

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

FERNANDO MURILLO AVILA, *Applicant*

vs.

SUNOPTA, INC.;
AMERICAN ZURICH INSURANCE COMPANY,
administered by TRISTAR RISK MANAGEMENT, *Defendants*

**Adjudication Number: ADJ14093359
Oxnard District Office**

**OPINION AND ORDER
DENYING 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, and for the reasons stated below, we will deny reconsideration.

For the first time on reconsideration, defendant raises the issue of mutual mistake of fact as to a stipulation entered into by the parties at trial that "[t]he carrier has not paid any permanent disability yet." (Minutes of Hearing and Summary of Evidence (MOH/SOE), 1/28/22, at p. 2:17-18.) In its Petition for Reconsideration, defendant asserts that "[t]he parties were unaware that defendant, TriStar Risk Management, had issued a permanent disability advance to the applicant on November 23, 2021 in the sum of \$2,900.00." (Petition for Reconsideration, at p. 2:25-27.)

Labor code¹ section 3202.5 states:

All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. "Preponderance of the evidence" means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence.

(Lab. Code, § 3202.5)

¹ All further statutory references are to the Labor Code, unless otherwise noted.

Section 5702 states:

The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. The appeals board may thereupon make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.

(Lab. Code, § 5702.)

Section 5903(d) provides that reconsideration from a final decision may be sought on the basis of newly discovered evidence on the grounds “[t]hat 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.” (Lab. Code, § 5903(d).) WCAB Rule 10974 further provides:

Where reconsideration is sought on the ground of newly discovered evidence that could not with *reasonable diligence* have been produced before submission of the case or on the ground that the decision had been procured by fraud, the petition must contain an offer of proof, specific and detailed, providing: [¶]... (e) As to newly discovered evidence, a *full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case.* [¶] A petition for reconsideration sought upon these grounds may be denied if it fails to meet the requirements of this rule, or if it is based upon cumulative evidence.

(Cal. Code Regs., tit. 8, § 10974.)

In the Report, the WCJ states:

At trial, the undersigned asked defense attorney if the stipulated facts as presented to the Court in the completed pre-trial conference statement were correct. Mr. Cohen advised the undersigned that the defendant had not paid any permanent disability advances. The undersigned relied on defendant’s representation to the Court, and issued the award of 3% permanent disability payable at the weekly rate of \$197.63 beginning 8/26/2021 for 9 weeks, totaling \$1,778.67, less 15% attorney fee without credit for permanent disability advances.

....

This is a very simple case. There were two exhibits total. The trial only lasted 26 minutes. To put it simply, defendant filed a declaration of readiness to proceed, and wanted the Court to issue the findings and award of 3% permanent

disability payable at the weekly rate of \$197.63 beginning 8/26/2021 for 9 weeks, totaling \$1,778.67, less 15% attorney fee. There was an off the record discussion prior to going on the record and submission of the case to make sure the stipulations, issues and exhibits were all agreed to before calling the court reporter. As an officer of the Court, and a very experienced defense attorney Mr. Cohen should know better than to file a declaration to proceed, file a pre-trial conference statement and finally to answer the Court's inquires if he is not sure of the answer. Instead of checking with his client, Mr. Cohen advised the undersigned that the defendant had not paid any permanent disability advances, and stipulated to that on the record.

(Report at pp. 2-3.)

Thus, despite being in possession of all the information necessary to determine the benefits paid in this case, defendant fails to provide a full and accurate statement in its petition as to why the amount of permanent disability advances paid to applicant was not known to defendant at the time it stipulated that none had been paid. Defendant's statement that it was "unaware" that it had paid the amount \$2,900.00 does not meet the requirement that it establish that the newly discovered evidence that could not with reasonable diligence have been produced before submission of the case.

Because defendant failed to meet the requirement that it establish reasonable diligence pursuant to section 5903(d), its petition is subject to denial. (Lab. Code, § 5903.) Therefore, we need not address the issue of mutual mistake of fact raised for the first time on reconsideration.

Accordingly, for the reasons stated herein, we deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 25, 2022

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

**FERNANDO MURILLO AVILA
RAHNAMA LAW
PEARLMAN, BOWN & WAX**

PAG/abs

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