

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

**DELFINO VEGA, *Applicant***

**vs.**

**TD SYNnex; SAFETY NATIONAL INSURANCE, *Defendants***

**Adjudication Numbers: ADJ16206398; ADJ16206424  
Oakland District Office**

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

Applicant, who is representing himself, seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Finding of August 29, 2023, wherein it was found that he "did not sustain injury to his neck and bilateral shoulders during the course and scope of his employment with TD Synnex." Applicant filed applications for adjudication of claim for a specific injury of February 21, 2022 (ADJ16206424) and a cumulative injury (ADJ16206398). At trial, the WCJ dismissed the cumulative injury claim because no medical evidence was submitted into evidence supporting a cumulative injury. (Minutes of Hearing and Summary of Evidence of July 11, 2023 trial at p. 2.)

Applicant filed concurrent documents entitled Petition for Reconsideration, both handwritten on DWC/WCAB Form 45. Both have a proof of service reflecting service on defense counsel, and both were received timely by the WCAB on September 18, 2023. One was only one page, and the other was about eight pages long. We have received an Answer from defendant which appears to be only in response to the one-page Petition. The WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

As explained below, we will grant reconsideration, rescind the WCJ's decision, and issue a new decision reflecting that applicant sustained specific industrial injury to his shoulders and neck in case ADJ16206424. The decision will affirm the finding of no industrial cumulative injury in case ADJ16206398.

Preliminarily, in its Answer, defendant objects to technical deficiencies in applicant's Petition. It appears that defendant's objections are geared towards the one-page Petition for Reconsideration, and not the longer concurrently filed Petition. Although applicant's hand-written Petition may not have the clarity one would expect from an attorney specializing in workers' compensation, it sufficiently sets forth applicant's contention that the findings of no industrial injury are in error. In any case, "it is settled law that a grant of reconsideration has the effect of causing 'the whole subject matter [to be] reopened for further consideration and determination' (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of '[throwing] the entire record open for review.' (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. [Citations.]" (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7 [Appeals Bd. en banc].) Thus, we accept applicant's Petition.

In the WCJ's Report, the WCJ states that the Petition is untimely vis-à-vis the cumulative injury claim, because the cumulative injury claim was dismissed at trial, as recorded in the Minutes of Hearing. The WCJ states that, in order to be timely, reconsideration should have been sought within twenty days of service of the Minutes of Hearing. However, we accept the applicant's Petition as timely, as it is not clear that the Minutes reflected a final order of the issue.

Turning to the merits, applicant testified at trial that a fence was stuck at work, and he was struggling to open it. (Transcript of July 11, 2023 trial at p. 23.) He struggled and managed to open the fence halfway, but not all the way. (Transcript of July 11, 2023 trial at p. 23.) Applicant testified that eventually the fence fell on him. (Transcript of July 11, 2023 trial at p. 23.)

Applicant's co-worker Kristen Price testified that applicant was "struggling to open the gate" and managed to open the gate only halfway. (Transcript of July 11, 2023 trial at p. 31.) Ms. Price testified "So it was a struggle to open the gate, and then once he was kind of nudging it, it was like – it wasn't fully off of it, but there was a hook holding it. So he said, 'The gate is coming off. I'll go get [supervisor] Mel.'" (Transcript of July 11, 2023 trial at p. 32.) Ms. Price testified that she observed the entire episode, but the fence never fell on applicant. (Transcript of July 11, 2023 trial at p. 33.)

Supervisor Melchisedec Davis testified that “one hook came off the top [of the fence] and [the fence] was barely leaning. The bottom hook still held.” (Transcript of July 11, 2023 trial at p. 32.)

Based on Ms. Price’s testimony, the WCJ found no industrial injury because the fence did not “fall” on the applicant. However, qualified medical evaluator chiropractor Ralph DuMouchel, D.C. does not appear to have found injury solely due to the force of the “fall” (and it was undisputed that the fence leaned at least slightly because it was unhinged), but also to the prior struggle to open the gate. (December 26, 2022 report at p. 14.) Since a finding of injury does not appear dependent on whether the fence fully fell on the applicant, and both Ms. Price and applicant testified to a struggle with the gate, we will grant reconsideration, rescind the WCJ’s decision and issue a new decision finding specific industrial injury on February 21, 2022 to the neck and shoulders in case ADJ16206424. Since there is no medical evidence of cumulative injury, we find no industrial injury in case ADJ16206398.

For the foregoing reasons,

**IT IS ORDERED** that Applicant’s Petition for Reconsideration of the Finding of August 29, 2023 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the Finding of August 29, 2023 is **RESCINDED** and that the following is substituted therefor:

**FINDINGS**

1. Applicant Delfino Vega, age 62 on the date of injury, while employed on February 21, 2022 by TD Synnex, insured by Safety National Insurance, in case ADJ16206424, sustained industrial injury to his neck and shoulders.
2. Applicant Delfino Vega did not sustain cumulative injury to his neck and shoulders as alleged in case ADJ16206398.
3. All other issues are deferred, with jurisdiction reserved.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

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



**I DISSENT,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

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

**November 17, 2023**

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

**DELFINO VEGA  
DIETZ, GILMOR & CHAZEN**

**DW/pm**

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

## **DISSENTING OPINION OF COMISSIONER JOSÉ H. RAZO**

I respectfully dissent. I would have denied Applicant's Petition for the reasons stated by the WCJ in the Report, which I quote below. While my colleagues base their decision on Ms. Price's testimony, qualified medical evaluator chiropractor Ralph DuMouchel, D.C. based his finding of industrial injury on the history of applicant having to "push a fence up using his arms and head that had fallen on him..." The WCJ found based on Ms. Price's testimony that no fence had fallen on the applicant. A WCJ's credibility determinations are "entitled to great weight because of the [WCJ's] 'opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand [Citation.]"

### **REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION**

Applicant filed a verified petition for reconsideration from my order which found that he did not sustain an injury during the course and scope of his employment.

### **INTRODUCTION**

Applicant, Delfino Vega, claimed that on February 21, 2022 while he was in a shipping cage, picking up orders, a gate fell on him. As the gate was falling, the applicant claimed that he had to use both his hands to prevent it from crushing him to the ground. He used his head to balance the fence, eventually pressing the fence off of his head away from his body. Applicant claimed to have reported his injury to his supervisor.

In addition applicant claimed that after the injury, he continued being injured on a cumulative trauma basis.

Defense witness, Kristin Price testified that on February 21, 2022, she was working with Mr. Vega. She was the one who asked Mr. Vega to get an item from the cage. She went directly to the cage with Mr. Vega to collect the item she requested. She was at the gate when Mr. Vega arrived with the forklift. She watched him during the entire time. Although he had a difficult time opening the gate, the gate did not fall on him. According to Ms. Price, the gate did come off its hinges but never fell.

The panel qualified examiner found that applicant's injury was industrial, relying solely on history of injury provided by the applicant as far as the specific date of injury was concerned. The panel qualified medical examiner did not find a cumulative trauma claim.

After review of the medical records and listening to the witness testimony provided at trial, I determined that Ms. Price was more credible than the applicant.

Since according to Ms. Price the event that allegedly caused applicant's injury did not occur, I decided that applicant did not sustain an injury as described by him on February 21, 2022.

On the day of trial, I dismissed the claim filed by applicant for a cumulative trauma claim since according to the panel qualified medical examiner, applicant did not sustain a cumulative trauma claim.

Applicant has filed a petition for reconsideration from my determination that he is not entitled to workers' compensation benefits.

### **DISCUSSION**

Applicant was evaluated by Dr. DuMouchel in the capacity of a panel qualified medical examiner. Dr. DuMouchel issued a report dated December 26, 2022 in which report he stated that applicant did sustain an injury to his neck and bilateral shoulders on an industrial basis as far as the specific date of injury was concerned but stated that there was no cumulative trauma injury.

Based on the record that was offered on the day of trial, I issued an order dismissing ADJ16206398 due to lack of finding of the existence of a cumulative trauma injury.

Since the Minutes of Hearing, summary of evidence was served upon applicant on July 18, 2023, applicant was required to file his petition for reconsideration for the dismissal of ADJ16206398 by no later than August 14, 2023. The petition for reconsideration is dated August 29, 2023. Since applicant failed to file his petition for reconsideration from the dismissal order of July 18, 2023 until August 29, 2023, the petition for reconsideration as it pertains to that case number is untimely and therefore must be dismissed.

Even if this honorable panel finds the petition to be timely, since there is no medical report verifying the existence of a cumulative trauma injury, the petition should be dismissed on its merits.

As far as the specific date of injury is concerned, ADJ16206424, neither party appears to understand what I based my decision on.

To begin with, I never admitted into evidence any of the videotapes provided by defendant. Applicant objected to the admission into evidence the surveillance videotapes. The videotapes were marked for identification purpose. Because of

applicant's objection, they were not viewed by me and were not admitted into evidence. My decision was therefore not based on the videotapes at all.

As far as testimony is concerned, I did not base my decision on the testimony of defense witness Mel Davis. Mr. Davis clearly disliked the applicant, based on the way he treated the applicant on the day of trial. Mr. Davis was dismissive of applicant and was aggressive toward applicant while testifying during cross examination.

The witness whose testimony I relied upon was Ms. Price. She presented calmly during the trial and testified matter of factly.

I have no doubt Ms. Price was observing Mr. Vega during the entire time he was at the cage retrieving an item Ms. Price requested to have retrieved.

Since Ms. Price testified that she did not see the gate fall on Mr. Vega nor did she see the gate fall at all, Mr. Vega could not have been injured since the incident he claims caused his injury did not occur.

Although the panel qualified medical examiner did find that applicant sustained an industrial injury, since the medical examiner relied solely upon the description of injury provided by the applicant, which I found to lack credibility, I disregarded the panel qualified medical examiner's opinion regarding causation for injury.

**RECOMMENDATION**

I recommend the Petition for Reconsideration filed by applicant be ***DENIED.***

I therefore respectfully dissent.

**WORKERS' COMPENSATION APPEALS BOARD**



**/s/ JOSÉ H. RAZO, COMMISSIONER**

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

**November 17, 2023**

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

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