

**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**SANDRA GIRON, *Applicant***

**vs.**

**LOS FELIZ HEALTHCARE WELLNESS CENTRE LP and XL SPECIALTY  
INSURANCE COMPANY, administered by INTERCARE INSURANCE SERVICES,  
*Defendants***

**Adjudication Number: ADJ12401537**

**Marina del Rey District Office**

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

Applicant seeks reconsideration of the Findings & Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on October 3, 2022, wherein the WCJ found that applicant did not sustain an injury arising out of and in the course of employment (AOE/COE) during the period from December 22, 2018, through September 11, 2019; all other issues were deferred.

Applicant contends that her testimony and the reports from primary treating physician John Boyko, D.C., are substantial evidence that she sustained an orthopedic injury as claimed.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

## **BACKGROUND**

Applicant claimed injury to her neck, back, psyche, and in the form of headaches, while employed by defendant as a certified nurse assistant (CNA), during the period from December 22, 2018, through July 11, 2019.

The parties proceeded to trial on May 5, 2021, and the matter was continued. At the October 4, 2021, trial the matter was submitted for decision, as of October 15, 2021. The issues submitted for decision included injury AOE/COE, and whether applicant's claim was barred by the provisions of Labor Code sections 3600(a)(2), 3600(a)(3), and 3600(a)(10). (See Minutes of Hearing and Summary of Evidence (MOH/SOE), May 5, 2021, pp. 2 – 3.) In the December 1, 2021, Findings and Order the WCJ found that applicant had not sustained injury AOE/COE. Applicant filed a Petition for Reconsideration, and by our February 3, 2022, Opinion and Order Granting Petition For Reconsideration and Decision After Reconsideration (Opinion and Order), which we adopt and incorporate by this reference thereto, we returned the matter to the WCJ for development of the record. We explained that:

Dr. Boyko did not review any x-rays, MRIs, or other diagnostics before stating his opinions as to the cause of applicant's subjective complaints. (App. Exh. 2, p. 5.) Absent any diagnostics in support of applicant's complaints, it appears that Dr. Boyko's opinions were based on "the history as provided by the patient." The subsequent PR-2s do not address the issue of causation. (See App. Exh. 1.) ... Dr. Boyko's conclusion appears to be based on an inadequate medical history, specifically the lack of review of diagnostics or other medical records, and in turn, it appears to be based on speculation, or guess. Thus, his report does not constitute substantial evidence. ...  
(Opinion and Order, pp. 4 – 5.)

On March 28, 2022, the WCJ issued an Order stating:

... The psyche portion of the applicant's claim in case ADJ12401537 is DISMISSED. ¶ The case is being returned to the Trial calendar for further development of the record. The hearing will be held in the courtroom with parties present. There will be further testimony of the applicant regarding the remaining body parts of her case. ...  
(See Order, March 28, 2022.)

At the April 25, 2022, trial the matter was submitted " ... on the existing record. Defendant had 2 witnesses present to testify, AA [applicant's attorney] objected." (Minutes of Hearing, April 25, 2022.)

On May 15, 2022, the WCJ issued an Order stating:

[O]n 10-4-2021, the psychiatric claim of the applicant in the above-referenced matter is dismissed pursuant to the stipulation of the parties on 10-4-2021, the matter proceeded on the issue of AOE/COE only. ¶ The matter remains under submission (disposition 4 -25 - 2022).  
(See Order, May 15, 2022.)

An Order Vacating Submission was issued on May 15, 2022, stating that “It is found that after review of the entire record in the above-entitled matter that evidence requires clarification and review.” The matter was set for trial and the September 12, 2022, Minutes of Hearing state: “The matter is submitted.”

### **DISCUSSION**

Any award, order, or decision of the Appeals Board. must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

We note that when deciding a medical issue, such as whether an applicant sustained a cumulative injury, the WCJ must utilize expert medical opinion. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) As quoted above, in our Opinion and Order, we explained why the reports from Dr. Boyko do not constitute substantial evidence. Based on the fact that the trial record did not contain substantial evidence pertaining to the issue of applicant’s injury claim, we returned the matter for development of the record. Applicant’s dismissal of the psychiatric injury claim does not impact the orthopedic injury claim. Having been informed that the trial record did not contain substantial evidence, it is not clear why the parties chose to re-submit the matter for decision “on the existing record.”

We have again reviewed the trial record, including the reports from Dr. Boyko and the WCJ's summary of applicant's testimony. Based thereon, it is clear that our Opinion and Order was correct that the trial record does not constitute substantial evidence upon which a Finding regarding the issue of injury AOE/COE can be made. Thus, the matter will again be returned to the trial level.

The Appeals Board cannot, and we do not, order parties to undergo the medical-legal procedure. However, it is the parties' responsibility to submit substantial evidence pertaining to the issues submitted for decision. Upon return of this matter, the most expedient means of resolving the disputed issues would be by settlement of the injury claim. If the parties are unable to settle the matter, they may choose to have applicant evaluated by a qualified medical examiner (QME) or in the alternative, they may request that the WCJ appoint a regular physician. (Lab. Code § 5701.) Counsel are reminded that if the matter is again submitted for decision on the existing record, the issues of burden of proof as well as frivolous and/or bad faith conduct will be considered. (Lab. Code, § 5705; Cal. Code Regs., tit. 8, § 10421, subd. (b).)

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Finding and Order issued by the WCJ on October 3, 2022, is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 3, 2022, Findings and Order is **RESCINDED**, and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**



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

**December 22, 2022**

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

**SANDRA GIRON  
HINDEN & BRESLAVSKY  
ALVES LAW OFFICE**

**TLH/mc**

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