

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

**UTUMA BELFREY, *Applicant***

**vs.**

**TUTOR PERINI CORPORATION; ZURICH INSURANCE, *Defendants***

**Adjudication Number: ADJ10774501  
San Francisco District Office**

**OPINION AND ORDER  
DENYING PETITION  
FOR RECONSIDERATION**

Applicant<sup>1</sup> seeks reconsideration of the Findings & Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on July 14, 2022.<sup>2</sup> By the F&A, the WCJ found that applicant sustained injury arising out of and in the course of employment (AOE/COE) to her right shoulder, right elbow, right wrist, psyche, left shoulder and left wrist. The injury was found to have caused 23% permanent disability. The Labor Code<sup>3</sup> section 132a claim was deferred and the parties were to informally adjust any issue of temporary disability. An award was issued for the value of applicant's permanent disability less 15% for attorney's fees.

Applicant contends that the WCJ acted in excess of her power by deferring the issues of the 132a claim and temporary disability. She also raises questions regarding the parts of the body found to be injured, the value of her permanent disability award, whether she is entitled to retroactive temporary disability and the value of a settlement.

We did not receive an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be dismissed as untimely or in the alternative, be denied on the merits.

We have considered the allegations of applicant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will deny the Petition.

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<sup>1</sup> Applicant filed the Petition herself although she remains represented by counsel.

<sup>2</sup> Commissioner Lowe was previously on the panel in this matter and is no longer a member of the Appeals Board. Another panelist has been assigned in her place.

<sup>3</sup> All further statutory references are to the Labor Code unless otherwise stated.

## FACTUAL BACKGROUND

We adopt and incorporate the following from the Opinion on Decision, which was included in the WCJ's Report:

### **I. Findings of Fact:**

The following findings of fact have been determined by the trial Court after reviewing the entire record.

1. Utuma Belfrey, [birth date redacted], while employed on 8/3/2016, as an electrician, Occupational Group Number 380, at San Francisco, California, by Fisk Electric, a Tutor Perini company, sustained injury arising out of and occurring in the course of employment to her right shoulder, right elbow, and right wrist, psyche, left shoulder, and left wrist.
2. The injuries herein resulted in permanent disability of 23%.
3. There is a need for future medical treatment to cure or relieve the effects of the industrial injuries to applicant's right shoulder, right elbow, and right wrist, psyche, left shoulder, and left wrist.

### **II. Issues**

The issues listed for trial are as follows:

- A. Parts of the body injured: psyche, left shoulder, and left wrist.
- B. Permanent disability.
- C. Future medical treatment.
- D. EDD lien - deferred at this time.
- E. Attorneys' fees.

### **III. Discussion of issues:**

#### **A. Determination of body parts industrially injured**

1. Defendant has accepted as industrial the following body parts:
  - right shoulder,
  - right elbow, and
  - right wrist
2. Industrial Injury to Applicant's Psyche

This Court has carefully read all of the medical legal evidence that has been properly admitted into evidence in this case. After careful consideration of the record, this Court believes that the analysis and conclusions of the psychiatric

PQME Dr. Sussman taken as a whole constitute substantial medical evidence on the issue of industrial causation of psych injury.

LC 3208.3(d) bars applicant from claiming a psychiatric industrial injury if she has worked for the employer for less than 6 months. These 6 months need not be continuous. Defendant argues that applicant has not met this 6-month rule since she was hired on 7/8/2016 and she was injured on 8/3/2016, after only a little over one month of employment.

However, Applicant credibly testified at trial that although she was hired in July of 2016, she was not terminated from employment until 4/6/2017 as follows:

“She was hired in the middle of July. She had been told to return to work, so she did, and she worked until April 6, 2017, when she received a layoff notice in person from Michael Fritchley, who was the superintendent of the jobsite, and he basically kicked her off the job.” (MOH dated 7/11/2022)

Therefore, applicant clearly worked for this employer more than 6 months and is not barred from claiming a psych industrial injury under LC 3208.3(d).

Next, defendant argues that applicant’s industrial psychiatric claim is barred by LC 4660.1(c)(1) which states as follows for psych injuries occurring on or after 1/1/2013:

“ ... the [permanent disability] impairment ratings for ... psychiatric disorder, arising out of a compensable physical injury shall not increase.”

Defendant is correct in claiming that applicant is not entitled to additional psychiatric permanent disability as a result of her industrial psych injury. However, LC 4660.1(c)(1) also states as follows:

“This section does not limit the ability of an injured employee to obtain treatment for any psychiatric disorder that is a consequence of an industrial injury.”

Therefore, although applicant is not entitled to any permanent disability amounts that may be a result of her psychiatric injury, she IS entitled to reasonable and necessary medical treatment for her industrial psychiatric injury.

### 3. Industrial injury to orthopedic body parts:

- left shoulder, and
- left wrist

Based on the entire medical record in the file, along with applicant’s credible testimony at trial, applicant has met her burden of proving that the two additional

orthopedic body parts listed above have been industrially injured as compensable consequences to the body parts accepted as industrial by defendant.

### **B. Permanent disability for Orthopedic Injuries Only**

This Court has carefully read all of the medical legal evidence that has been properly admitted into evidence in this case. After careful consideration of the record, this Court believes that the analysis and conclusions of the orthopedic AME Dr. Renbaum taken as a whole constitute substantial medical evidence on the issue of permanent disability.

At page 28 of his report dated 12/14/2021 (Exhibit B) Dr. Renbaum concluded the applicant sustained the following permanent disability:

Rt Shoulder (ROM) - 8% WPI	16.01.02.00 – 8 – [1.4]11 – 380H – 14 – 15
Rt. Elbow (Almaraz) 2% WPI	16.03.02.00 – 2 – [1.4]3 – 380H – 5 – 5
Rt. Wrist 2% WPI	16.04.02.00 – 2 – [1.4]3 – 380H – 5 – 5

**CVC of orthopedic ratings: 15 C 5 C 5 = 23%**

As explained above, since the psych industrial injury occurred post 1/1/2013, it is subject to the limitations set forth in LC 4660.1. Therefore, although medical treatment is awarded for the psych injury, the level of permanent disability awarded may not be increased by any permanent psych disability.

### **C. Future Medical Treatment**

Based on a review of the record there is a need for future medical treatment to cure or relieve the effects of the industrial injuries to the Applicant, including, but not limited to the body parts of psyche, left shoulder and left wrist.

### **D. Remaining Issues**

All remaining issues including the 132a claim, as well as the EDD lien and the TD issues are deferred at this time with WCAB jurisdiction reserved in the event the parties are not able to resolve these issues amongst themselves.

(Report, August 16, 2022, pp. 2-5.)

## DISCUSSION

### I.

Contrary to the WCJ, we find applicant's petition was timely filed. There are 20 days allowed within which to file a petition for reconsideration from a "final" decision. (Lab. Code, §§ 5900(a), 5903.) This time is extended by ten calendar days if service is made to an address outside of California but within the United States. (Cal. Code Regs., tit. 8, § 10605(a)(2).) While applicant and her attorney received service of the decision within California, defendant was served at an address outside of California. Accordingly, and to observe due process for all parties, we interpret WCAB Rule 10605 as extending the time to file for all parties being served.

### II.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment (AOE/COE), jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Applicant challenges findings regarding both threshold issues and interlocutory decisions in the F&A. We evaluate the issues raised in turn applying the appropriate standard to each.

The WCJ found injury AOE/COE to the right shoulder, right elbow, and right wrist, psyche, left shoulder and left wrist. Injury AOE/COE is a threshold issue fundamental to the claim

for benefits. Applicant takes issue with the parts of the body that the WCJ found asserting that she also injured her right hand. The Minutes of Hearing and Summary of Evidence from the July 11, 2022 trial do not reflect that the right hand was asserted as an injured body part. (Minutes of Hearing and Summary of Evidence, July 11, 2022, p. 2.) “It is improper to seek reconsideration on an issue not presented at the trial level.” (*Cottrell v. Workers’ Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 760, 761 (writ den.)) Applicant cites to no evidence to support injury to the hand. The WCJ found injury AOE/COE to all of the other parts that applicant asserts were injured. Applicant has not provided a basis to find injury to additional parts.

### III.

Applicant also takes issue with the WCJ’s deferral of the section 132a claim, EDD lien and temporary disability. Deferral of these issues is an interlocutory decision subject to removal rather than reconsideration. We therefore apply the removal standard to our review. (See *Gaona, supra.*)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers’ Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra.*) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

A WCJ has broad authority to issue orders to ensure proper adjudication of each claim, including “any interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case.” (Cal. Code Regs., tit. 8, § 10330.) This includes the authority to defer issues that the trier of fact determines are not ripe for adjudication. (See e.g., Cal. Code Regs., tit. 8, § 10787(a) [the WCJ may bifurcate the issues for trial and try them separately upon a showing of good cause].) It was consequently within the WCJ’s authority to defer the issues of applicant’s section 132a claim and the EDD lien.

With respect to retroactive temporary disability, the parties stipulated at trial to informally adjust any issue of temporary disability if owed. (Minutes of Hearing and Summary of Evidence, July 11, 2022, p. 2.) The WCJ may make findings based upon the parties’ stipulations. (Lab.

Code, § 5702.) In the event the parties cannot informally resolve temporary disability, either party may file a declaration of readiness to proceed to seek the Appeals Board's assistance in resolving the dispute.

Applicant has not shown that she will suffer significant prejudice or irreparable harm by the WCJ's deferral of certain issues. She also has not shown that reconsideration will not be an adequate remedy if a final decision addressing the unresolved issues adverse to her ultimately issues.

#### **IV.**

Applicant's Petition contains several questions regarding the value of her claim and settlement. We may not order the parties to settle or provide legal advice to a party. Applicant may seek assistance from the Information and Assistance Officer at the district office to respond to her questions if she does not wish to discuss her case further with her attorney.

In conclusion, we will deny applicant's Petition.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings and Award issued by the WCJ on July 14, 2022 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

I CONCUR,

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

**/s/ MARGUERITE SWEENEY, COMMISSIONER**



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

**October 10, 2022**

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

**KURLANDER BURTON & MACK  
LAUGHLIN FALBO LEVY & MORESI  
UTUMA BELFREY**

***AI/pc***

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