis wrote in his January 5, 2016 report:

It is also reasonable to conclude that there are applicable two cumulative trauma periods/injuries in Mr. McLain's case; one while he was playing for the Los Angeles Rams from June 15, 1975 until November 10, 1979; and the other while he was playing for the Washington Federals and Houston Gamblers from April 29, 1983 through the 1984 season.

Separate CT periods are deemed applicable, as there was an intervening period of time when he left professional football after being released by the Los Angeles Rams on November 10, 1979, and the time that he signed with the Washington Federals on April 29, 1983. During that gap in his professional football career, there is no indication that he sustained any interval injury or received any active care for his orthopaedic injuries.

(January 5, 2016 report at p. 32.)

Similarly, Dr. Einbund wrote, "[G]iven the length of time between playing for the Rams and playing in the USFL, approximately three years, it would be reasonable to state that Mr. McClain was subjected to two separate periods of continuous trauma, the first from 06/15/75 through 11/10/79 and the second from 04/29/83 through the 1984 season in the USFL." (March 30, 2017 report at p. 2.)

As the Court of Appeal wrote in *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 234-235 [58 Cal.Comp.Cases 323]:

In any given situation, there can be more than one injury, either specific or cumulative or a combination of both, arising from the same event or from separate events. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1990) 219 Cal.App.3d 1265, 1271; *City of Los Angeles v. Workers' Comp. Appeals Bd.* (1978) 88 Cal.App.3d 19, 29; *State Comp. Ins. Fund v. Workmen's Comp. App. Bd.* (1969) 1 Cal.App.3d 812, 819.) The number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB. (*Aetna Cas. & Surety Co. v. Workmen's Comp. Appeals Bd.* (1973) 35 Cal.App.3d 329, 341; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 637.) For example, if an employee becomes disabled, is off work and then returns to work only to again become disabled, there is a question of fact as to whether the new disability is due to the old injury or whether it is due to a new and separate injury. (See *Assurance Corp. v. Industrial Acc. Com.* (1922) 57 Cal.App. 257, 259-260; *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856.) In addition, one exposure may result in two distinct injuries, posing another question of fact. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.*, *supra*, 219 Cal.App.3d at p 1271.) If a worker not only suffers a nervous breakdown but also develops an ulcer as a result of work-related stress, there would be two distinct injuries from one exposure. The nature and the number of injuries suffered are determined by the events leading to the injury, the medical history of the claimant, and the medical testimony received.

Without citation to any authority, CIGA appears to argue that, as a matter of law, there was only one cumulative injury because applicant did not sustain compensable disability between the two injuries. While this could be a factor for a reporting physician to consider in determining the number of injuries, we have been given no authority to which to conclude it is the overriding determination as a matter of law. To the contrary, *Austin, supra*, states that the number of injuries is a question of fact “determined by the events leading to the injury, the medical history of the claimant, and the medical testimony received.” (*Austin*, 16 Cal.App.4th at p. 235.) Here, both reporting physicians opined that applicant sustained two separate cumulative injuries. As noted in the WCJ’s Opinion on Decision, “There was no medical evidence offered to rebut the uncontroverted medical opinions of Dr. Einbund and Dr. Georgis that there are two separate cumulative traumas.” (Findings of Fact and Opinion on Decision at p. 6.)

Accordingly, we will deny CIGA’s Petition for Reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that Defendant California Insurance Guarantee Association's Petition for Reconsideration of the Findings of Fact of January 27, 2022 is hereby **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**August 29, 2022**

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

**FLOYD, SKEREN MANUKIAN, LANGEVIN  
KEVIN McCLAIN  
MIX & NAMANNY  
SIEGEL, MORENO & STETTLER**

**DW/oo**

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