WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KATO SERWANGA, ***Applicant***

vs.

NEW YORK GIANTS; INDIANAPOLIS COLTS;
TRAVELERS INDEMNITY INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ6694887
Sacramento District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant and defendant New York Giants, insured by Travelers Indemnity Insurance Company (defendant) both seek reconsideration of the October 1, 2019 Amended Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found in relevant part that California jurisdiction exists to find and award Workers' Compensation benefits. (F&A, Findings of Fact No. 4.) The WCJ further determined that applicant sustained injury arising out of and in the course of his employment to the cervical spine, lumbar spine, right hip, right and left hands, right knee, right and left ankles, headaches, hypertension with left ventricular hypertrophy and chronic renal insufficiency, and in the form of cognitive deficiencies, but not to the brain or psyche. (Findings of Fact Nos. 6-8.) The WCJ entered findings of permanent disability and the need for future medical care. The WCJ also deferred issues of permanent disability with respect to hypertension, chronic renal insufficiency and headaches for development of the record.

Applicant contends the reporting of Agreed Medical Examiner (AME) Mark Hyman, M.D. provides a sufficient basis to decide permanent disability to the deferred body parts/systems of hypertension, chronic renal insufficiency, and headaches. (Applicant's Petition for

[1] Commissioner Sweeney, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been substituted in her place.

Reconsideration (Applicant's Petition) at p. 1.) Applicant requests that the court give leave to the parties to submit an interrogatory to Dr. Hyman, and in the alternative, seeks reconsideration by the Appeals Board. (*Id*. at p. 2.)

Defendant contends there is no California jurisdiction over the claimed injuries because the evidence does not establish that applicant's contract of hire was made in California. (Defendant's Petition for Reconsideration (Defendant's Petition), at 5:7.) Defendant also contests the WCJ's permanent disability ratings and apportionment analysis. (*Id*. at 8:14.)

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that Applicant's Petition be denied on the merits, and that Defendant's Petition be denied as to the issue of California jurisdiction. The WCJ further recommends the grant of Defendant's Petition on the issue of permanent disability ratings, and for return of the matter to the trial level for further proceedings.

We have considered applicant's and defendant's Petitions for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&A and return the matter to the trial level for further proceedings.

FACTS

Applicant claimed injury to the brain, face, head, neck, upper extremities, lower extremities, neurological system including headaches, migraines and memory, internal system including high blood pressure, headaches, sleep disorder, chronic pain, chest pain and heart palpitations, and low back while employed as a professional football player by defendant New York Giants, insured by Travelers Insurance from September 5, 2003, through February 28, 2004, and by the Indianapolis Colts, insured by Travelers Insurance from August 31, 2004, to September 5, 2004. Defendant Travelers disputes California jurisdiction and denies injury.

The parties have selected Agreed Medical Evaluator (AME) Nial R. Morgan, M.D., and internal medicine AME Mark Hyman, M.D. In addition, medical-legal reporting has been adduced from regular physicians Michael A. Kasman, M.D. in neurology, Benjamin A. Carey, M.D. in psychiatry, and Claude S. Munday, Ph.D. in neuropsychology.

The parties proceeded to trial on September 19, 2011, framing issues that included, in relevant part, California jurisdiction over the claimed injuries, and whether applicant's injuries

arose out of and in the course of injury (AOE/COE). (September 19, 2011 Minutes of Hearing, at 3:22; 3:14.)

The WCJ conducted further trial proceeding on October 31, 2011, at which time applicant testified, in relevant part, to his permanent residence in California throughout his NFL career. (October 31, 2011 Minutes of Hearing and Summary of Evidence (Minutes), at 3:3.) Applicant testified he was represented throughout his NFL career by Don Yee, whose offices are in Los Angeles, California. (*Id*. at 3:7.) Applicant testified to the high levels of physical performance and exertion expected from his position as a professional athlete. (*Id*. at 3:17.) Applicant's NFL career started with the New England Patriots, and then the Washington Redskins. Prior to the end of the 2002 season, applicant's agent Don Yee negotiated a contract for him with the New York Giants. (*Id*. at 5:10.) Applicant played for the Giants for two seasons, and received bumps, bruises and pain while playing for the Giants, which was typical. (*Id*. at 5:14.) In the off-season of 2003, applicant returned to California, where applicant's agent negotiated another one year contract with the Giants. Applicant was in California when he learned the terms of the contract and advised his agent to accept the contract on his behalf, which his agent did. (*Id*. at 5:20.) Applicant played 13 games for the Giants in 2003. In December, 2003, while playing for the Giants, applicant injured the femoral condyle of the right knee and tore the labrum of this right hip, as well as sustained a tendon rupture of the right index finger. Applicant was "waived" by the Giants following treatment for his injuries. In 2004, applicant was physically located in California when his agent presented terms of a proposed contract with the Indianapolis Colts. Applicant gave his agent authority to accept the proposal, which the agent did. (Minutes, at 6:11.) Throughout his career, applicant's agent would present applicant with various contract proposals, and applicant would agree. Applicant only called his agent at his agent's business phone. (*Id*. at 6:14.) After accepting the offer from the Colts, applicant flew to Indianapolis where he underwent a physical examination and was provided a packet of documents, which he signed. Applicant denies any specific injuries with the Colts. However, applicant was injured in every game he played in the NFL through a combination of collisions and battery. (*Id*. at 7:3.) Applicant described the onset and development of a variety of symptoms during and after his NFL career. (*Id.* at pp. 8-11.)

Following submission and a review of the evidentiary record, the WCJ vacated the submission and ordered development of the record on January 27, 2011.[2] The parties obtained additional reporting from multiple specialties, and on June 27, 2019, the parties requested the supplemental reporting be moved into evidence and the matter submitted for decision. (June 27, 2019 Minutes of Hearing.)

The WCJ's F&A determined, in relevant part, that California jurisdiction was established because of applicant's residency at the time his contracts were negotiated. (F&A, Findings of Fact No. 4; Opinion on Decision, p. 1) The WCJ further determined that applicant sustained injury AOE/COE, and that all disability and need for medical treatment arose out of applicant's employment with the New York Giants. (Findings of Fact Nos. 6 and 13.) The WCJ awarded permanent disability arising out of injury to the cervical spine, lumbar spine, right hip, right and left hands, right knee, right and left ankles, headaches, hypertension with left ventricular hypertrophy and, chronic renal insufficiency, and in the form of cognitive deficiencies. (Finding of Fact No. 6.) The body parts of brain and psyche were deemed nonindustrial. (Findings of Fact Nos. 7 and 8.) The WCJ also order ordered the record developed regarding the nature and extent of the injury arising out of applicant's hypertension, chronic renal insufficiency and headaches. (Finding of Fact No. 9.)

Applicant filed a letter addressed to the WCJ on October 8, 2019, requesting the WCJ rely on the November 18, 2009 report of Dr. Hyman for ratings purposes. Therein, Dr. Hyman opined that applicant was not yet permanent and stationary but would be in six months. Applicant observed that Dr. Hyman had issued multiple reports thereafter stating he was making no change to his prior opinions. Applicant concluded that "it would appear that factually, applicant would have been permanent and stationary on or about 5/19/09." (Applicant's Petition, p. 1.) In the alternative, applicant proposed a joint interrogatory to Dr. Hyman, or that the letter be treated as a petition for reconsideration. (*Id*. at p. 2.) We will treat applicant's October 8, 2019 letter as a petition seeking reconsideration. (Lab. Code, § 5903; Cal. Code Regs., tit. 8, § 10940.)

Defendant's Petition asserts that the F&A does not address whether applicant's contracts of hire were made in California. (Defendant's Petition at 5:7.) Defendant asserts that California residency alone is insufficient to establish jurisdiction, and that applicant had not shown he signed

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[2] Following the issuance of the January 27, 2011 Order, the original WCJ retired, and a new WCJ was assigned to the matter.

any employment contract in California. (*Id*. at 5:17.) Defendant further asserts that applicant has not established the existence of an oral contract through his agent:

> As to the contract the applicant signed with the New York Giants on December 4, 2002, the applicant could not recall where he was physically located when he accepted the contract. As far as the contract the applicant signed with the New York Giants after the 2002 season, the applicant testified at Trial that he was in California, when he communicated his acceptance of his contract to Agent, Don Yee. Although Mr. Yee was a California-based agent, the record does not contain evidence as to the location of Mr. Yee when he accepted the contract with the New York Giants for the 2003 season on behalf of the applicant. The record is therefore insufficient to lead to a conclusion that an oral contract was formed in California. (*Id*. at 6:4.)

Defendant contends that in the absence of a contract of hire in California, applicant failed to establish that California has sufficient interest in the claim to exercise jurisdiction under *Federal Ins. Co. v. Workers' Comp. Appeals Bd. (Johnson)*, 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257]. Defendant also contests the ratings methodology used by the WCJ, and further avers the WCJ did not apply orthopedic apportionment. Finally, defendant includes an Answer to applicant's letter of October 8, 2019, asserting, "the trial judge should be upheld in his decision not to award permanent disability based on the reporting of AME Dr. Hyman." (Defendant's Petition at 12:10.)

The WCJ's Report observes that basis for the exercise of California's jurisdiction over the claimed injury arises out of applicant's oral contracts with his various employers, as described in applicant's trial testimony. (Report, at p. 4.) With respect to permanent disability, the WCJ recommends that defendant's petition be granted to correct instances where whole person impairment was inadvertently used instead of permanent disability. (*Ibid.*) The WCJ similarly recommends we return the matter for application of apportionment identified by the orthopedic AME. With respect to applicant's petition, the Report observes that no evidence was produced responsive to applicant's assertion that had no means to complete his hypertension course of treatment, and that the WCJ would revisit any supplemental reporting of AME Dr. Hyman as necessary. (*Id*. at p. 5.) Accordingly, the WCJ recommends the denial of defendant's petition as to jurisdiction, and the grant of the petition on issues of permanent disability and apportionment. (*Ibid.*)

DISCUSSION

Defendant contends California is without jurisdiction over the claimed injury because none of applicant's various employment contracts were formed in California.

Labor Code[3] Section 3600.5(a) provides that, "[i]f an employee who has been hired or is regularly working in the state receives personal injury by accident arising out of and in the course of employment outside of this state, he or she, or his or her dependents, in the case of his or her death, shall be entitled to compensation according to the law of this state."

Section 5305 provides:

> The Division of Workers' Compensation, including the administrative director, and the appeals board have jurisdiction over all controversies arising out of injuries suffered outside the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state. Any employee described by this section, or his or her dependents, shall be entitled to the compensation or death benefits provided by this division.

The burden of establishing that a contract of hire was made in California rests with applicant, who has the affirmative of the issue. (Cal. Lab. Code § 5705; § 3202.5.) The critical question in determining whether Labor Code section 5305 applies to a contract of hire is whether the acceptance took place in California. (*Aetna Casualty and Surety Co. v. Workers' Comp. Appeals Bd. (Salvaggio)* (1984) 156 Cal.App.3d 1097, 1103 [49 Cal.Comp.Cases 447]. A contract of employment is governed by the same rules applicable to other types of contracts, including the requirements of offer and acceptance. (*Reynolds Electrical & Engineering Co. v. Workmen's Comp. Appeals Bd. (Egan)* (1966) 65 Cal. 2d 429 [31 Cal.Comp.Cases 415].) Where parties have agreed in writing upon the *essential terms* of a contract, there is a binding contract even though a formal one is to be prepared and signed later. (*Commercial Casualty Insurance Company of Newark, New Jersey v. Indus. Acc. Comm.* (*Porter*) (1952) 110 Cal.App.2d 83 [17 Cal.Comp.Cases 84, *italics added*.)

We begin our discussion by observing that the California Supreme Court has held the residency requirement of section 5305 to be in conflict with the privileges and immunities clause of the United States Constitution. (U.S. Const., art. IV, §1; *Quong Ham Wah Co. v. Industrial Acci. Com.* (1920) 184 Cal.26 [1920 Cal. LEXIS 295].) Accordingly, the residency requirement of

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

section 5305 "has been nullified by the decision in *Quong Ham Wah Co. v. Industrial Acc. Com*. [citations], which held that the federal Constitution extended the benefits of the act to nonresidents also. (*Alaska Packers Asso. v. Industrial Acci. Com.* (1934) 1 Cal.2d 250, 255 [1934 Cal. LEXIS 358].) Thus, the applicant's residency at the time of his contract negotiations is not dispositive of the issue of California jurisdiction.

Accordingly, we turn to the question of whether jurisdiction is established by the existence of a contract of hire made in California. (Lab. Code, § 5305.) Applicant acknowledges that he signed his various written NFL contracts outside of California. (Minutes, at 6:20 12:9; 12:16.) However, applicant asserts that prior to executing a written contract he formed an enforceable oral contract with the Giants. Applicant avers that he was physically present in California when he authorized his agent, who was also physically present in California, to accept the offered contracts of hire. (Minutes, at p. 6:22.)

Defendant's Petition acknowledges that California caselaw provides that the "oral acceptance of a contract [leads] to a finding that an injured worker was hired in California." (Defendant's Petition, at 5:25.) Defendant also acknowledges the California Supreme Court decision in *Travelers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Coakley*) (1967) 68 Cal.2d 7, 12-13 [32 Cal.Comp.Cases 527], which held, "California has adopted the rule that an oral contract consummated over the telephone is deemed made where the offeree utters the words of acceptance." (See also *Ledbetter Erection Corp. v. Workers' Comp. Appeals Bd. (Salvaggio)* (1984) 156 Cal.App.3d 1097 [49 Cal.Comp.Cases 447]; *Paula Insurance Co. v. Workers' Comp. Appeals Bd. (Montes)* (2000) 65 Cal.Comp.Cases 426 [2000 Cal. Wrk. Comp. LEXIS 6264].)

However, defendant contends the record in this matter does not support the formation of an oral contract of hire, because the evidence does not establish the physical location of applicant's agent at the time he accepted the contract with the Giants on behalf of applicant. (Petition, at 6:4.)

Applicant testified that he negotiated his contract with the Washington Redskins while in California, and that he had conversations with his agent who was also in California. Applicant told his agent "he would sign with the Redskins under the terms that [sports agent] Yee told him." (Minutes, at p. 4:18.)

Applicant testified that he negotiated a contract with the New York Giants at the end of the 2002 season, and that he signed a contract at some point prior to December 8, 2002. Applicant testified that he returned to California during the off-season in 2003, and while in California,

"learned the terms of the contract and advised Yee to accept the contract on his behalf, which Yee did." (*Id.* at p.5:18.) In September 2004, applicant negotiated a contract with the Indianapolis Colts. Applicant was in California when his agent informed of the terms of a proposed contract. Applicant gave the agent authority to accept on his behalf, which the agent did. (*Id.* at p. 6:10.) With respect to the agent's location at the time of acceptance of the various offers, applicant testified:

> Throughout applicant's whole career Yee had authority to act for him. He indicates that the contract was usually negotiated the same every time. Yee would negotiate; applicant would get a phone call from him. There would be an understanding that "it was on the table" and applicant would agree. Applicant only called Yee at his business phone. Yee was not a cell phone guy.
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> (*Id.* at p. 6:13.)

It is well established that acceptance of an offer of employment in California by the injured worker or by his or her agent supports a finding of hire in California under sections 3600.5 and 5305. (*Alaska Packers Assn. v. Industrial Acc. Com.* (*Palma*) (1934) 1 Cal.2d 250, 252 [20 Cal. I.A.C. 319], affd. (1935) 294 U.S. 532 [55 S.Ct. 518, 79 L.Ed. 1044, 20 I.A.C. 326] [only connection to California was non-resident employee's agreement to out-of-state employment while aboard a ship in San Francisco harbor] (*Palma*).)

Here, applicant's agent communicated to him the terms of a proposed contract, while applicant was physically situated in California. In each instance, applicant testified that he would instruct his agent to accept the terms of the offer on his behalf, and that the agent thereafter conveyed applicant's acceptance to the NFL team making the offer. (Minutes, at 4:18; 5:18; 6:10.) However, the record does not establish the agent's physical location at the time of the acceptance. While applicant has testified that his agent was *based* in Los Angeles, California, the record does not establish that the agent was in California at the time he communicated applicant's acceptance of the offer of employment. (See *Tampa Bay Devil Rays v. Workers' Comp. Appeals Bd.* (*Luke*) (2008) 73 Cal.Comp.Cases 550 (writ den.) [2008 Cal. Wrk. Comp. LEXIS 85], panel dec. [2007 Cal. Wrk. Comp. P.D. LEXIS 125] [terms of contract were agreed to by telephone through California agent]; *Palepoi v. Seattle Seahawks* (February 5, 2015, ADJ7087477) [hiring in California by one team through agents' acceptance of employment in this state provided WCAB with jurisdiction over cumulative injury claim and supported joinder of another team that did not

hire the applicant in California]; *Clemons v. Indianapolis Colts* (May 3, 2017, ADJ9380444) [2017 Cal. Wrk. Comp. P.D. LEXIS 187] [acceptance of offer by authorized agent physically located in California sufficient to confer jurisdiction].) In addition, none of the contracts in question have been offered into evidence.

Decisions of the Appeals Board "must be based on admitted evidence in the record. (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*).) Our decision in *Hamilton* further held that, "for the opinion on decision to be meaningful, the WCJ must refer with specificity to an *adequate and completely developed record*." (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 476, italics added.) The WCJ or the WCAB, "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." (*San Bernardino Community Hospital v. Workers. Comp. Appeals Bd.* (*McKernan*) 74 Cal.App.4th 928 (64 Cal.Comp.Cases 986); see also *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 (63 Cal.Comp.Cases 261) [lack of substantial medical evidence on issue in dispute supported development of record]; *M/A Com-Phi v. Workers' Comp, Appeals Bd.* (*Sevadjian*) (1998) 65 Cal.App.4th 1020 [63 Cal.Comp.Cases 821] [appropriate to develop record lacking competent medical evidence].) 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].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) "It is well established that the WCJ or the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence." (*Id.* at p. 404; Garza v. Workers' Comp. App. Bd. (1970) 3 Cal.3d 312, 318 [35 Cal.Comp.Cases 500].)

Here, applicant contends that jurisdiction flows from a contract of hire formed in California when his agent, while in California, communicated his acceptance of an offer of employment. However, the record does not establish the agent's actual location at the time he communicated applicant's acceptance of the contract to the Giants. (*Id*. at 5:10.) Accordingly, we believe that the record must be developed to address whether a valid oral contract of hire was entered into in California, and specifically, the physical location of applicant's agent at the time he communicated applicant's acceptance of the various contracts. We also note that to the extent the assertion of

jurisdiction is based on a contract of hire, none of the actual written contracts have been offered into evidence by the parties. We will therefore rescind the finding of California jurisdiction pending development of the record.

Defendant's Petition also avers error in the ratings determination of the WCJ. (Defendant's Petition, at p. 8:14.) Defendant avers the WCJ applied the lower extremity impairment identified for the right knee and bilateral ankles, but did not convert lower extremity impairment to whole person impairment prior to adjusting for age and occupation. (*Id.* at p. 8:20.) The WCJ's Report agrees that the lower extremity impairment figure was used inadvertently, and recommends we rescind the finding of permanent disability and return the matter to the trial level for recalculation. (Report, at p. 2.) We agree, and pursuant to our rescission of the F&A and order for development of the record, we will return the matter to the trial level as per the WCJ's recommendation.

Defendant's Petition also avers the apportionment identified by AME Dr. Morgan was not properly applied in the WCJ's F&A. (Defendant's Petition, at p. 11:16.) The WCJ's Report again agrees, noting that his decision contemplated apportionment as between employers, but that apportionment pursuant to section 4663 was not adequately considered. We agree, and pursuant to our rescission of the F&A and order for development of the record, we will return the matter to the trial level as per the WCJ's recommendation.

Turning to Applicant's Petition, applicant challenges the WCJ's Finding that the "[the] record is insufficiently developed to determine the level of permanent disability in the form of hypertension with left ventricular hypertrophy and chronic renal insufficiency, and headaches." (Finding of Fact No. 9.) Applicant contends that pursuant to the finding of AME Dr. Hyman, applicant "would have been permanent and stationary on or about 5/19/09…." (Applicant's Petition, at p. 1.) Applicant contends the reporting of Agreed Medical Examiner (AME) Mark Hyman, M.D. therefore provides a sufficient basis to decide permanent disability to the deferred body parts/systems of hypertension, chronic renal insufficiency, and headaches. (*Ibid.*) Applicant requests in the alternative that the court give leave to the parties to submit an interrogatory to Dr. Hyman. (*Id.* at p. 2.)

The WCJ's Report observes, however, that the reporting of Dr. Hyman is not yet final, and that the record is incomplete with respect to the alleged hypertension. The WCJ notes that "[b]ecause of this lack of information in the record, the undersigned allowed the parties to identify a report by Dr. Hyman where he finalizes his permanent disability finding, and if one was

submitted, the undersigned would re-visit the issue." (Report, at p. 5.) While we agree with the WCJ's reasoning in this regard, our rescission of the entirety of the Award obviates the issues of the nature and extent of the claimed injury, including injured body parts and permanent disability.

In summary, we find that the record does not adequately address key issues relevant to the determination of whether California has jurisdiction over the injuries claimed herein. We also agree with the WCJ's recommendation that we rescind findings pertaining to permanent disability and apportionment, and return the matter to the trial level for development of the record. We will therefore rescind the October 1, 2019 Amended Findings and Award and return this matter to the WCJ for development of the record and for further proceedings and decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Amended Findings and Award, issued on October 1, 2019, is **RESCINDED**, and the matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 30, 2023

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

KATO SERWANGA
LEVITON DIAZ & GINOCCHIO
WALL MCCORMICK BAROLDI & DUGAN

SAR/abs

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