**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**PETE GARZA, *Applicant***

**vs.**

**SKANSKA-SHIMMICK-HERZOG, a joint venture; LIBERTY MUTUAL, administered by HELMSMAN MANAGEMENT SERVICES et al., *Defendant***

**Adjudication Numbers: ADJ10507939; ADJ9231232**
**San Francisco District Office**

# OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Joint Findings and Order and Award of February 5, 2020, the workers' compensation judge (WCJ) found that applicant, while employed during the period May 19, 2014 through May 19, 2015 by Skanska, Shimmick and Herzog (Joint Venture), Case Pacific Company, and Schnabel Foundation Company (but excluding employment by Demo-Masters, Inc.) sustained industrial injury in the form of hernia, but not to his bilateral knees, causing permanent disability of 17% and the need for further medical treatment (ADJ10507939). In ADJ9231232, the WCJ found that applicant, while employed by Underground Construction Company on August 22, 2013, sustained industrial injury in the form of hernia, causing permanent disability of 24% after apportionment, and the need for further medical treatment.

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends, in connection with his claim of bilateral knee injury, that the WCJ erred in failing to apply the rule of liberal construction under Labor Code section 3202, that the WCJ erred in not further developing the record, and that the WCJ erred in submitting the matter at trial, because "the underlying Declaration of Readiness was filed inappropriately, and applicant filed a timely objection and timely amendment to his application."

Answers were submitted by Skanska, Shimmick and Herzog (Joint Venture), Underground Construction Company, and Demo-Masters, Inc. The answers have been considered.

The WCJ submitted a Report and Recommendation ("Report").

Based on our review of the record and applicable law, we conclude that applicant's claim of bilateral knee injury in ADJ10507939 requires further development of the record, and that otherwise the WCJ's decision should be affirmed. We will amend the WCJ's decision accordingly, and we will return this matter to the trial level for further proceedings and new decision on applicant's claim of bilateral knee injury in ADJ10507939.

We observe at the outset that if a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include but are not limited to, injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or Court of Appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petition challenging a hybrid decision disputes a determination made on an interlocutory question, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions, i.e., significant prejudice or irreparable harm. (Cal. Code Regs., tit. 8, § 10955.)

In this case, we are called upon to review a hybrid decision because the WCJ's finding of no bilateral knee injury in ADJ10507939 is a "final" decision on the threshold issue of industrial injury, while the WCJ's rejection of further development of the medical record is in the nature of an interlocutory ruling. For these reasons, although we treat applicant's petition as a petition for reconsideration to review the finding of no bilateral knee injury in ADJ10507939, we also evaluate applicant's request for further development of the record under the removal standard, i.e., significant prejudice or irreparable harm.

At the outset, we further observe that the only part of the February 5, 2020 Joint Findings and Order and Award in dispute is the finding in ADJ10507939 that applicant did not sustain an industrial injury to his bilateral knees. Since the remainder of the decision is not challenged upon reconsideration, we will affirm everything but the WCJ's denial of bilateral knee injury in ADJ10507939 and the other outstanding issues relevant to that claim. (Lab. Code, § 5904.)

**BACKGROUND**

In her Opinion on Decision, the WCJ provided the chronology relevant to ADJ10507939 and explained why she rejected further development of the record:

> July 28, 2016: application filed alleging continuing trauma resulting in hernia from May 19, 2014 through May 19, 2015. Answer filed September 1, 2016: injury denied.
>
> April 3, 2018 application amended to add claimed injury to the right shoulder. The right shoulder was not raised as a claimed body part at trial, nor was any evidence presented supporting injury to the right shoulder.
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> On June 25, 2018 applicant petitioned for consolidation with ADJ9231232. Grounds for consolidation were overlapping hernia injuries.
>
> Four status conferences were held: August 15, 2018, October 17, 2018, January 30, 2019, and March 13, 2019. At the time of the last status conference the cases were ordered off calendar to join one additional defendant and engage in settlement discussions.
>
> Months later, (and more than 3 years from the initial filing of the application for adjudication of claim), on July 9, 2019 one of the defendants filed a declaration of readiness to proceed representing that the defendants had met and conferred and were prepared to meet applicant's settlement demand. Applicant objected, stating discovery was not complete. Applicant did not describe what further discovery was needed. Nor did applicant include any discussion of additional body parts in the objection.
>
> At the MSC on September 2, 2019 [WCJ] Casey closed discovery and set both cases for trial. Applicant filed a Petition for Removal. In her report on recommendation Judge Casey commented she had advised applicant's attorney he could submit a report from a treating physician to prove injury to the knees.

> The Board agreed with Judge Casey's Report and returned the matter to the trial level. The Board stated that applicant "…may raise the issue of additional discovery with the trial judge."
>
> Applicant arrived at trial with designated portions of the records of applicant's primary treating physicians at Kaiser. Those portions were objected to by defendants and marked for identification only. In the interest of developing the record Applicant's proposed Exhibit 3 will be admitted into evidence.
>
> The Kaiser records document treatment in 2018 and 2019 for bilateral knees with complaints of gradual onset of pain over the last "several years". (Mr. Garza stopped working in 2015.) There is nothing in any of these records which would support a finding of industrial injury to the knees. The records note the industrial injury to the hernia but make no mention of any industrial cause or industrial aggravation of Mr. Garza's knee complaints.
>
> Mr. Garza testified at trial his knees began to hurt him in the early 2000's. He thought the knee pain was related to his work but kept that to himself. (Minutes of Hearing p.8, lines 25- 27)
>
> Defendant's Exhibit E, designated portions of the June 9, 2014 deposition, sheds further light. Mr. Garza testified during deposition he did not have knee problems that affect his ability to work. (p. 29, lines 15-17) He elaborated on pages 37 and 38 he did have swelling of his left knee, saw the doctor once and took no medication.
>
> Under the circumstances here, there is no need to further develop the record. There is no showing Mr. Garza's knee complaints were related to his employment. Had Mr. Garza wanted to pursue a knee claim he could have raised the issue long before.
>
> Even if Mr. Garza presented evidence of industrial knee injury at trial, his claim likely could have been barred by the Statute of Limitations. The additional issues raised by defendants associated with the claimed injury to the knees are also moot.

In her Report, the WCJ reiterates her analysis that applicant raised his claim of bilateral knee injury in an untimely manner. (Report and Recommendation, pp. 3-6.)

**DISCUSSION**

We find some problems with the WCJ's approach in addressing applicant's claim of bilateral knee injury. In her Opinion on Decision, the WCJ stated: "There is no showing Mr. Garza's knee complaints were related to his employment." Thus, the ostensible reason for the

WCJ's rejection of the claim is failure of proof under Labor Code section 3202.5. However, the WCJ goes on to state that even if applicant presented such proof, "his claim likely could have been barred by the Statute of Limitations." This latter statement suggests that the real reason for the WCJ's rejection of the claim is that it was filed beyond the Statute of Limitations. The same is true of the WCJ's Report, wherein section 3202.5 is quoted but the WCJ states that applicant "failed to claim injury to the knees in a timely manner."

If the true basis for the WCJ's finding of no bilateral knee injury is that applicant's claim was made beyond the Statute of Limitations (an affirmative defense), we cannot uphold it because the WCJ's Opinion on Decision did not provide a complete factual and legal analysis of the elements necessary to sustain the defense. (See Lab. Code, § 5313.) The Opinion on Decision enables the parties, and the Board if reconsideration is sought, to ascertain the actual basis for the decision, and makes the right of seeking reconsideration more meaningful. (*Evans v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 753 [33 Cal. Comp. Cases 350].)

Further, even if the actual basis for the WCJ's decision *was* the Statute of Limitations, we believe the WCJ's analysis is flawed, because an applicant is not charged with knowledge of the potential existence of a claim of cumulative trauma injury absent evidence, not present here, that a physician informed him that his knee problems were related to work. (See *City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467 [50 Cal.Comp.Cases 53] [worker not chargeable with knowledge that his disability is job-related without medical confirmation].)

In fact, the evidence of record suggests that applicant's claim of bilateral knee injury requires further inquiry. At trial on December 12, 2019, applicant testified that he had problems with his knees over the years, and that although he never missed any time from work because of knee pain, nothing happened to injure his knees after he stopped working. According to Dr. Ryan, who evaluated applicant's hernia injury, he was having right knee problems at the time of the doctor's report dated September 28, 2015, not too long after applicant stopped working in May 2015. (Joint Exhibit W.) In one exchange upon cross-examination, applicant testified that he first felt left knee pain around 2001, and that he thought it was caused by work, though no doctor had ever taken him off work for his knees. (See Summary of Evidence, 12/12/19, 8:6-9:39.)

However, the fact that applicant testified he never missed time from work due to knee pain does not exclude the possibility that his work was causing injury by way of cumulative trauma.

The same is true of applicant's June 9, 2014 deposition testimony that no knee problems were affecting his ability to work. To properly address these issues, expert medical opinion is required. As the Court of Appeal explained in *Peter Kiewit Sons v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188]: "Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a [WCAB] finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. Expert testimony is necessary where the truth is occult and can be found only by resorting to the sciences."

Concerning further development of the medical record, we stated in our Opinion and Order Denying Petition for Removal dated October 23, 2019 that applicant may raise the issue of further development of the record with the trial judge, which he did, but without success. We also stated that we were not persuaded that reconsideration would not be an adequate remedy if the matter ultimately proceeded to a final decision adverse to applicant. That is what happened, and applicant has properly availed himself of the remedy.

In her Report, the WCJ cites *San Bernardino Comm. Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986] and states that the Board's general power to develop the record should not be used to circumvent the rule that discovery closes at the Mandatory Settlement Conference ("MSC"). (Lab. Code, § 5502(d)(3).) But *McKernan* is distinguishable. Here, unlike *McKernan*, it was a defense Declaration of Readiness to Proceed ("DOR") that triggered the MSC of September 4, 2019. Applicant objected to the DOR based on the general claim that discovery was incomplete, and at the MSC he amended his Application for Adjudication of Claim to include the claim of bilateral knee injury. Following the MSC, it appears that applicant's attorney did make an effort to obtain medical-legal evidence to support his claim of bilateral knee injury. In contrast, applicant's attorney in *McKernan* attempted to "reopen the record" only at the time of the second trial date, after applicant had failed to appear for the first one. It appears this case does not involve such egregious circumstances. Here, although applicant did not raise the bilateral knee injury claim until the MSC, he did so about two months before trial and immediately attempted to obtain medical evidence in support of the claim.

Turning to the issue of irreparable harm and significant prejudice between the parties, we are persuaded that the balance weighs in favor of applicant. If procurement of further medical evidence is denied, applicant forfeits a potential injury claim, whereas defendants will only suffer

further delay in finally resolving the claim. Defendants' answers herein do not persuade us that further delay in resolving this last part of applicant's claim will result in significant prejudice or irreparable harm, all the other claims having been finally decided. Of course, in ADJ10507939 the defenses raised by defendants at trial on December 12, 2019 remain available to them, and the defenses should be properly addressed by the WCJ in further proceedings at the trial level.

It should be noted that we express no final opinion on applicant's claim of bilateral knee injury in ADJ10507939 or on the defenses that were raised at trial. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided by Labor Code sections 5900 *et seq*.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings and Order and Award of February 5, 2020 is **AFFIRMED**, except that the decision in ADJ10507939 is **AMENDED** in the following particulars:

**FINDINGS OF FACT ADJ10507939**

1. PETE GARZA, while employed during the period 05-19-2014 through 05-19-2015 as a laborer Group 480 at various locations California, by PACIFIC UNDERGROUND CONSTRUCTION, Zurich American, SKANSKA SHIMMICK HERZOG A JOINT VENTURE, Liberty Mutual administered by Helmsman, CASE PACIFIC COMPANY, Starr Indemnity & Liability Insurance Company administered by Berkeley Entertainment SCHNABEL FOUNDATION COMPANY, Liberty Mutual Insurance Company, sustained injury arising out of and occurring in the course of employment consisting of a hernia. Applicant did not sustain a hernia injury during his employment with DEMO MASTERS INC. The issue of whether applicant sustained industrial injury at any employer to his bilateral knees, including the defenses raised in connection therewith, is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.
2. Applicant's hernia injury caused no temporary disability. The issue of whether the alleged injury to his bilateral knees caused temporary disability, if any, is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.
3. Applicant's hernia injury rates at permanent disability of 17%. The issues of permanent disability caused by applicant's alleged bilateral knee injury, if any, and overall

permanent disability in ADJ10507939, as well as attorney's fees, are deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

Zurich American on behalf of PACIFIC UNDERGROUND CONSTRUCTION is not liable for the 8 hours of employment in accord with the opinion of Dr. Ryan as reflected on p.8 of his March 25, 2018 report.

Also in accord with the opinion of Dr. Ryan applicant did not sustain hernia injury at Demo Masters, Great Divide Insurance Company administered by Berkley Entertainment.

4. Applicant will require further medical treatment to cure or relieve from the effects of the hernia injury. The issue of medical treatment, if any, in connection with applicant's claim of bilateral knee injury is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.
5. The issues of Statute of Limitations, violation of Labor Code Section 5412 and post-termination claim are deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

…

**AWARD**

**AWARD IS MADE** in favor of PETE GARZA against various carriers in accord with paragraphs 1, 3, and 4 above, consisting of future medical treatment reasonably required to cure or relieve from the effects of the hernia injury herein. Further Award of any other outstanding benefits in ADJ10507939 is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

**ORDER**

**IT IS ORDERED** applicant take nothing as to his claim for hernia injury against Demo Masters, Great Divide Insurance Company administered by Berkley Entertainment. Zurich American on behalf of PACIFIC UNDERGROUND CONSTRUCTION is not liable in accord with paragraph 3 above.

…

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that case number ADJ10507939 is **RETURNED** to the trial level for further proceedings and new decision by the WCJ on all outstanding issues, consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

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

**JUNE 3, 2021**

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

**PETE GARZA**
**ALBERT AND MACKENZIE**
**ARNS LAW FIRM**
**STANDER REUBENS THOMAS & KINSEY**
**THOMAS BURNS**
**ZGRABLICH & MONTGOMERY**

**JTL/bea**

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