

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

JOSE MEDINA, *Applicant*

vs.

**CYGNUS HOME SERVICE, LLC. dba SCHWAN'S HOME SERVICE, INC. and
AMERICAN HOME ASSURANCE COMPANY, administered by SEDGWICK
CLAIMS MANAGEMENT SERVICES, INC., *Defendants***

Adjudication Number: ADJ16830722

Oxnard District Office

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

Applicant (in pro per) seeks reconsideration of the Findings of Fact (Findings) issued by the workers' compensation administrative law judge (WCJ) on August 23, 2023, wherein the WCJ found in pertinent part that, "The UR decision of June 19, 2023 was untimely" and "There is no substantial medical evidence to support treatment in the form of right carpal tunnel release and ulnar decompression as requested by Dr. Taher on June 9, 2023." (Findings, p. 2.)

Applicant contends that the May 31, 2023 Secondary Treating Physician's Report from David Robert Sollaccio M.D., is evidence that applicant is in need of the right carpal tunnel and ulnar nerve decompression surgery requested by his primary treating physician (PTP) Reza Taher, M.D., on June 9, 2023.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be dismissed as untimely, or in the alternative that it be denied. We received an Answer from defendant.

We have considered the allegations in the Petition, and the Answer, 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 Findings, 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 his cervical spine, right shoulder, right upper extremity, and left upper extremity, while employed by defendant as a route sales representative/delivery driver on January 8, 2021.

Applicant underwent a course of medical treatment including treatment he received from, or was recommended by, PTP Dr. Taher and Dr. Sollaccio. On May 31, 2023, applicant was seen by Dr. Sollaccio. The doctor reviewed the March 31, 2023 NCV (nerve conduction study). He stated, "This is an abnormal study" and explained that the NCV was evidence of entrapment neuropathy affecting the sensory fibers of the median nerves consistent with mild right and left sided carpal tunnel syndrome; and consistent with right and left sided Guyon's canal syndrome (injury to the ulnar nerve). (Joint Exh. C, David Robert Sollaccio M.D., May 31, 2023, p. 12 [EAMS p. 6].) The treatment note included:

Case request sent for right carpal tunnel release, right elbow ulnar nerve decompression ... Other treatment options discussed, including continued conservative treatment. Benefits of the surgical procedure include improved function, mitigation of continued nerve injury, and decreased pain (though not guaranteed). Patient has exhausted most applicable forms of conservative care. Patient understands and accepts these risks and wishes to proceed with surgery. (Joint Exh. C, p. 13 [EAMS p. 7].)

Dr. Taher's June 6, 2023 progress report (PR-2) indicated that he had reviewed the March 31, 2023 NCV, and the PR-2 included a Request for Authorization seeking approval of right carpal tunnel release and right elbow ulnar nerve decompression surgery. (See Joint Exhs. A and B, Reza Taher, M.D., June 6, 2023.)

The parties proceeded to an Expedited Hearing on August 9, 2023. The issues submitted for decision included applicant's need for right carpal tunnel and ulnar decompression surgery. (Minutes of Hearing and Summary of Evidence (MOH/SOE) August 9, 2023, p. 2.)

DISCUSSION

There are 30 days allowed within which to file a petition for reconsideration from a “final” decision that has been served by mail upon a party to an address outside the state of California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(2).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) To be timely, however, a petition for reconsideration must be *filed* with (i.e., received by) the Appeals Board within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10940(a), 10615(b).)

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656]; *Scott v Workers’ Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].) However, where an order can be shown to have been defectively served, the time limit begins to run as of the date of receipt of the order. (*Hartford Accident & Indemnity Co. v. Workers’ Comp. Appeals Bd. (Phillips)* (1978) 86 Cal.App.3d 1 [43 Cal.Comp.Cases 1193].) Here, the Findings were served on applicant and defense counsel on August 23, 2023. (See Findings p. 3.) But our review of the Electronic Adjudication Management System (EAMS) ADJ file indicates that defendant Sedgwick Claims Management Services, Inc. (P.O. Box 14433 Lexington, KY 40512) was not served the Findings until August 29, 2023. (See Proof of Service/Service List, Lewis Brisbois Bisgaard & Smith LLP, August 29, 2023.) Labor Code section 5313 states in part that:

[T]ogether with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made. (Lab. Code, § 3513, underlining added.)

Thus, the Findings was defectively served and the 30-day time limit for applicant to file the Petition began August 29, 2023.¹ Applicant’s Petition was filed/received on September 27, 2023, and therefore was timely and will be considered on the merits.

¹ The actual date that Sedgwick Claims Management Services, Inc. received the Findings is unknown, but the Petition was filed within 30 days of the Findings being served on defendant, so it clearly falls within 30 days of the Findings being received by defendant.

Regarding the merits of applicant's Petition, in her Report, the WCJ discussed the reports from Dr. Taher and Dr. Sollaccio as follows:

Dr. Taher did not provide an analysis as to why he was recommending the surgery for the applicant. The analysis should have included a summary of treatment rendered to the applicant for said body part, if further conservative care was needed, and why the applicant required the specific surgery recommended. Dr. Taher simply requested the surgery with no explanation. This does not constitute substantial medical evidence. ¶ Dr. Sollaccio's May 31, 2023 report was also considered in determining if there was substantial medical evidence for the requested surgery. Specifically, on page 7 of his report, Dr. Sollaccio indicates that he "discussed at length with the patient the diagnosis and treatment options." Dr. Sollaccio reports that the "treatment options include activity modifications, hand therapy exercises, night splinting, anti-inflammatory medications, possible corticosteroid injections, potential and surgery (carpal tunnel release, elbow ulnar nerve decompression)." Id. at page 7. Dr. Sollaccio then indicates that the "patient elects for surgery, beginning with right side." Id. at page 7. However, Dr. Sollaccio did not provide an explanation as to why the applicant was not going to undergo further conservative care, nor why he recommended the applicant undergo surgery. (Report, p. 3; citations to doctors' reports in original.)

When a physician's report is well-reasoned, is not speculative, is based on an adequate history and examination, and sets forth the reasoning behind the physician's opinion, not merely his or her conclusions; the report constitutes substantial evidence. (*Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Having reviewed the trial record, we agree with the WCJ that the treatment notes/reports from Dr. Taher and Dr. Sollaccio do not constitute substantial evidence as whether the recommended/requested surgery is reasonable and necessary medical treatment for applicant's industrial injury. However, the reports do include references to diagnostics (e.g., the March 31, 2023 NCV; January 26, cervical MRI) which indicate applicant has neurologic conditions that may well warrant surgery as requested by Dr. Taher. 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; *Kuykendall v. Workers' Comp. Appeals Bd.*, (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264] *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].) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery pertaining to a threshold issue is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.*, *supra* at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Under the circumstances herein, upon return of this matter to the WCJ we recommend that a Status Conference be scheduled so the WCJ may assist the parties in determining how best to develop the record as to the medical treatment at issue.

Accordingly, we grant reconsideration, rescind the Findings, 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 Findings of Fact issued by the WCJ on August 23, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 23, 2023 Findings of Fact 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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ NATALIE PALUGYAL, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 21, 2023

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

**JOSE MEDINA, IN PRO PER
LEWIS BRISBOIS BISGAARD & SMITH LLP**

TLH/mc

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