WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

KENNETH SKAGGS, *Applicant*

vs.

GRIMWAY ENTERPRISES, Permissibly Self-Insured, *Defendant*

Adjudication Number: ADJ12328983
Bakersfield District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Rulings, Findings of Fact & Order of August 1, 2023, wherein it was found that, while employed during a cumulative period ending May 24, 2019, applicant did not sustain an industrial dental injury. The WCJ thus ordered that applicant take nothing by way of his workers' compensation claim.

Applicant contends that the WCJ erred in not finding industrial injury, arguing that he was entitled to the presumption of injury codified in Labor Code section 5402(b) because defendant did not deny liability for injury within 90 days of applicant's filing of a DWC-1 claim form. The WCJ found that, while the defendant did not timely deny liability, any presumption of injury was properly rebutted by evidence not reasonably obtainable in the 90-day period. We have received an Answer from the defendant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will deny the Petition for Reconsideration for the reasons stated in the portion of the Report quoted below. As noted by the WCJ, the medical reporting stood unanimously for the proposition that applicant's condition was not industrial, and the reports were properly considered because they were not reasonably obtainable within 90 days of receipt of the claim form:

> The third problem with the first argument of the pending petition is that it over-claims the cited precedent. *Petition for Reconsideration 8/23/2023 p. 4 lines 4-24* citing *SCIF v. WCAB (Welcher)*, 1995) 37 Cal.App. 4th 675, 43 Cal.Rtpr. 660, 60 CCC 717. However, the Second District Court did not find that the presumption or exclusion were absolute. The Second District Court cited with

approval prior cases in which subsequently obtained evidence was received to rebut the presumption. *Welcher*, supra, 60 CCC at p. 723.

Nor did the Second District Court in *Welcher*, supra, put the burden of proof to establish that subsequently obtained evidence could not have been obtained within the 90-day determinative period but instead found that the hospital records of Lien Claimant Kaiser already contained the relevant information, which could have been obtained within 90 days. *Welcher*, supra, 60 CCC at p. 723.

Finally, the first argument of the pending petition overlooks the power of the Appeals Board to develop the medical-legal record regardless of the follies of the litigants. The Appeal Board is expressly authorized to receive the reports of attending or examining physicians at any time and use those reports to prove or disprove any fact in dispute. Lab.C. §5703. Defendant correctly argues that chemical exposures are complex matters that require discovery that cannot be reasonably completed within 90 days. *Answer to Petition for Reconsideration* 9/07/2023 *p. 3 lines 5-22*. Moreover, written reports from physicians remain the favored mode for the production of evidence to the Appeals Board. 8 CCR §10682 (WCAB Rule 10682).

The second argument of the pending petition is "Defendant failed to conduct a reasonable and timely investigation upon receiving the claim for as it required by 8 CCR 10109." *Petition for Reconsideration 8/23/2023 p. 5 lines 13-20*.

But the facts are otherwise. An initial evaluation at an industrial clinic was provided thirteen days after the filing of the claim form. The initial examination indicated that a dental examination was needed. *Joint Exhibit B-4: Report of Sriram Mummaneni, M.D. 1/22/2020 pp. 6-7 (review of Doctor's First Report of Irene Sanchez, M.D./Stephen Hanson, PA-C 8/02/2019)*. The recommended dental exam occurred thirty-five days later. The initial dentist, in turn, recommended Qualified Medical Evaluation. *Joint Exhibit B-4: Report of Sriram Mummaneni, M.D. 1/22/2020 p. 7 (review of Doctor's First Report of Chap Yam, D.D.S. 9/06/2019)*. Even if the Defendant did not deserve any prizes for promptly getting sufficient MSDS sheets to the QMEs thereafter, the initial investigation upon receipt of the claim form was both reasonable and timely.

Finally, the pending petition argues "Labor Code Section 3202 requires an interpretation of the Labor Code and California Code of Regulations in favor of the injured worker in this case." *Petition for Reconsideration 8/23/2023 p. 5 line 23 to p.* [sic]construction of the compensation law does [not] replace the obligation to meet applicable burdens of proof via a prepondera[nc]e of the evidence. Lab.C. §3202.5.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Rulings, Findings of Fact & Order of August 1, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ NATALIE PALUGYAI, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 27, 2023

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

KENNETH SKAGGS
KEITH GILMETTI
HANNA, BROPHY, MacLEAN, McALEER & JENSEN

DW/oo

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