

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

KENYON WARNER, *Applicant*

vs.

WILLIAM BOLTHOUSE FARMS, *Permissibly Self-Insured, Defendants*

**Adjudication Numbers: ADJ9082866, ADJ15378781, ADJ13667170
Bakersfield District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Applicant, who is representing himself, seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact and Orders of December 13, 2023, wherein it was found that while employed as a laborer-production manager during a cumulative period ending September 26, 2013 in case ADJ15378781, applicant did not sustain industrial injury to his lower extremities. And while employed during a cumulative period ending on September 28, 2020 in case ADJ13667170, applicant did not sustain industrial injury to his neck, thoracic spine, lumbar spine, abdomen, nervous system, psyche or in the form of hypertension. Previously in this matter, in an Amended Findings of Fact and Order of September 26, 2016, it was found that while employed on July 21, 2013 in case ADJ9082866, applicant sustained industrial injury to his low back causing permanent disability of 19%. Applicant filed a Petition to Reopen for new and further disability with regard to his July 21, 2013 injury in case ADJ9082866, but in a decision of January 16, 2020, no further disability was found.¹

Applicant's handwritten Petition for Reconsideration is not a model of clarity. It appears that he is contending that the WCJ erred in not finding cumulative injury in cases ADJ15378781 and ADJ13667170 and in finding only 19% permanent disability in case ADJ13667170. We have

¹ Applicant sought reconsideration of the January 16, 2020 decision which we denied on March 16, 2020. The Appeals Board panel which decided the Order Denying Reconsideration of March 16, 2020 as well as a subsequent December 1, 2021 Order Denying Petition for Removal and Disqualification included former Commissioners Deidra E. Lowe and Marguerite Sweeney as well as former Deputy Commissioner Amber Ingels, all of which are no longer with the Appeals Board. Commissioners Joseph V. Capurro and José H. Razo and Chair Katherine A. Zalewski have been substituted in their place.

not received an Answer from defendant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below, except as noted below, we will deny the applicant's Petition for Reconsideration. We have omitted the sentence in the Discussion of the Report that "The filing of ADJ 15378781 on November 3, 2021 for a cumulative injury ending in September 2013 was well after the time allowed by law." (Report at p. 20.)

The running of the statute of limitations is an affirmative defense, and the burden of proving it is on the party opposing the claim. (Lab. Code, § 5409; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 67, fn. 8 [50 Cal.Comp.Cases 411].) The burden is on defendant to show when the statute of limitations began to run, "starting from any and all three points designated [in Labor Code section 5405]." (*Colonial Ins. Co. v. Industrial Acc. Com. (Nickles)* (1945) 27 Cal.2d 437, 441 [10 Cal.Comp.Cases 321].) The three points designated in section 5405 are date of injury (Lab. Code, § 5405, subd. (a)); the last payment of disability indemnity (Lab. Code, § 5405, subd. (b)); and the last date on which medical treatment benefits were furnished (Lab. Code, § 5405, subd. (c).) In case ADJ15378781, it appears that the applicant was not provided with disability indemnity or medical treatment. Thus, the relevant date for statute of limitations purposes is the date of injury. The date of injury in cumulative injury cases is "that date upon which the employee first suffered *disability* therefrom and either knew, or in the exercise of reasonable diligence should have known, that *such disability* was caused by his present or prior employment." (Lab. Code, § 5412 [emphasis added].)

The WCJ did not analyze applicant's date of injury in case ADJ15378781, and therefore we cannot affirm the finding of no industrial injury in that case on the grounds that the case was not timely filed. However, as noted in the Report quoted below, there was no substantial medical evidence of injury presented in case ADJ15378781, and we thus affirm the WCJ on that ground.

Report and Recommendations on Petition for Reconsideration

I. Introduction: Applicant-Petitioner Kenyon Warner seeks reconsideration of the Findings of Fact & Orders of December 13, 2023.

Petitioner Kenyon Warner, then 32 years of age, sustained a specific industrial injury to his low back and nervous system/psyche and claimed to have sustained

injury to his neck, thoracic spine, and abdomen while employed on July 21, 2013, at Bakersfield, California, as a Production Worker (Occupational Group 360) by Defendant William Bolthouse Farms. On July 21, 2013, Defendant was permissibly self-insured for California workers' compensation liability. Its program of permissible self-insurance is presently administered by Intercare. The July 21, 2013 specific injury claim is being heard as case ADJ 9082866, which is the designated master file and depository of documentary evidence.

Primary proceedings in case ADJ 9082866 were resolved via Findings, Orders & Award of August 17, 2016, amended September 26, 2016, wherein Petitioner was found to have sustained the specific injury of July 21, 2013 to his back and nervous system/psyche, to have sustained 19% permanent partial disability after applicable adjustment and apportionment and to need further medical treatment. Indemnity compensation and a general award of further medical treatment were provided. Amended Applications for Adjudication of Claim were accepted as a timely Petition to Reopen but were dismissed on January 16, 2020. Reconsideration of the dismissal was denied on March 16, 2020.

Petitioner also claimed to have sustained a cumulative industrial injury to his bilateral lower extremities during the period from July 21, 2013 to September 26, 2013 while employed in Bakersfield, California as a Laborer/Production Worker by Defendant William Bolthouse Farms, permissibly self-insured. This claim has been heard as case ADJ 1538781. The filing of this claim on November 4, 2021 was not within the time allowed by law. The alleged cumulative injury was not shown to have occurred. Petitioner was ordered to take nothing further in case ADJ 1538781.

Petitioner also claimed to have sustained a cumulative trauma injury to his neck, thoracic spine, lumbar spine/back (with L-5 radiculopathy), abdomen, nervous system/psyche and in the form of hypertension while employed at Bakersfield, California, during the period from October 2, 2019 to September 28, 2020 by Defendant William Bolthouse Farms, permissibly self-insured. This claim has been heard as case ADJ 13667170. Primary proceedings were dismissed without prejudice on May 17, 2020. Amended Applications on July 25, 2022 and September 7, 2022 were not filed within the time allowed by law. The alleged cumulative injury was not shown to have occurred. Petitioner was ordered to take nothing further in case ADJ 13667170.

Following Trial on September 27, 2023 and submission for decision on November 17, 2023, Findings of Fact & Orders issued on December 13, 2023. In case ADJ 9082866 ten motions/petitions were denied, including denials of Defendant's petition to declare Petitioner a vexatious litigant and Petitioner's petition alleging that he suffered discrimination prohibited by Labor Code Section 132a. In cases ADJ 15378781 and ADJ 13667170, the cumulative injuries were not shown to have occurred and the Applications were not filed

within the time allowed by law. Petitioner was ordered to take nothing in both cumulative injury claims.

By timely but unverified and insufficiently served petition, Applicant Kenyon Warner seeks reconsideration. *Petition for Reconsideration 1/04/2024*; Proof of Service 01/04/2024. Petitioner generally alleges a need for corrections of errors as well as allegations of newly discovered evidence and fraud. *Petition for Reconsideration 01/04/2024 p. 1*.

Denial or dismissal of the pending petition is recommended on account of three procedural deficiencies. The first procedural deficiency is the lack of verification. A legible verification of the pending petition was not included with the copy of the pending petition filed at the Bakersfield District Office. Verification is required. Unverified petitions are subject to dismissal. Lab.C. §5902; 8 CCR § 10940{c}.

In fairness, it should be noted that the twenty-fifth and final page of the main part of the hand-written pending petition is poorly copied. There is a blank area above Petitioner's signature. This is a customary location for verification statements. Review of the original pleading (apparently filed directly to the Appeals Board) is recommended. There might actually be a verification on page twenty-five.

It is also worth noting that the lack of verification is a curable defect. Petitioner can fix the problem by promptly filing/re-filing a legible copy of the original verification and/or providing a supplemental verification. If this is not done, however, the unverified pending petition is subject to dismissal.

The second procedural deficiency is the failure to serve Lien Claimants. A Petition for Reconsideration must be served on all adverse parties. Lab.C. §5905. However, only Defendant's counsel, the Bakersfield District Office and the Appeals Board were provided with copies of the Petition. *Proof of Service 1/04/2024*.

Lien claims of Applicant's former attorney, Kern County's Department of Child Support Services and the Employment Development Department could potentially attach to the additional indemnity compensation that Petitioner is claiming. These Lien Claimants were entitled to notice that the pending petition was filed and the opportunity to be heard regarding the relationship between their lien claims and Petitioner's claims via service of a copy of the petition. Dismissal is the appropriate remedy for non-service of the Petition on a litigant entitled to receive it. *MCA, Inc. v. WCAB (Stott)* (1981) 46 CCC 621 2nd DCA WDn; *Fisher v. WCAB*, (2001) 66 CCC 517 3rd DCA WDn.

The third procedural deficiency is non-compliance with WCAB Rule 10974. When a petitioner seeks reconsideration on the basis of new evidence or alleged

fraud, it is not sufficient to generally assert the legal conclusion(s). Instead, the petition must contain “an offer of proof, specific and detailed” that specifies the names of witnesses, their anticipated testimony, additional documentary evidence, the anticipated effect on the record and “a full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case.” The pending petition may be denied or dismissed if the required Offer of Proof is not made or if the proffered evidence is cumulative to that already in the record. 8 CCR §10974 (WCAB Rule 10974). The required Offer of Proof does not appear in the pending petition.

If a decision on the merits is desired notwithstanding these procedural deficiencies, it is recommended that the petition be denied.

The pending petition begins with twenty-five handwritten pages including some photocopied inserts. This main body of the petition is followed by eighty-five pages of DWC-EAMS separator sheets. Only the separator sheet for the March 17, 2017 (proof of the service of an Amended Application for Adjudication of Claim) was followed by the identified document. The pending petition then concludes with its Proof of Service. At various points in the twenty-five handwritten pages, the pending petition appears to argue that:

1. There was significant prejudice is not raising the presumption of compensability of Labor Code Sections 5401, Section 5402{b} and Section 5402{c}. *Petition for Reconsideration 1/04/2024 p.1, pp. 6-7 and p. 14.*
2. There was a significant prejudice by failing to raise the medical-legal opinion of QME Dr. Stalberg and/or failing to obtain an additional QME appointment to provide evidence supporting Petitioner’s claim to have sustained permanent disability greater than the standard rating under the rules of *Almaraz-Guzman*. *Petition for Reconsideration 1/04/2024 p. 2, pp. 4-5, pp. 9-10, pp. 12-13 & pp. 14-15.*
3. Petitioner should have been fully compensated for temporary partial disability during the period from July 22, 2013 to August 18, 2014 at rate of \$425.39 per week yielding \$23,821.84 but has been paid only \$12,336.31, leaving \$17,653.68 due. *Petition for Reconsideration 1/04/2024 p. 4.*
4. Summary judgement awarding a commutation of temporary and permanent disability indemnity and finding discrimination pursuant to Labor Code 132a should have been issued because of an inappropriate referral. *Petition for Reconsideration 1/04/2024 pp. 5-6 & p. 8.*
5. Petitioner’s due process rights were violated by failing to enter a

wage settlement agreement of July 28, 2021 into evidence and not taking the testimony of Petitioner's uncle regarding the settlement. *Petition for Reconsideration 1/04/2024 p. 8.*

6. Petitioner's due process rights were violated by failing to bifurcate and defer his claim of discrimination prohibited by Labor Code Section 132a. *Petition for Reconsideration 1/04/2024 p. p. 16 & pp. 18-19.*

7. Correction of Petitioner's wages to \$665.00 per week entitles Petitioner to an award of temporary and permanent disability indemnity in the total amount of \$1,204,942.465. *Petition for Reconsideration 1/04/2024 pp. 22-23 (half-cent in original).*

An Answer to the pending petition on behalf of Defendant has not been received as of the composition of this Report & Recommendation.

If a decision on the merits is desired notwithstanding the procedural defects described above, it is recommended that the pending petition be denied. The issues presented in the pending petition were previously adjudicated to a final determination, are being presented well after the time allowed by law, are unsupported by substantial evidence, or combinations of the three.

II. Facts: On July 21, 2013, Petitioner Kenyon Warner was employed as a Production Worker (Occupational Group 360) by Defendant William Bolthouse Farms in Bakersfield, California. Defendant was permissibly self-insured for workers' compensation liability. Petitioner sustained a specific industrial injury to his low back and later claimed to have sustained injury to his neck, thoracic spine, abdomen, nervous system and psyche while stacking fifty pound bags of carrots. *Findings of Fact & Orders 12/13/2023 p. 6 (Findings of Fact #1 & #2); Minutes of Hearing-Summary of Evidence 9/27/2023 pp. 2-3 (Admitted Facts # & #2); Application for Adjudication of Claim (ADJ 9082866) 8/23/2013.*

Petitioner was provided with industrial medical care. *Defendant's Exhibit E: Doctors' First Report of Vernon Sorenson, M.D. 7/25/2013.* Petitioner was provided with temporary modified work including lifting limited to ten pounds, freedom to stand or sit as needed and a fifteen-minute break every hour while at work *Defendant's Exhibit H: Temporary Transitional Duty Job Offer 8/21/2013.*

Petitioner retained Joseph Pluta, Esq. as his legal counsel and initiated case ADJ 9082866. Only Petitioner's back was identified as an injured bodily system. Petitioner claimed wages based on \$9.08 per hour for 60-hour weeks. *Application for Adjudication of Claim (ADJ 9082866) 8/23/2013 p. 3.* A DWC-1 Claim Form does not appear to have been filed at that time.

Petitioner was unable to continue with modified work due to pain. He stopped working on September 3, 2013. He transferred his care to Alan Moelleken, M.D.

of The Spine & Orthopedic Center. Dr. Moelleken opined that Petitioner sustained the claimed industrial injury and was temporarily partially disabled with further modifications needed to restrict Petitioner's work with lifting limited to ten pounds, standing, sitting and walking limited to thirty minutes at a time with a five-minute break and performing bending, kneeling and squatting only rarely. *Applicant's Exhibit 03: Doctors' First Report of The Spine & Orthopedic Center (Alan Moelleken, M.D.) 9/06/2013-narrative; Applicant's Exhibit 06: Doctor's First Report of The Spine & Orthopedic Center- Alan Moelleken, M.D. 9/06/2013-form.*

On September 7, 2013, Petitioner was suspended from work following a confrontation with one of Defendant's employees on Defendant's premises. *Applicant's Exhibit 01: Correspondence of William Bolthouse Farms (Cristina Navarro-Human Resources Specialist) 9/11/2013.*

On September 17, 2013, Petitioner was seen at The Spine & Orthopedic Center again. He reported that modified duty work was making his condition worse. Dr. Moelleken opined that Petitioner was temporarily totally disabled for at least four weeks pending diagnostic studies and further treatment. Dr. Moelleken did not note Petitioner's suspension from work, but did indicate that if modified work was unavailable, Petitioner should be considered temporarily totally disabled. *Applicant's Exhibit 05: Report of The Spine & Orthopedic Center (Darren Richards PA-C and Alan Moelleken, M.D.) 9/17/2013-narrative report and Disability Status slip.*

On September 19, 2013, Lien Claimant County of Kern filed a lien claim for family support expenses and petitioned for an order for family support withholding from any advances of permanent partial disability indemnity. *Lien Claimant KCDCSS Exhibit 1: Notice and Request for Allowance of Lien Claim 9/19/2013; Petition to Withhold and Pay from Permanent Disability Advances for Child Support 9/19/2013.*

On September 24, 2013, Defendant terminated Petitioner's employment based on the prior confrontation and allegedly being "disrespectful to management when they tried to investigate the occurrence." *Defendant's Exhibit 1: Employment Termination Form 9/24/2013; Applicant's Exhibit 02: Conclusion of Investigation-Cristina Navarro 9/26/2013.*

On October 21, 2013, the petition of County of Kern' Department of Child Support Services for family support withholding from permanent disability advances was granted. *Order Allowing Withholding of Child Support 10/21/2013.*

Meanwhile, Defendant denied liability for temporary disability, noting the termination of Petitioner's employment and Dr. Moelleken's lack of affiliation with Defendant's Medical Provider Network (MPN). *Defendant's Exhibit G:*

Denial Notice Regarding Temporary Disability Benefits (Viki L. Barrow-Senior Claim Examiner 11/04/2013).

Petitioner transferred his care to Marshall Lewis, M.D. Dr. Lewis reported that Petitioner was suffering from pain in his low back with radiation of symptoms to his upper back and possible radiculopathy to his lower extremities as well as “depression, stress, anxiety, insomnia, frustration and personal relationship difficulties.” Dr. Lewis denied that Petitioner was permanent and stationary and recommended modified work with no repetitive bending or stooping, no lifting or carrying of greater than 15-20 pounds on a regular basis and the ability to stand or sit for comfort. *Defendant’s Exhibit D: Doctor’s First Report of Marshall Lewis, M.D. 11/04/2013 (narrative and form reports).*

Petitioner sought and obtained State Disability Insurance (SDI) benefits from Lien Claimant Employment Development Department (EDD). SDI benefits began on September 25, 2013 with notice provided to Defendant on November 12, 2013. *Lien Claimant EDD Exhibit 04: Notice of Lien Claim 11/12/2013.*

On January 16, 2014, Dr. Lewis provided a supplemental report in response to a request from Defendant’s counsel. Dr. Lewis re-affirmed his prior opinion regarding appropriate work restrictions and opined that Petitioner should be considered temporarily totally disabled if compliant modified work was not available. *Defendant’s Exhibit C: Report of Marshall Lewis, M.D. 1/16/2014.* Defendant declined to provide temporary disability benefits, alleging that modified work would have been available but for Petitioner’s termination for cause. *Defendant’s Exhibit F: Denial Notice regarding Temporary Disability Benefits 3/24/2014.*

Petitioner was deposed on February 7, 2014. *Applicant’s Exhibit 10: Deposition of Kenyon N. Warner 2/07/2014.* Applicant testified regarding the incident resulting in the termination of his employment. He testified that he accidentally bumped into a co-worker whom he had bumped previously. Petitioner testified that he immediately apologized. The co-employee asked whether the bump had been intentional. Applicant testified that he had indicated that it was an accident. He denied following the co-employee thereafter. Petitioner did not know what third parties observing the incident may or may not have reported to Defendant-employer. *Applicant’s Exhibit 10: Deposition of Kenyon N. Warner 2/07/2014. p. 21 line 14 to p. 24 line 10.*

Petitioner also testified that he was aware that Dr. Lewis intended to refer him to a psychiatrist and felt that he was under a lot of stress and probably needed such a referral. *Applicant’s Exhibit 10: Deposition of Kenyon Warner 2/07/2014. p. 61 line 9 to p. 62 line 3*

The primary parties jointly agreed to obtain the guidance of Richard Scheinberg, M.D. as an orthopedic Agreed Medical Evaluator (AME). Dr. Scheinberg

evaluated Petitioner and provided a report. Dr. Scheinberg opined that Petitioner has sustained the claimed specific injury to his lower back with confirmed radiculopathy. He considered Petitioner to be permanent and stationary with impairment within Diagnosis Related Estimate (DRE) Group III with 13% Whole Person Impairment and a need for further medical treatment. *Defendant's Exhibit B: AME Report of Richard Scheinberg, M.D. 8/19/2014 pp. 3-4.* Dr. Scheinberg thereafter reviewed the result of an MRI scan and opined that the results confirmed his earlier opinion. *Defendant's Exhibit A: AME Report of Richard Scheinberg, M.D. 9/15/2014 pp. 1-2.*

Notwithstanding AME Dr. Scheinberg's guidance, the parties were unable to settle. A Mandatory Settlement Conference was held on December 30, 2014. The primary parties stipulated to the claimed specific industrial injury to Petitioner's low back on July 21, 2013. Injury to other bodily systems was not claimed. Average weekly wages were stipulated to be \$418.77 per week. *Pre-Trial Conference Statement 12/30/2014 p. 2.*

Petitioner thereafter dismissed attorney Joseph Pluta. *Dismissal of Attorney 12/30/2014.*

A Trial originally scheduled for September 2, 2015 was postponed repeatedly in the hope that Petitioner might be able to obtain replacement counsel. *Minutes of Hearing-Summary of Evidence 9/02/2015 p. 1 lines 33-37.* Replacement counsel was not obtained and case ADJ 9082866 came to Trial on February 17, 2016 with Petitioner in propria persona. Stipulations, issues and exhibits from the prior MSC were approved, including average weekly wages of \$418.77 per week. Petitioner's back was the only bodily system identified as industrially injured. *Minutes of Hearing-Summary of Evidence 2/17/2016 p. 2 lines 22-32 (Admitted Facts #1 & #3).*

Findings, Orders & Award issued on August 17, 2016. Among other things, it was found that Petitioner had sustained the specific injury of July 21, 2013 to his low back. Average weekly wages were found to be the stipulated \$418.77 per week. Petitioner was found to have been temporarily totally disabled during the period from July 22, 2013 to July 24, 2013 and September 5, 2013 to September 6, 2013 for which Petitioner was awarded indemnity compensation at the rate of \$ 279.18. Petitioner was also found to have sustained 19% permanent after applicable apportionment and adjustment and to need further medical treatment. The lien claims of Mr. Pluta (Applicant's former attorney) and Kern County Department of Child Support Services were allowed. The EDD lien claim was not allowed. *Findings, Orders & Award 8/17/2016.*

Defendants sought an amended decision. Defendant noted a three-dollar understatement of the value of permanent disability indemnity for 19% (\$16,212.00 rather than the correct \$16,215.00). Defendant also reported that, after approved attorneys' fees and credit for permanent disability advances, the

remaining permanent disability due was not sufficient to support the allowance of the KCDCSS lien. Fortunately, Lien Claimant KCDCSS graciously agreed to a reduction of its recovery to the available sum. *Correspondence of Goldman, Magdalin & Kirkes (Scott H.S. Goldflam, Esq.) 8/24/2016.*

The decision was amended to resolve these issues. *Amended Findings & Award 9/26/2016.* No petition for reconsideration was filed within the time allowed. The Amended Findings of Fact & Award of September 26, 2016 was final on October 21, 2016.

On October 14, 2016, Petitioner was notified and invited to participate in a classaction settlement of a wage-and-hours dispute brought against Defendant-Employer William Bolthouse Farms. Petitioner was informed that he appeared to be within the class and that if he did not opt-out or object to the class settlement, he would receive a monetary award from that settlement. A handwritten note (not necessarily written by Petitioner) on the notice indicates “Opt out 10-14 2016.” *Applicant’s Exhibit 16: Notice of Class Action Settlement 10/14/2016.* There is no indication that Petitioner thereafter opt-ed out or objected to the settlement or received any funds from the settlement. There is also no indication that had funds been received, they would have represented wages for a period including the specific industrial injury on July 21, 2013.

On December 15, 2016, Petitioner filed a DWC-1 claim form regarding his July 21, 2013 injury. Petitioner described his injury and parts of the body affected as:

... lumbar disc herination (M51.26), Anxiety (F41.9), P.T.S.D (F43.10), lumbar strain, subsequent encounter (S33.5xxD), lumbar disc disease (M51.9), Lumbar DRE Category III: 13 WPI.” *Applicant’s Exhibit 15: Correspondence regarding Claim Form 12/15/2016 (DWC-1 12/22/2016.*

Petitioner also filed a complaint with the California Department of Fair Employment and Housing alleging that:

On or about July 8, 2013 to September 7, 2016, I was denied a reasonable accommodation, suspended and then discharged me because of my disability and in retaliation in violation of the Americans with Disabilities Act of 1990, as amended. *Applicant’s Exhibit 15: Correspondence regarding Claim Forms 12/15/2016 (Charge of Discrimination 12/12/2016).*

Fifty-five days later, Defendant denied liability for anxiety and post-traumatic stress disorder while acknowledging that injury to the low back had been accepted from the July 21, 2013 injury. *Defendant’s Exhibit O: Notice Regarding Denial of Workers’ Compensation Benefit 2/09/2017.*

On March 16, 2017, Petitioner filed an Amended Application for Adjudication

of Claim in case ADJ 9082866. Petitioner alleged that the specific lifting injury of July 21, 2013 had injured his lower back/lumbar spine, stomach, thoracic spine, mental health and in the forms of anxiety and PTSD. Petitioner claimed average earnings based on \$9.08 per hour for 60-hour weeks. *Amended Application for Adjudication of Claim 3/16/2017.*

On April 4, 2017, Defendant denied liability for injury to Petitioner's stomach or thoracic spine "based upon lack of medical documentation to substantiate industrial causation with regard to those additional body parts." *Defendant's Exhibit N: Notice Regarding Denial of Workers' Compensation Benefit 4/04/2017.*

On May 11, 2017, Petitioner filed a second Amended Application for Adjudication of Claim to add his neck to the allegedly injured bodily systems. *Amended Application for Adjudication of Claim 5/11/2017.*

On June 15, 2017, Petitioner filed a petition for commutation of any unpaid permanent partial disability indemnity with penalty or late fees, nothing that his condition had been permanent and stationary per the opinion of AME Dr. Scheinberg from August 19, 2014 to August 31, 2015. *Petition for remaining P.P.D., Penalty Fees and late fees 6/15/2017.* Notice of Intention to grant the requested commutation issued. *Notice of Intention to Award Commutation 7/08/2017.* Defendant objected, alleging that all accrued indemnity benefits had been paid. *Objection to Notice of Intention to Award Commutation 7/08/2017; Defendant's Exhibit P: Indemnity Benefit Payment Analysis Printout 5/30/2017.* The Notice of Intention to award the requested commutation was rescinded pending hearing. *Rescission of Notice of Intention to Award Commutation 7/11/2017.*

On July 21, 2017, Petitioner petitioned for an award of temporary disability indemnity for the period from July 22, 2013 to August 18, 2014 (56 weeks) at a rate of \$418.77 totaling \$46,902.24 and detailing the medical evidence for temporary partial or temporary total disability during that period. *Petition for remaining TTD, penalties fees and late fees as Amended 7/21/2017.* Defendant replied that Petitioner's entitlement to temporary disability indemnity (including the compensation rate) had been decided by the Amended Findings & award of September 26, 2016, all of which had been paid. *Defendant's objection to Applicant's Petition for Commutation of remaining Temporary Total Disability, penalties and late fees (with verification and partial benefit printout) 7/28/2017.* Petitioner thereafter filed an amended petition adding the reports of Dr. Scheinberg and electrodiagnostic consultation report of Dr. Michael Kenly to his listing of medical reports offered in support of his claim for additional TTDI. *Amended Petition for remaining TPD, Penalties and Late Fees 8/07/2017.*

On August 3, 2017, Petitioner filed a petition seeking penalty pursuant to Lab.C. §139.32 and disciplinary referrals to licensing agencies of Michelle Mata

(Defendant's claims administrator), Dr. James Mazo, Dr. Gary Krulik and Scott Goldflam, Esq. (Defendant's attorney) for denying his claim and failing to provide benefits allegedly due. *Petition for Benefits and Penalty Fees under Section Code 139.32 as of January 1, 2013 8/03/2017.*

Richard Scheinberg, M.D. continued to serve as an orthopedic Agreed Medical Evaluator. He re-evaluated Petitioner on August 9, 2017 and provided a report. He opined that Petitioner's physical symptoms had not changed and he remained permanent and stationary. However, he also noted that:

As an aside, I believe that Mr. Warner is extremely emotionally distraught and is resentful of the way the system has treated him. I believe psychological assessment would be beneficial, but that is not my area of expertise, and I would defer to the appropriate evaluator. *Joint Exhibit 1: AME Report of Richard Scheinberg, M.D. 8/09/2017 p. 3.*

Petitioner thereafter filed a petition for reconsideration of an objection to a rating of the re-evaluation report of Dr. Scheinberg with a listing of medical reports and an allegation that a rating had been previously obtained with an allegedly fraudulent incorrect claim number. *As Amended Reconsideration of my Rating Objection to Dr. Richard Scheinberg Medical Report on August 9, 2017 8/28/2017.*

Defendant attempted to depose Petitioner on September 15, 2017. After being sworn as a witness, Petitioner insisted that the deposing attorney be sworn "by God" less the attorney be able to say something false during the deposition. Defendant's attorney declined to be sworn. Applicant agreed to continue the deposition. *Defendant's Exhibit R: Transcript of Deposition of Kenyon N. Warner 9/15/2017 p. 3 line 11 to p. 4 line 13.* Petitioner thereafter provided a narrative statement of his opinions regarding the workers' compensation benefits due him and a demand for settlement. He declined to be admonished regarding the deposition process and insisted on asking question of the compensation defense attorney rather or prior to responding to the attorney's questions. *Defendant's Exhibit R: Transcript of Deposition of Kenyon N. Warner 9/15/2017 p. 4 line 14 to p. 20 line 6.*

September 21, 2017, Defendant sought an order designating Petitioner as a vexatious litigant and for a "pre-filing" order pursuant to WCAB Rule 10782. Defendant argues that Petitioner's petitions for TTDI, additional permanent disability indemnity and other relief were attempts to re-litigate the issues resolved by the Amended Findings of Fact & Award of September 26, 2016. *Defendant's Petition to Declare Applicant a Vexatious Litigant (Title 8 California Code of Regulations §10782) 9/21/2017.*

Case ADJ 9802866 came on for Status Conference on September 26, 2017. Dr. Scheinberg's recommendation for psychiatric-legal examination and

Defendant's rule 10782 petition were discussed. *Minutes of Hearing 9/26/2017*. The primary parties agreed to have the Medical Unit issue a QME panel in the field of psychiatry based on Dr. Scheinberg's prior report. *Stipulation and Order 9/26/2017*. After discussion regarding whether Petitioner's penalty claims were a "repeated re-litigation" of judicially determined matters, Defendant withdrew its petition to declare Petitioner a vexatious litigant. *Correspondence of Goldman, Magdalin & Kirkes, LLP (Scott H.S. Goldflam, Esq) 9/27/2017*.

On November 6, 2017, Petitioner was deposed regarding the psychiatric issues in his cases. Petitioner testified regarding his stressors, treatment, family situation, financial situation, and on-going physical symptoms. *Defendant's Exhibit Q: Deposition of Kenyon N. Warner 11/06/2017*.

John Stalberg, M.D. was selected and is serving as a Qualified Medical Evaluator (QME) in the field of psychiatry. He initially evaluated Petitioner on November 28, 2017. Records were provided to QME Dr. Stalberg in two sets, with the latter arriving just prior to his deadline to complete his report. Therefore, Dr. Stalberg provided an initial and preliminary report pending review of the second set of records. *Joint Exhibit 03: QME Report of John Stalberg, M.D. 11/28/2017 p. 1*.

Dr. Stalberg diagnosed an Adjustment Disorder with depression and anxiety which was "a direct result of his back injury then then coupled with his termination." Dr. Stalberg opined that Petitioner had never been temporarily totally disabled psychiatrically and was permanent and stationary. Dr. Stalberg initially opined that Petitioner's psychiatric condition was 80% the result of his back injury with 20% causation from the termination of his employment with a Global Assessment of Function (GAF) score of 61, consistent with Whole Person Impairment (WPI) of 12%. *Joint Exhibit 03: QME Report of John Stalberg, M.D. 11/28/2017 pp. 8-9*.

Dr. Stalberg opined that the standard GAF-based rating was inaccurate. He opined that the use of Table 13-8 of the AMA Guides would be more accurate and would add 5% to the rating, yielding 17-18% WPI. *Joint Exhibit 03: QME Report of John Stalberg, M.D. 11/28/2017 pp. 10-11*. Dr. Stalberg was aware that Petitioner's claim post-dated his termination. He noted that Petitioner "certainly believes" that his termination was "in bad faith and discriminatory." *Joint Exhibit 03: QME Report of John Stalberg, M.D. 11/28/2017 p. 12*. Dr. Stalberg also opined that only 2% of the 18% Whole Person Impairment was "attributable to the way Applicant was treated from a personnel point of view." *Joint Exhibit 03: QME Report of John Stalberg, M.D. 11/28/2017 p. 12*.

Dr. Stalberg concluded his first report by noting that it was based only on the first set of records provided to him. He also warned that Petitioner's "mental state depends on how this litigation unfolds" which may take a "considerable

period of time” and reexamination might be needed. *Joint Exhibit 03: QME Report of John Stalberg, M.D. 11/28/2017 p. 31.*

Dr. Stalberg reviewed the second set of records and provided a supplemental report on January 10, 2018. He noted that Petitioner’s deposition testimony on November 6, 2017 was consistent with the history that Petitioner had given him. *Joint Exhibit 02: QME Report of John Stalberg, M.D. 1/10/2018 p. 2.* Dr. Stalberg did not change his initial medical-legal opinions after review of the second set of records. *Joint Exhibit 02: QME Report of John Stalberg, M.D. 1/10/2018 pp. 2-3.*

Case ADJ 9082866 was initially tried on October 10, 2018. *Minutes of Hearing-Summary of Evidence 10/10/2018.* Formal disability Rating was obtained, but cross-examination of the Rating Specialist was requested and further Trial occurred on September 18, 2019. Following cross-examination of the Rating Specialist, Petitioner moved to strike the recommended rating. Case ADJ 9082866 was set for Status Conference. *Minutes of Hearing-Summary of Evidence 9/18/2019.*

On October 2, 2019 and again on November 1, 2019 Petitioner filed an amendment to his prior petition alleging that referrals in opposition to his claims and failure to pay his claims were prohibited by Labor Code Section 139.32. Petitioner again called for “disciplinary action” by licensing boards against claims administrator Michelle Mata, James Mazo, M.D., Gary Krulik, M.D. and Scott Goldflam, Esq. *Petition for Benefits and Penalty Fees under Section Code 139.32 as of January 1, 2013 (as amended) 10/02/2019.*

Also on November 1, 2019, Petitioner sought 132a benefits, alleging that during the period from July 8, 2013 to September 7, 2016, he had been suspended and then discharged in violation of the Americans with Disabilities Act. *Petition for Discrimination Benefits pursuant to Labor Code section 132a 11/01/2019.*

On November 4, 2019, Petitioner petitioned for a Summary Judgement. *Petition (Summary Judgment) 11/04/2019.*

On November 26, Defendant replied to Petitioner’s 132a claim, alleging that the termination had been on September 24, 2013, such that the filing on November 1, 2019 was not within the one-year Statute of Limitations. Defendant also argued that Petitioner’s termination for cause had been done in good faith. *Defendant’s Response to Applicant’s Petition for Benefits pursuant to Labor Code §132(a) 11/26/2019.*

Status Conference was held on December 5, 2019. The parties agreed that the pending issues would be submitted for decision. *Minutes of Hearings 12/05/2019.*

Following submission for decision, Findings of Fact issued on January 16, 2020. Petitioner's earnings were found to be \$418.77 per week. Petitioner was not shown to be entitled to temporary disability or permanent disability beyond the Amended Findings, Orders & Award of September 26, 2016. The Petition to Reopen filed May 11, 2017 (as an Amended Application) was dismissed. *Findings of Fact 1/16/2020*. WCJ Donald Johnson opined that the prior finding on average earnings was final, that neither AME Dr. Scheinberg nor QME Dr. Stalberg had found any additional periods of temporary disability, that compensation for the psychiatric permanent disability identified by Dr. Stalberg was barred by Lab.C. §4660.1{c}(1), that Petitioner's termination had been previously found to be in good faith, and, that, therefore, new and further disability had not been shown. The Petition to Reopen was dismissed. *Opinion on Decision 1/16/2020*.

Petitioner petitioned for reconsideration of the Findings of Fact of January 16, 2020. *Petition for Reconsideration 1/31/2020*. Reconsideration was denied. *Opinion & Order Denying Petition for Reconsideration 3/16/2020*. With the expiration of the time to seek judicial review, the Findings of Fact of January 16, 2020 became final on March 1, 2020.

On September 28, 2020, Petitioner initiated case ADJ 13667170, alleging cumulative injury during a period from October 2, 2019 to September 28, 2020 to his back, neck, abdomen, nervous system/psyche, thoracic spine and in the form of hypertension. It does not appear that a DWC-1 Claim Form was filed. The CT injury was claimed notwithstanding Petitioner's last day of work for Defendant on September 7, 2013 and formal termination of employment on September 24, 2013. It included Petitioner's claim that he sustained a period of disability ending August 19, 2014 from a cumulative injury that would not begin for another five years and two months. In case ADJ 13667170, Petitioner also claimed that October 2, 2019 was both the beginning of the period of injurious exposure and the last day of a second period of disability resulting from the injurious exposure. *Application for Adjudication of Claim (ADJ 13667170)*.

The lack of employment with Defendant and the time-sequence irrationalities of the time sequences were discussed at a Mandatory Settlement Conference on March 16, 2021. Case ADJ 13667170 was ordered off-calendar to permit Petitioner to review and amend his claim. *Minutes of Hearing 3/16/2021*. Petitioner was offered the choice between amending his cumulative injury claim to end on the date of his termination or coming to Trial with evidence that he worked for Defendant William Bolthouse Farms thereafter. *Correspondence of Wai & Conner (Sean Sabrkhani, Esq.) 3/17/2021*.

On March 18, 2021, Petitioner amended his Application in case ADJ 13667170 but continued to allege a cumulative injury begin after the termination of this

employment and causing periods of temporary disability before injurious exposure began. *Amended Application for Adjudication of Claim 3/18/2021.*

Defendant obtained new counsel, retaining the Law Offices of Coleman, Chavez & Associates to represent it further. *Substitution of Attorneys (Defendant) 11/24/2020; Notice of Representation 3/17/2021.*

After some settlement discussions, Petitioner asked for a hearing. *Declaration of Readiness to Proceed 8/18/2021.* Defendant objected, noting that case ADJ 9082866 “has been fully adjudicated” following dismissal of the Petition to Reopen. *Objection to Applicant’s Declaration of Readiness to Proceed 9/14/2021.* An MSC was held on October 21, 2021 but was continued to January 20, 2022. *Minutes of Hearing, 10/21/2021.*

Petitioner petitioned for Removal, complaining that he had been denied a bifurcation of his Lab.C. §132a claim and had otherwise been prevented from litigating his issues. *Petition for Removal 10/25/2021; Amended Petition for Removal 10/25/2021.* WCJ Donald Johnson reported that it was not clear that the petition was seeking Removal, his Disqualification, or both. *Report & Recommendation on Petition for Removal 11/10/2021.* The petition was denied. *Opinion and Order Denying Petition for Reconsideration 12/01/2021.*

On November 3, 2021, Petitioner initiated case ADJ 15378781 claiming cumulative injury to his bilateral lower extremities during the period from July 21, 2013 to September 26, 2013. *DWC-1 Claim Form 11/03/2021; Application for Adjudication of Claim 11/03/2021.* Petitioner was initially represented by the Alvandi Law Group. *Fee Disclosure Statement 11/03/2021.*

Case ADJ 15378781 was initially venued at the DWC’s Santa Ana District Office. Defendant sought and obtained a change of venue to the Bakersfield District Office. *Petition for Change of Venue 11/17/2021; Order Changing Venue 12/16/2021.*

On December 22, 2021, Lien Claimant Kern County Department of Child Support Services updated its lien claim to indicate a balance due of \$4,999.00. *Updated Child Support Lien 12/22/2021.*

A Mandatory Settlement Conference was held on January 28, 2022. Settlement negotiations were reportedly in progress. The MSC was continued again, this time to April 7, 2022. *Minutes of Hearing 1/28/2022.* Negotiations were not successful and the third session of the MSC ended with an Order Taking Off-Calendar (OTOC). *Minutes of Hearing 4/07/2022.*

A Status conference was held in case ADJ 13667170 concerning the alleged cumulative injury from October 2, 2019 to September 28, 2020. At the request

of the parties, Case ADJ 13667170 with dismissed without prejudice. *Minutes of Hearing 5/17/2022.*

Petitioner re-filed case ADJ 13667170 on July 26, 2022. The amended claim identified Traveler's Insurance as a Defendant-Carrier and asserted cumulative injury to his back, neck, abdomen, nervous system/psyche, thoracic spine and in the form of hypertension during the period from October 2, 2019 to October 2, 2020 despite Petitioner's 2013 termination from Defendant's employment and somehow resulting in periods of disability starting August 19, 2014 and November 28, 2017. *Amended Application for Adjudication of Claim (ADJ 13667170) 7/21/2020.*

The amended application in ADJ 13667170 was amended again on August 30, 2022 to delete Traveler's Insurance as a carrier and note that Defendant William Bolthouse Farms was permissibly self-insured. *Amended Application for Adjudication of Claim 8/30/2022.*

On October 29, 2022, Defendant changed law firms, retaining the Law Offices of Michael Sullivan & Associates. *Substitution of Attorneys 8/29/2022.* Defendant asked for an MSC in both pending cases. *Declaration of Readiness to Proceed 10/04/2021.* Applicant objected via Alvandi Law, his new attorneys. Applicant requested judicially supervised in-person informal settlement conference, which was described as "the only possible hope for resolution." *Objection to Declaration of Readiness to Proceed 10/21/2022.*

A Mandatory Settlement Conference was held on February 7, 2023. The parties had not meet and conferred and had not completed a Pre-Trial Conference Summary Statement (PTCSS). The MSC was continued to March 15, 2023 for completion of the Summary Statement with an admonishment that the parties were free to have an informal settlement conference if they wished. *Minutes of Hearing 2/07/2023.*

On February 10, 2023, Petitioner filed a petition for discovery order to require Defendant to disclose it claims reserves. *Correspondence Requesting Reserves Sheets 2/10/2023.*

On the morning of the next session of the MSC, the Alvandi Law Group (ALG) petitioned for an order authorizing its withdrawal as attorneys of record for Petitioner alleging an "irreparable breakdown in understand between Applicant and the ALG." *Petition to be Relieved as Counsel of Record for Applicant 3/15/2023.* At the MSC later the same day, the cases were ordered off-calendar to allow Petitioner time to react to his counsel's petition and seek replacement counsel. *Minutes of Hearing 3/15/2023.* The motion of Alvandi Law Group to withdraw was thereafter granted. *Order Authorizing Attorney Withdrawal 5/02/2023.*

Petitioner thereafter petitioned for an order requiring Defendant to produce its claims reserve sheets and thereafter pay any reserves for remaining permanent partial disability indemnity or temporary disability to him with penalties and interest. *Petition for Remaining P.P.D. Penalty fees and late fees per LC 5814. TPD per LC 5814. 5/08/2023.* Petitioner thereafter requested a Mandatory Settlement Conference. *Declaration of Readiness to Proceed 5/15/2023.*

Petitioner sought treatment from Sendas Business Healthcare, which reported that he was temporarily partially disabled from June 20, 2023 to August 1, 2023 as a result of the July 21, 2013 injury. *Applicant's Exhibit 14: Report of Sendas Business Healthcare (Lihn K. Ngo, M.D.) 6/20/2023.*

A third session of the Mandatory Settlement Conference was held on July 6, 2023. A bilateral Pre-Trial Conference Statement (PTCS) had not been completed. Petitioner and Defendant submitted exhibit and witness lists. Petitioner Kenyon Warner was the only identified witness. *Pre-Trial Conference Statement (Defendant- exhibits only) 8/03/2023; Pre-Trial Conference Statement (Applicant-proposed-exhibits and witnesses only) 8/08/2023.* The cases were ordered set for Trial on August 31, 2023 with Trial to begin with a review of Stipulations, Issues and Exhibits. A request for virtual Trial was denied. *Minutes of Hearing 7/06/2023.*

A hearing reporter was not available for Trial on August 31, 2023 due to a conflict with a continuing Trial. Trial in these cases was postponed to September 27, 2023. *Minutes of Hearing 8/31/2023.*

The present cases were Tried on September 27, 2023 and scheduled for submission for decision on November 17, 2023. A family member (believed to be Petitioner's uncle) was present at Trial, but was not listed as a witness, was not called as a witness and was not refused as a witness. Nor did Petitioner testify. *Minutes of Hearing-Summary of Evidence 9/27/2023 p. 2.*

On November 3, 2023 (after Trial but before submission for decision), Petitioner petitioned for the appointment of a replacement QME panel. *Petition for Appointment of QME panel 11/03/2023.*

Following submission for decision on November 17, 2023, Findings of Fact & Orders issued on December 13, 2023. In case ADJ 9082866 ten motions/petitions were denied, including denials of Defendant's petition to declare Petitioner a vexatious litigant and Petitioner's petition alleging that he suffered discrimination prohibited by Labor Code Section 132a. In cases ADJ 15378781 and ADJ 13667170, the cumulative injuries were not shown to have occurred and the Applications were not filed within the time allowed by law. Petitioner was ordered to take nothing in both cumulative injury claims.

Whereupon Petitioner seeks reconsideration.

III. Discussion: The first argument of the pending petition complains that “there was significant prejudice is not raising the presumption of compensability of Labor Code Sections 5401, Section 5402{b} and Section 5402{c}. *Petition for Reconsideration 1/04/2024 p.1, pp. 6-7 and p. 14.*

When the claim is initiated with the filing of a DWC-1 claim form, and liability for the claimed injury is not denied within 90 days, the injured worker is entitled to a presumption that a compensable injury occurred. Lab.C. §5402. This presumption relates to compensability as a whole and not to “parts-of-the-body” disputes. Moreover, the presumption is rebuttable and does not avoid time limitations or the *res judicata* effect of already-decided issues.

In case ADJ 9082866, a DWC-1 claim form was not filed until December 13, 2016, well after Defendant’s acceptance of liability for the specific low back injury of July 21, 2013 and denial of injury to other bodily systems on November 4, 2013. The specific injury claim was fully litigated, becoming final with the denial of Petitioner’s petition for reconsideration of the dismissal of his Petition to Reopen. Petitioner has been fully compensated for the temporary and permanent partial disability found to have occurred and remains entitled to further medical treatment.

Case ADJ 15378781 is the cumulative injury claim running from the specific injury of July 21, 2013 through the short period of modified work and ending with the termination of Petitioner’s employment on September 24, 2013. A DWC-1 claim form was filed and a denial of liability specific to this cumulative injury claim did not appear to have been made. Thus, Petitioner appears to be correct that a presumption of compensability is applicable in ADJ 15378781. Furthermore, in fairness, it should be noted that the contemporary treatment reports from Drs. Moelleken and Lewis indicate a worsening of Petitioner’s condition during the period of modified work. This is consistent with the occurrence of a post-specific cumulative injury.

That said, the application of the Lab.C. §5402 presumption would not change the outcome. [Discussion of ADJ15378781 being filed outside of the limitations period is omitted.] Moreover, a presumption for the cumulative injury would be rebutted by the substantial medical reports of AME Dr. Scheinberg and QME Dr. Stalberg, which attribute the entirety of Petitioner’s disability and need for treatment to the specific injury of July 21, 2013.

Case ADJ 13667170 is the second cumulative injury, eventually alleged to have occurred from October 2, 2019 to October 2, 2020 despite the termination of Petitioner’s employment in 2013. No DWC-1 claim form appears to have been filed with respect to that injury. Moreover, the medical evidence attributing

Petitioner's condition entirely to the specific injury would rebut the presumption in ADJ 13667170, even if the presumption somehow arose.

The second argument of the pending petition complains of significant prejudice by failing to raise the medical-legal opinion of QME Dr. Stalberg and/or failing to obtain an additional QME appointment to provide evidence supporting Petitioner's claim to have sustained permanent disability greater than the standard rating under the rules of *Almaraz-Guzman*. *Petition for Reconsideration 1/04/2024 p. 2, pp. 4-5, pp. 9-10, pp. 12-13 & pp. 14-15.*

In fact, the substantial medical opinion of QME Dr. Stalberg was expressly noted to remain in evidence as part of the Trial-level decision. *Findings of Fact & Orders: Rulings & Orders Admitting Evidence 12/13/2023 p. 1 (Rulings #3 & #4)*. As just discussed, the expert opinions of AME Dr. Scheinberg and QME Dr. Stalberg that Petitioner's disability and need for treatment was the result of the specific injury (and the subsequent termination) rather than either of the claimed cumulative injuries were relied upon. *Findings of Fact & Orders 12/13/2023 p. 7-8 (Findings of Fact #4, #11 & #14)*. Dr. Stalberg denied that any psychiatric temporary disability occurred and the additional permanent disability he identified was previously found to be barred by Lab.C. §4660.1.

Petitioner's post-Trial motion for a new QME panel in an unspecified field was properly denied. Even if further litigation of the specific injury was somehow appropriate after the denial of reconsideration of Petitioner's Petition to Reopen, any such discovery closed at the prior MSC. Furthermore, Petitioner's remaining entitlement is to further medical treatment, which is subject to the UR/IMR process of Lab.C. §4610 *et seq.* rather than the AME-QME process of Lab.C. § 4060 *et seq.*

The third argument of the pending petition is that Petitioner should have been fully compensated for temporary partial disability during the period from July 22, 2013 to August 18, 2014 at rate of \$425.39 per week yielding \$23,821.84 but has been paid only \$12,336.31, leaving \$17,653.68 due. *Petition for Reconsideration 1/04/2024 p. 4.*

This argument is irreconcilable with final determinations (originally upon stipulations made on Petitioner's behalf by his then-attorney) that Petitioner's average weekly wages were \$418.70 per week (yielding the TTDI rate for which Petitioner has been fully compensated) and that he would have been able to continue in modified work but for a good-faith termination for cause.

The fourth argument of the pending petition is that Summary judgement awarding a commutation of temporary and permanent disability indemnity and finding discrimination pursuant to Labor Code 132a should have been issued because of an inappropriate referral. *Petition for Reconsideration 1/04/2024 pp. 5-6 & p. 8.*

The first problem with the fourth argument of the pending petition is that the awarded indemnity benefits have been paid. There is nothing left to commute. Secondly, the claim for discrimination prohibited by Labor Code Section 132a was not filed within the one-year from the allegedly discriminatory action allowed by law. It is also contradicted by the credible contemporary documentary evidence indicating that the termination resulted from an incident with a co-employee followed an appropriate process of suspension, investigation and then termination. Finally, Petitioner's allegation that failing to pay disputed benefits means referrals to claims administrators, reviewing physicians and even legal counsel are improper referrals subject to potential professional discipline pursuant to Lab.C. §139.32 is illogical and inconsistent with Defendant's due process right to defend the claim. Moreover, the requested professional discipline, even if somehow appropriate, is outside of the jurisdiction of the Appeals Board.

The fifth argument of the pending petition is Petitioner's due process rights were violated by failing to enter a wage settlement agreement of July 28, 2021 into evidence and not taking the testimony of Petitioner's uncle regarding the settlement. *Petition for Reconsideration 1/04/2024 p. 8.*

The "wage settlement" that was offered in evidence was received and considered. *Findings of Fact & Orders 12/13/2023 p. 3 (Order Admitting Evidence #20-Applicant's Exhibit 16: Notice of Class Settlement 10/14/2016; p. 11 (Opinion on Decision).* Notably absent is any documentation that such a settlement result in the payment to Petitioner of any retroactive wages for work on July 21, 2013.

Petitioner was the only witness identified for the Trial September 27, 2013. He was accompanied by a family member, who may have been his uncle. But the uncle was not listed as a witness, was not called as a witness, and was not refused the opportunity to testify after being called. Further, this argument lacks the required statement of anticipated testimony required by WCAB Rule 10974, including whether it would relate to wages on the date of the specific injury.

The sixth argument of the pending petition is that Petitioner's due process rights were violated by failing to bifurcate and defer his claim of discrimination prohibited by Labor Code Section 132a. *Petition for Reconsideration 1/04/2024 p. p. 16 & pp. 18- 19.*

The first problem with the sixth argument is that there is no due process right to bifurcation of issues. To the contrary, compensation litigants are expected to prepare and submit all matters properly at issue in a single trial. Bifurcation of issues is at the discretion of the judge. 8 CCR §10787{a}. There was no abuse of this discretion in requiring Petitioner to try his 132a claim with the other pending issues.

Secondly, bifurcation would not have made any difference to the outcome. It would not change the fact that the Lab.C.§132a petition was filed well after the one-year time limitation. It also would not change the documentary evidence establishing the nondiscriminatory process followed by the employer rather than the retaliation alleged by Petitioner.

The final argument of the pending petition is “Correction of Petitioner’s wages to \$665.00 per week entitles Petitioner to an award of temporary and permanent disability indemnity in the total amount of \$1,204,942.465. *Petition for Reconsideration 1/04/2024 pp. 22-23 (half-cent in original).*”

The problems with this final argument have been previously discussed herein. Petitioner’s average weekly wages at \$418.70 per week have been fully and finally adjudicated. Petitioner’s entitlement to indemnity compensation, and Defendant’s payment thereof, have also been fully and finally adjudicated. Petitioner’s claim of entitlement to additional indemnity compensation in excess of \$1.2 million is inconsistent with fully litigated and finally decided questions.

IV. Recommendation: Dismissal or denial of the pending petition for one or more of its three procedural deficiencies is recommended. If a decision on the merits notwithstanding these deficiencies is desired, it is recommended that the pending petition be denied.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings of Fact and Orders of December 13, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSEPH V. CAPURRO, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 8, 2024

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

**KENYON WARNER
MICHAEL SULLIVAN & ASSOCIATES
EMPLOYMENT DEVELOPMENT DEPARTMENT**

DW/oo

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