

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

JESSICA LOPEZ, *Applicant*

vs.

**JACK IN THE BOX;
ARCH INSURANCE COMPANY,
ADMINISTERED BY YORK RISK SERVICES GROUP, A SEDGWICK COMPANY,
*Defendants***

**Adjudication Number: ADJ13428151
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the workers' compensation administrative law judge's (WCJ) July 14, 2021 Findings and Order (F&O). The WCJ determined that applicant was not a credible witness, that applicant failed to prove she sustained industrial injury, and ordered that applicant take nothing. Applicant contends the contemporaneous medical and documentary evidence establishes applicant's credibility and supports a finding of injury.

We received an answer from defendant. The WCJ issued a Report and Recommendation (Report) on applicant's petition recommending that we dismiss the petition as untimely or deny the petition on the merits.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the report of the WCJ with respect thereto. Based on our review of the record, and for the reasons below, we will rescind the WCJ's decision, and return this matter to the WCJ for further proceedings.

FACTS

Applicant claimed injury to the back, left hip, and left leg, while employed as a cashier by defendant Jack in the Box on June 28, 2020. She alleged that she was injured after striking her left hip against a corner metal wall. (June 7, 2021 Minutes of Hearing and Summary of Evidence (Minutes), at 5:19.) Defendant denies injury.

On July 9, 2021, applicant sought medical treatment for her injuries with AME Medical Group. (Ex. 2, records of AME Medical Group, dated July 9, 2020, at p. 9.) Applicant's reporting symptoms were described as follows:

19 year old patient reports to the clinic far left hip pain x3 weeks ago while working at Jack in the Box. The patient states that she had hit her hip and fallen side ways on her hip trying to avoid falling on her belly because she is 5 months pregnant. The patient states that she had initially [sic] felt the pain but was not sent home or treated for this injury. The hip pain became worse over the past 3 weeks with increasing symptoms of pain radiating to the back and lower leg. Denies numbness, burning, bruising [sic], or any other acute symptoms. No other concerns verbalized at this time. (*Ibid.*)

The evaluating nurse practitioner recommended medication, rest, and a follow-up evaluation with applicant's primary care physician. (*Id.*, at p. 10.) Applicant was provided with an off-work "note" returning her to work the following Wednesday.¹ (*Ibid.*)

On July 10, 2020, at the employer's request, applicant signed a document that states, "I, Jessica, declare under penalty of perjury under the laws of the State of California that I have not had nor reported any work related injuries." (Ex. E, signed Statement from Applicant, dated July 10, 2020.)

On July 20, 2020, applicant sought additional medical treatment with primary care physician Juan Montes, M.D. (Ex. 3, records of Montes Medical Group, dated July 20, 2020, at p. 11.) The evaluation notes describe the reason for appointment as, "19 y/o female c/o Left hip and Right knee pain x 2 months." The history of illness discussion states:

19 y/o F c/o left hip and right knee pain. She states pain started after incident at work. Patient works at Jack in the Box. She states she accidentally bumped her left hip against a metal pole as she turned the corner on 06/28/2020. She states the floor at work is usually slippery. She was evaluated at an urgent care on 07/09/2020 and was given an off work note for 5 days. No imaging done due to

¹ We take judicial notice that July 9, 2020 was a Thursday.

patient being pregnant. She takes tylenol when pain is not tolerable. Right knee pain started shortly after her left hip pain. Pain is aggravated with prolonged standing and walking. (*Ibid.*)

Applicant was advised to continue with conservative treatment and to consider taking additional time off work. (*Id.* at p. 12.)

On July 23, 2020, applicant filed an Application for Adjudication, claiming injury to the left hip, left leg and back on June 28, 2020. Applicant served the application on the employer and its workers' compensation insurer Arch Insurance Company.

On August 4, 2020, the employer emailed notice of the claim to the claims administrator, adding that applicant had started working for Jack in the Box on May 31, 2020, that applicant never reported a "slip and fall" to the management, and that she had further signed biweekly acknowledgements attesting that she sustained no injuries. (Ex. D, employer emails, dated August 4, 2020.)

On August 7, 2020, defendant issued a delay notice regarding the claimed injury date of June 28, 2020. On October 7, 2020, defendant denied the claim, "because the employer witnesses indicated you did not report the ongoing injury and we have no substantial evidence indicating a specific injury." (Notice of Denial of Claim, dated October 7, 2020.)

On November 12, 2020, applicant sought further medical treatment with primary treating physician (PTP) Marina Russman, M.D. (Ex. 1, report of Marina Russman, M.D., dated November 12, 2020, p. 1). The history of injury states:

Ms. Jessica Lopez is a 20 year old, Right hand dominant female who sustained work related injuries on 06/28/2020, during the course of her employment for Jack In The Box as a Cashier...[s]he stated on 06/28/2020 she was walking to the fridge when she slipped, due to the floor being greasy. She added that she tried to prevent hitting herself on the stomach due to being pregnant. She hit her left hip and left leg against a corner of a wall, that had a metal part. She stated she continued working despite the pain and discomfort, and was limping. She verbally reported her injury to her manager, Miguel, but was not offered medical care. She stated she continued working and continued verbally reporting her symptoms to her manager, but was not offered medical care. (*Ibid.*)

Applicant also reported, "[o]n 07/09/2020 she sought medical care on her own and went to an Urgent Care. There she was evaluated, was placed off work for a couple days, and was told to take Tylenol for the pain. She stated she noticed that she was starting to limp and her left knee was

starting to get worse. After three to four days she returned to work, but she would still limp. She continued verbally reporting her pain, but she was still not offered medical.” (*Id.* at p. 2.)

The parties proceeded to trial on June 7, 2021. The minutes reflect the WCJ’s stated concerns regarding the lack of Qualified Medical Evaluation (QME) reporting:

LET THE RECORD REFLECT that substantial and significant discussion was held in the morning session with the parties regarding the lack of PQME report and, after a lengthy discussion with both the applicant counsel and defense counsel, both parties agreed to waive the right to PQME exam for the purpose of proceeding forward with trial on the issue of AOE/COE. In fact, both parties insisted on going forward with the sole issue present the AOE/COE trial, instead of proceeding to a 4060 PQME exam on compensability. (Minutes, at 2:22.)

Applicant testified to a mechanism of injury involving hitting her left hip against the “corner metal wall.” (*Id.* at 5:19.) Applicant reported the injury to supervisor Miguel Gomez, who acknowledged the report and told applicant that “if it still hurts then let him know.” (*Id.* at 5:24.) Applicant reported the injury to Mr. Gomez a second time on July 3, 2020, and again, no medical referral was made. When asked about the July 10, 2020 statement denying injury, applicant responded “she signed it because the lady said she had to sign it or she will not get her paycheck.” (*Id.* at 6:13.)

Defense witness Marylu Ocegüera testified that she worked in close physical proximity to applicant on the day of the claimed injury, and that she did not witness applicant slip and fall or hit her left hip, and that applicant never complained of pain or injury. (*Id.* at 7:3.) Ms. Ocegüera had previously filed a claim for work injury and had received prompt medical treatment.

Defense witness Miguel Gomez testified that he was a team leader at Jack in the Box, and that he worked with applicant on the claimed date of injury. Mr. Gomez denied that applicant ever reported an injury. (*Id.* at 8:9; 8:17.) Following the alleged date of injury, applicant continued to work without reporting any injuries. When the employer distributes paychecks, they ask each employee if they have sustained an injury during the pay period. Mr. Gomez denied that an employee would be denied a paycheck for refusing to sign the form. (*Id.* at 9:14.)

The F&O issued July 20, 2021, and determined that applicant had failed to prove she had sustained injury arising out of and in the course of employment (AOE/COE), and ordered that applicant take nothing. The Opinion on Decision found applicant’s testimony not credible, the

defense witnesses' testimony credible, and the medical record inconsistent as to the mechanism and date of injury. (Opinion on Decision, pp. 5-7.)

On August 16, 2021, applicant served a verified Petition for Reconsideration. The proof of service indicates service on the offices of defense counsel and the claims administrator, and that the petition, verification and proof of service were "JET Filed" with the WCAB. On the same day, August 16, 2021, applicant filed the verification of the Petition for Reconsideration in EAMS. However, no petition accompanied the proof of service.

On August 25, 2021, defendant filed an Answer, contending applicant's Petition for Reconsideration was not filed within 25 days of the decision date, and that the WCJ's credibility determination should be upheld.

On October 12, 2021, applicant filed the Petition in EAMS, contending she reported her injury to Mr. Gomez on two occasions, and further filed and served a claim form on July 23, 2020, and that after each instance of reporting defendant failed to offer medical treatment. (Petition, at 5:22.) Applicant challenged the authenticity of the "Declaration of No Injuries" form dated July 10, 2020, stating she was on medical leave on that date. (*Id.* at 5:8.) Applicant observed that her "soft tissue" injury is not the type of injury that would be witnessed, and that applicant was under no obligation to discuss the injury with defense witness Ms. Ocegüera. The Petition further challenges the WCJ's interpretation of the medical reporting as inconsistent, noting that the mechanism of injury described in the medical record was consistent, and that any minor variations arose out of the process of medical transcription. (*Id.* at 7:5.)

The WCJ's report recommends dismissal of the petition as not filed within the statutory twenty days plus five afforded by Labor Code section 5903 and WCAB Rule 10605, and further recommends denial of the petition based on the inconsistent evidence.² (Report, at p. 4.)

DISCUSSION

I.

Initially, we address the issue of the timeliness of applicant's petition. The Answer avers the August 16, 2021 petition is untimely because it was filed on the 27th day following service of

² All further statutory references are to the Labor Code unless otherwise stated.

the F&O. (Answer, at 2:14.) However, the 25th day following service of the F&O fell on Saturday, August 14, 2021. Pursuant to WCAB Rule 10600(b), “if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers’ Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.” Thus, applicant’s service of the petition the following Monday, August 16, 2021 was timely.

The WCJ’s report further recommends dismissal of the petition, as it was not filed in EAMS until October 12, 2021, beyond the twenty plus five days allowed under section 5903 and WCAB Rule 10605(a)(1). However, we note that applicant filed the executed verification of the petition in EAMS on August 16, 2021. We further note that defendant received and responded to the petition shortly after its service by mail on August 16, 2021, as is evidenced in the August 25, 2021 Answer.

WCAB Rule 10617 subsection (a) provides for discretionary acceptance of incorrectly or partially filed documents, including those subject to time limitations, where the filing is filed at an incorrect office, without required cover or separator sheets, or in an improper form. (Cal. Code Regs., tit. 8, § 10617(a).) Subsection (d) provides:

Nothing in this rule shall preclude the discretionary or conditional acceptance for the filing of a document that is subject to a statute of limitations or a jurisdictional time limitation, even if it does not contain a combination of information sufficient to establish the case or cases to which the document relates or, if it is a case opening document, sufficient information to open an adjudication file.³

Here, applicant’s Petition was timely, but incompletely filed. Applicant served the petition on defendant and the claims administrator on August 16, 2021, whose receipt of the petition is evidenced in their prompt Answer seven days later. Accordingly, we are satisfied that applicant served a complete copy of the Petition for Reconsideration on the parties on August 16, 2021. EAMS further reflects the filing of the executed verification of applicant’s petition on August 16, 2021, within the statutory time limitations of section 5903. Because applicant’s filing of the

³ Moreover, Rule 10617 is in keeping with the rule of liberal pleading found elsewhere in California statute, including Labor Code section 5506, which authorizes the Appeals Board to relieve a defendant from default or dismissal due to mistake, inadvertence, surprise or excusable neglect, and Code of Civil Procedure sections 452 (allegations of pleadings must be liberally construed), 473(b) (relief from default judgement), and 576 (amendment to pleadings permissible at any time in the furtherance of justice).

verification of the petition was timely, applicant may amend the petition under WCAB Rule 10617. Accordingly, we conclude that applicant's petition was timely filed.

II.

Applicant contends the evidence supports a finding of injury AOE/COE. The WCJ has determined that applicant did not sustain an injury based on inconsistencies in the record, including the date of injury and the mechanism of injury. The WCJ further found the testimony of the defense witnesses credible. (Report, at p. 5.)

We accord to the credibility determination of the WCJ the great weight to which it is entitled. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) "Nevertheless, any award, order or decision of the board must be supported by substantial evidence in the light of the entire record..." (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310].)

Here, notwithstanding the WCJ's determinations regarding witness credibility, the record demonstrates applicant's contemporaneous reporting of the claimed June 28, 2020 work-related injury to third parties on multiple occasions. The July 9, 2020 report of AME Medical Group states a history of left hip pain for three weeks, and a mechanism of injury of applicant striking her left hip and falling "sideways." (Ex. 2, records of AME Medical Group, dated July 9, 2020, p. 9.) The July 20, 2020 report of Montes Medical Group listed the date of injury as June 28, 2020, and a mechanism of injury of applicant slipping due to the floor being greasy, and applicant hitting her left hip and left leg against a corner of a wall that had a metal part. (Ex. 3, records of Montes Medical Group, dated July 20, 2020, p. 11.) Additionally, on November 12, 2020, applicant's PTP Dr. Russman described the date of injury as June 28, 2020, and the mechanism as slipping on a greasy floor, and applicant hitting her left hip and leg against a corner of the wall that had a metal part. (Ex. 1, report of Marina Russman, M.D., dated November 12, 2020, p. 1.) It is also undisputed that applicant filed and served an application for adjudication of her claimed injury on July 23, 2020. Applicant thus reported an injury alleged to have occurred on or near June 28, 2020 to two separate medical clinics or physicians, and filed a claim for benefits, all within 30 days of the alleged date of injury. The PTP reporting of November 12, 2020 was also consistent with the claimed mechanism and date of injury.

On the day of trial, the WCJ encouraged the parties to obtain QME reporting prior to proceeding. In the report, the WCJ noted that the parties “stipulated” to proceed to trial against the WCJ’s recommendation, notwithstanding the lack of Qualified Medical Evaluator (QME) reporting. (Report, at p. 4.) The WCJ further noted that at trial, “the mechanism of injury was not clearly explained.” (*Ibid.*)

Section 5702 establishes that “[w]hile stipulations between adversary parties concerning the existence or nonexistence of material facts are permissible in workmen’s compensation cases, the stipulations *are not binding on the appeals board or the [workers’ compensation judge]*; the board or [workers’ compensation judge]...may reject a stipulation and base the decision on the evidence presented at the hearing. (*Huston v. Workers’ Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 865 [44 Cal.Comp.Cases 798], *emphasis added.*)

On the record before us, we agree with the WCJ that the appropriate course of action herein was to obtain QME reporting. Section 4060 provides for a medical-legal evaluation to determine compensability of a disputed claim in accordance with the procedures set forth in section 4062.2. We believe that such a comprehensive evaluation would serve multiple purposes, including documentation of the claimed mechanism of injury, the establishment of a medical diagnosis, if any, and a medical opinion as to whether the mechanism is congruent with the diagnosed injury.

Given the WCJ’s credibility determinations, but also the consistent and contemporaneous medical reporting following the date of injury, we believe that obtaining a QME report would best serve the purposes of substantial justice, allowing the WCJ to arrive at a determination supported by substantial evidence “in the light of the entire record.” (*Lamb v. Workmen’s Comp. Appeals Bd., supra*, 11 Cal.3d 274, 283.)

Accordingly, we will rescind the F&O and return this matter to trial level for further proceedings consistent with this opinion. Once the WCJ issues a new decision or order, any party newly aggrieved may thereafter seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the July 14, 2021 Findings and Order is **RESCINDED**, and the matter **RETURNED** to trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER



/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 20, 2022

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

**JESSICA LOPEZ
BLANCO ARIAS
SAPRA & NAVARAA**

SAR/abs

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