

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

MIGUEL LEMUS, *Applicant*

vs.

GOODFELLOW BROS., LLC; BROADSPIRE, *Defendants*

**Adjudication Number: ADJ16801627
Fresno District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

Labor Code section 5700 provides in relevant part that: "Either party may be present at any hearing, in person, by attorney, or by any other agent, and may present testimony pertinent under the pleadings." WCAB Rule 10305(c) states that: "'Appearance' means a party or their representative's presence, pursuant to Labor Code 5700, at any hearing." (Cal. Code Regs., tit. 8, § 10305(c).) WCAB Rule 10752, subdivision (a) requires that: "each applicant and defendant shall appear or have an attorney or non-attorney representative appear at all hearings pertaining to the case in chief," and subdivision (d) states in pertinent part that: "Any appearance not required by this rule may be noticed pursuant to rule 10642 or ordered by the Workers' Compensation Appeals Board." (Cal. Code Regs., tit. 8, § 10752(a), (d).)

Here, defendant did not send a notice to applicant to appear at trial as is allowed by WCAB Rule 10642 (Cal. Code Regs., tit. 8, § 10642). There is nothing in the record to indicate that defendant, either before, or at trial on May 23, 2023, sought to have a WCJ order applicant to appear. At the continued trial on June 22, 2023, defendant did not raise any objections, and the matter was taken off calendar by agreement of the parties. Yet, defendant raises the issue of due process for the first time on reconsideration, without having ever taken any steps to obtain applicant's testimony at trial. Thus, defendant's contention that it had an expectation that applicant would appear and provide testimony lacks merit.

Accordingly, we deny the Petition as one seeking reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Award issued by the WCJ on June 22, 2023, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 15, 2023

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

**MIGUEL LEMUS
GOLDBERG & IBARRA
LLARENA, MURDOCK, LOPEZ & AZIZAD, APC**

AS/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

1. Applicant’s Occupation: Operating Engineer
Age at Injury: 31
Date of Injury: 8/26/2022
Parts of Body Alleged Injured: thoracic spine, bilateral upper-extremities, bilateral arms, and psyche.
Manner in Which Injury Alleged Occurred: Using a jack hammer and carrying asphalt.
2. Identity of Petitioner: Defendant
Timeliness: The Petition was timely filed on 7/17/23
Verification: The Petition was Verified.
- [3.] Date of Award: 6/27/23
- [4.] Petitioner contends:
 - a. Defendant was denied due process by allowing the issue of Applicant’s entitlement to Temporary Disability to proceed to an Expedited Hearing over Defendant’s timely objection that they had not been allowed sufficient time to complete discovery.
 - b. Defendant was denied due process when not allowed to call the applicant to testify at the Expedited Hearing due to Applicant’s failure to appear.

II FACTS

Applicant sustained an accepted industrial injury to his thoracic spine on August 26, 2022, while using a jackhammer and carrying asphalt. The applicant was seen by his PTP, Guillermo Perez, PA-C, on 9/20/22, 9/28/22, 10/26/22, 11/8/22, 12/9/22 and 1/25/23. He was treated with pain medications, muscle relaxant, physical therapy, chiropractic treatments and trigger point injections. (Exh. A, Concentra Medical report, 1/25/23.) An MRI of the thoracic spine showed T5-T6 and T4-T5 small right lateral disc protrusions. The applicant was referred for neurosurgery evaluation but continued on full duty work status. (*Ibid.*)

The applicant underwent a QME evaluation with Steven Mamigonian, D.C. on January 25, 2023. The doctor noted the applicant has not worked since December 2022 and was not receiving any disability benefits. (Exh. 1, Dr. Mamigonian QME report, 1/25/23, pg. 2.) The doctor reported that the applicant described constant moderate thoracic spine pain radiating to the bilateral scapulas and arms up to the biceps with numbness and tingling, worse on the right. The pain increases with increased ADL or when he is forced to perform heavy work. (*Ibid.*) On physical examination, the doctor noted decreased range of motion for the thoracic spine accompanied by pain, as well as some sensory loss and motor/muscle loss. (*Id.* at pg. 8-9.) The doctor noted applicant's condition had not reached a Permanent and Stationary Level and recommended additional treatment including EMG/NCV studies and neurosurgical consult. The doctor stated applicant is TTD at this time.

On March 20, 2023, defendant scheduled Dr. Mamigonian's deposition to take place on June 27, 2023.

On May 23, 2023, the matter proceeded to an Expedited Hearing on the issue of applicant's entitlement to Temporary Disability benefits over defendant's objection.

On June 22, 2023, the undersigned found Dr. Mamigonian's QME report constituted substantial medical evidence and was relied upon to find applicant was entitled to temporary disability indemnity at a rate to be adjusted by the parties with jurisdiction reserved should a dispute arise, from last date worked ongoing, less credit for time worked and benefits paid, including EDD, less attorney fees of 15% of any unpaid benefits, to be paid until such time as the applicant's condition reaches Maximum Medical Improvement, he returns to work or a total of 104 weeks of temporary disability benefits have been paid, whichever occurs first. It is from this Finding and Award that Defendant seeks reconsideration. Applicant has not filed a Response as of the time of this report.

III

DISCUSSION

Defendant contends they were deprived of their due process rights by allowing the Expedited Hearing to proceed over their objection when they had exercised due diligence in setting the QME's deposition. While defendant argues that this additional discovery was needed to create substantial medical evidence, they fail to identify what mistake of law or fact existed in Dr. Mamigonian's report that required corrections. During informal discussions on this issue prior to the trial, Defendant indicated that they needed to provide the QME with a copy of the most recent PTP report indicating that the applicant was able to return to regular work. While the doctor had not reviewed that particular report, he had reviewed a similar report of 11/21/22, wherein the applicant had been returned to full duty. (Exh. 1, pg. 6.) In addition, Dr. Mamigonian reported discussing the applicant's 1/25/23 visit with the applicant. (Exh. 1 pg. 2.) As such, there is no evidence that there was an error in the doctor's report that would prevent it from constituting substantial medical evidence.

As discussed in Llamas v. Earthbound Farms, 2011 Cal. Wrk. Comp. P.D. LEXIS 487, defendant's due process rights are not violated by denial of a request for continuance of an Expedited Hearing on the issue of temporary disability. The WCAB found that the applicant was entitled to proceed to expedited hearing within 30 days of Declaration of Readiness under Labor Code § 5502(b) which does not contain language allowing parties to request a continuance for the purpose of completing discovery, as is contained in Labor Code §5502(c) in reference to priority conferences.

Defendant contends that the QME report of Dr. Mamigonian does not constitute substantial medical evidence because the doctor does not provide a full and complete explanation supporting his determination that the applicant is TTD. However, the doctor's report must be considered as a whole and not only isolated to specific statements. In a subsequent section, the doctor sets forth the REASONS FOR OPINIONS as: 1. Duties of the patient's occupation. 2. Duration of the symptoms. 3. Description of the injury as provide by the patient during this interview. 4. Physical examination finding. 5. Clinical experience. 6. Credibility of the patient. 7. Review of available records. (Exh. 1 pg. 13.)

Under OCCUPATIONAL HISTORY, the doctor describes applicant's job requirements as operating heavy machinery requiring him to do repetitive pulling, sitting, reaching, twisting, climbing, grasping, fingering, and walking. (Exh. 1, pg. 2.) The doctor noted the applicant described constant moderate thoracic spine pain to the bilateral scapulas and arms up to the biceps with numbness and tingling, which increases when forced to perform heavy work. (Exh. 1, pg. 2) The doctor indicated that his physical examination reveals spasms, positive orthopedic testing, restricted motion, tenderness, motor/muscle loss, and sensory loss. (Exh. 1, pg. 12) The doctor also described additional treatment required consisting of continued physician visits, medication, chiropractic care, therapy, acupuncture and pain management. Additional diagnostic studies required consisting of thoracic spine MRI, a thoracic and bilateral upper extremity EMG/NCV. As well as neurosurgical consults with treatment required based upon the testing/imaging results. (Exh. 1, pg. 12).

Even if a continuance of an Expedited Hearing was allowable, Labor Code § 5502.5 states that a continuance shall not be favored and may only be granted upon a showing of good cause. When determining a request for continuance, the workers' compensation judge shall take into consideration the complexity of the issues, the diligence of the parties, and the prejudice incurred on the part of any party by reasons of granting or denying a continuance.

In this case, while the defendant did act with due diligence in setting the doctor's deposition, the prejudice to the applicant of continuing to be denied temporary disability benefits outweighs any prejudice to the defendant. As the undersigned explained to the defendant prior to denying their request for a continuance, they were not being denied their right to take the doctor's deposition and could proceed with the deposition as long as they properly provided the applicant with temporary disability indemnity during the pendency of that discovery. If the doctor had

changed his opinion as a result of the deposition, the defendant would be entitled to request a credit for any temporary disability overpayment to be applied against any future permanent disability.

Defendant further contends that they were denied their due process right to call the applicant as a witness. In their Petition, the defendant misrepresents the proceedings by stating that they were not allowed to call the applicant as a witness. The defendant did not request to call the applicant as a witness to testify telephonically but rather requested that the Expedited Hearing be continued so that the applicant could be Ordered to appear to testify at trial. For the same reasons as discussed above, the request for continuance was denied. The undersigned inquired as to whether the applicant's deposition had been taken and if so, would allow it to be introduced into evidence in lieu of the applicant's testimony but the defendant declined the introduction of the deposition as evidence. In addition, if defendant disputed the information that the applicant provided to the QME regarding his work duties, the defendant could just as easily have provided their own employer witness but failed to do so. Finally, while defendant states that applicant's testimony was required on a material issue relating to indemnity benefits, defendant fails to identify specifically what material issue required his testimony. The issues as framed by the parties at the time of the Expedited Hearing were whether or not the applicant was entitled to temporary disability with the applicant relying upon the QME report of Dr. Mamigonian while the defendant was relying on the reports of the PTP; with the additional issue of defendant's request for ongoing discovery of the QME deposition.

There is no indication that the QME's opinions are based on surmise, speculation or conjecture or are based on incomplete or missing information.

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

E-SIGNED 8/1/2023

DEBRA SANDOVAL
Workers' Compensation Judge