

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICK MONTES, *Applicant*

vs.

**INSPERITY PEO SERVICES, L.P./ZOLLNER ELECTRONICS, INC.;
ACE AMERICAN INSURANCE COMPANY, adjusted by SEDGWICK CLAIMS
MANAGEMENT, *Defendants***

**Adjudication Number: ADJ17059668
San Jose District Office**

**OPINION AND ORDER
DISMISSING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, the petition fails to establish grounds for reconsideration or to make specific citations to the record and will be dismissed.

The Labor Code states that an aggrieved person may petition for reconsideration upon one or more of the following grounds and no other:

- (a) That by the order, decision, or award made and filed by the appeals board or the workers' compensation judge, the appeals board acted without or in excess of its powers.
- (b) That the order, decision, or award was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order, decision, or award.

(Lab. Code, § 5903.) The applicant failed to establish any of the grounds for reconsideration in the petition and therefore the petition will be dismissed on that basis.

Further, a petition for reconsideration "may be denied or dismissed if it is unsupported by specific references to the record and to the principles of law involved." (Cal. Code Regs., tit. 8, § 10972.) Specifically,

(a) Every petition for reconsideration, removal or disqualification shall fairly state all of the material evidence relative to the point or points at issue. Each contention shall be separately stated and clearly set forth. A failure to fairly state all of the material evidence may be a basis for denying the petition.

(b) Every petition and answer shall support its evidentiary statements by specific references to the record.

(1) References to any stipulations, issues or testimony contained in any Minutes of Hearing, Summary of Evidence or hearing transcript shall specify:

(A) The date and time of the hearing; and

(B) If available, the page(s) and line number(s) of the Minutes, Summary, or transcript to which the evidentiary statement relates (e.g., “Summary of Evidence, 5/1/08 trial, 1:30pm session, at 6:11-6:15”).

(2) References to any documentary evidence shall specify:

(A) The exhibit number or letter of the document;

(B) Where applicable, the author(s) of the document;

(C) Where applicable, the date(s) of the document; and

(D) The relevant page number(s) (e.g., “Exhibit M, Report of John A. Jones, M.D., 6/16/08 at p. 7.”).

(3) References to any deposition transcript shall specify:

(A) The exhibit number or letter of the document;

(B) The name of the person deposed;

(C) The date of the deposition; and

(D) The relevant page number(s) and line(s) (e.g., “Exh. 3, 6/20/08 depo of William A. Smith, M.D., at 21:20-22:5”).

(Cal. Code Regs., tit. 8, § 10945.) Here, applicant failed to provide citations to the record. Accordingly, the Petition for Reconsideration will be dismissed.

If the petition was not being dismissed for failing to establish grounds for reconsideration and failing to cite to the record, we would have denied it on the merits for the reasons stated in the WCJ’s report, which we adopt and incorporate. We have given the WCJ’s credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ’s credibility determinations. (*Id.*)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 19, 2024

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

**RICK MONTES
ABRAMSON LABOR GROUP
LAW OFFICES OF SASSANO & FLEISCHER**

JMR/ara

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Applicant's Occupation: Operations Manager
Applicant's Age: 58 years old at time of alleged injury
Date of Injury: 8/24/2022 or 8/25/2022
Parts of Body Injured: Left shoulder, hernia

2. Identity of Petitioner: **Applicant** filed the petition.
Timeliness: The petition was timely filed on 11/20/2023
Verification: The petition was properly verified.

3. Date of Issuance of Order: 11/02/2023

4. Petitioners Contends: Petitioner filed DWC Form 45 without much specificity as to the five grounds for reconsideration with possible assertion of ineffective assistance of counsel. Applicant contends that his attorney was fired due to misconduct, that his attorney failed to comply with the judge's request for trial briefs before and after the hearing, that defendant provided false information and that applicant was not allowed to give additional information regarding the facts of the case.

Defendant file an answer.

II
FACTS

Applicant, Rick Montes, claims to have sustained an injury arising out of and in the course of employment either on 8/24/2022 or 8/25/2022 to his left shoulder and hernia.

By way of brief history, alleged a specific injury to his left shoulder and hernia approximately five days prior to his termination on 8/29/2022 with Zollner Electronics, Inc. Claim was timely denied based on lack of medical evidence as well as Labor Code §3600(a)(10) post termination. Mandatory Settlement Conference was held on 07/18/2023 wherein trial briefs were ordered by the MSC Judge on the Pre-trial conference statement. Defendant, represented by Sassano Fleischer, filed its trial brief on or about 9/1/2023 wherein applicant, represented at the time by Abramson Labor Group, did not.

At time of trial on 9/11/2023, parties were encouraged to engage in potential settlement discussion but were unsuccessful. Parties were also given option to a brief continuance to allow the applicant's attorney to file its trial brief. Applicant and his attorney wished to proceed forward and defendant was in agreement. Applicant as well as Carol Cotton, HR Manager, testified at trial. At conclusion of trial, post trial briefs were requested to provide an opportunity particularly for the applicant's

attorney, and matter was submitted for decision on 9/21/2023. Both parties submitted post-trial briefs.

Upon review of evidence submitted including testimony at trial and trial briefs, the undersigned found that applicant's claim was barred under LC §3600(a)(10) post termination. Findings and Order issued on 11/2/2023.

It is from this Order that applicant filed his petition for reconsideration.

III **DISCUSSION**

DEFECTIVE PETITION FOR RECONSIDERATION

LC §5903 states in part aggrieved party may file petition for reconsideration upon one or more of the following grounds and no other:

- (a) That by the order, decision, or award made and filed by the appeals board or the workers' compensation judge, the appeals board acted without or in excess of its powers.
- (b) That the order, decision, or award was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order, decision, or award.

Petitioner is required to enumerate one or more grounds on which reconsideration may be sought under LC §5903 and present its argument in that context. Further, 8 CCR §10945(a) requires every petition for reconsideration to state "all of the material evidence related to the point(s) at issue" and failure to "fairly state all of the material evidence may be a basis for denying the petition." CCR 10945(b) requires said petition "support its evidentiary statement by specific references to the record" so not to shift the burden to find evidence supporting a petition to the appeals board. *Hill v. County of San Bernardino*, 2021 CalWrk.Comp.P.D.LEXIS 74, *Dyer v. Boeing McDonnell Douglas*, 2011 Cal.Wrk.Comp. P.D. LEXIS 158.

While applicant filed the standard Board Form 45 alleging all 5 grounds, applicant failed to establish any of the grounds under LC § 5902 nor state any material evidence under 8 CCR §10945(a). Applicant appears to be alleging ineffective assistance of counsel or misconduct of his attorney, but does not point to any supporting evidence.

While the petition should be dismissed on the basis that petition failed to comply with LC §5903 and 8 CCR §10945(a) & (b), the undersigned will do her best and explain the reason for her Findings and Order as disposition on the merit is a preferred procedure.

Post Termination – LC §3600(a)(10)

Labor Code §3600(a)(10) states in part:

... “where the claim for compensation is filed after notice of termination or layoff... and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply: (A) The employer has notice of the injury ... prior to the notice of termination... (B) The employee’s medical records, existing prior to the notice of termination or layoff, contain evidence of the injury. (C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff but prior to the effective date of the termination or lay off. (D) The date of injury as specified in Section 5412 is subsequent to the date of the notice of termination or layoff.”

Meaning, the initial burden lies with the employer who must establish that applicant’s claim for compensation was filed after the notice of termination and that the injury occurred before the notice of termination or layoff. In the present case, the undersigned found that the employer established the criteria under LC §3600(a)(10).

Both parties allege that applicant’s claimed injury is a specific injury as specified in LC §5411, and said claimed injury date was before applicant’s notice of and actual termination date of 8/29/2022. While there is conflicting testimony as to when said injury was reported, it is not disputed that the injury was not reported until after applicant’s notice of termination. Applicant attorney’s post trial brief argues applicant reported his injury during termination meeting, however, nothing in the evidence supported this argument. Applicant testified that he did not report his injury to Carol Cotton nor the CEO prior to his termination. Based on the testimony of both witnesses, the undersigned is not convinced that applicant reported his injury during the termination meeting. The undersigned is also not convinced that applicant mention he was hurt when Carol Cotton walked him to his car. While the undersigned is not convinced that applicant mentioned his injury to Carol Cotton when she walked him out, this would not change the application of LC §3600(a)(10) as he was already terminated when Carol Cotton walked him to his vehicle.

Applicant further failed to prove that the post-termination defense is not applicable LC§3600(a)(10)(A)(B)(C)(D) with preponderance of the evidence. Applicant testified that his injury occurred prior to his termination notice and actual termination and that he did not report his injury prior to his termination as he thought he was going to get better. Therefore, LC§3600(a)(10)(A)(C)(D) are not applicable. Applicant also failed to meet LC §3600(a)(10)(B). There lacks any medical evidence supporting injury existing prior to notice of termination. While post termination medical evidence can be used to establish industrial causation, none of the medical evidence applicant submitted as evidence supported injury prior to 8/29/2022 nor industrial injury for that matter. First medical evidence showing left shoulder pain and left inguinal hernia by Dr. Lawrence Epstein was dated 10/12/2022. While the hand written progress notes by Dr. Epstein dated 10/12/2022, 11/16/2022, 1/9/2023, 2/28/2023 and 3/20/2023 mentioned left shoulder or abdomen / hernia complaints, all were silent as to causation. EDD supplemental certificate by Dr. Epstein dated 1/17/2023 did not identify applicant’s complaints or injury to be industrial.

As set forth above, the undersigned found applicant’s claim is barred under LC §3600(a)(10).

IV
RECOMMENDATION

It is respectfully recommended that the applicant's Petition for Reconsideration be denied for the reasons stated above.

DATE: 12/1/2023

Pauline H. Suh
WORKERS' COMPENSATION JUDGE