

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

**MARCO MAGANA, *Applicant***

**vs.**

**YOUNG'S COMMERCIAL TRANSFER;  
NATIONAL INTERSTATE INSURANCE COMPANY, *Defendants***

**Adjudication Numbers: ADJ9703521, ADJ11110715  
Bakersfield 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.<sup>1</sup> Based on our review of the record, and based upon the WCJ's analysis of the merits of the petitioner's arguments in the WCJ's report, we will deny the Petition as one seeking reconsideration.

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, 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.

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<sup>1</sup> Commissioner Lowe, who previously served as a panelist in this matter no longer serves on the board. Another panel member was assigned in her place.

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.

Here, the WCJ's decision includes a finding regarding a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

To the extent that the petition challenges an interlocutory finding/order in the decision regarding further development of the record, we will 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).) We have considered the allegations of the Petition for 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 removal.

Therefore, we will deny the Petition as one seeking reconsideration.

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**I CONCUR,**

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

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**



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

**August 15, 2022**

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

**EMPLOYMENT DEVELOPMENT DEPARTMENT  
LAW OFFICE OF GHITTERMAN GHITTERMAN & FELD  
MARCO MAGANA  
LAW OFFICE OF MICHAEL SULLIVAN**

**LN/oo**

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

## **Report and Recommendations on Petition for Reconsideration**

**I. Introduction:** Defendants Young's Commercial Transfer and National Interstate Insurance Company seek reconsideration of the Findings of Fact & Order of June 8, 2022 which found that the claimed industrial injuries occurred, granted Applicant's petition to rescind the November 28, 2017 dismissal of case ADJ 9703521 and deferred other issues pending development of the medical-legal record.

Applicant Marco Magana, then 52 years of age, sustained a specific injury arising out of and in the course of employment to his back while employed on July 8, 2014 as a Truck Driver (Occupational Group 350) in Buttonwillow, California, by Defendant- Employer Young's Commercial Transfer. This claim is being heard as case ADJ 9703521.

Applicant Marco Magana, 52 years of age at the end of the claimed period of injurious exposure, sustained a cumulative injury arising out of and in the course of employment to his back during the periods from August 11, 2013 to December 23, 2013 and from July 1, 2014 to July 8, 2014, while employed in Buttonwillow, California, by Defendant-Employer Young's Commercial Transfer. This claims is being heard as case ADJ 111110715, which is designated as the master file and depository of documentary evidence.

On July 8, 2014 and during the periods from August 11, 2013 to December 23, 2013 and from July 1, 2014 to July 8, 2014 Defendant-Employer Young's Commercial Transfer was insured for California workers compensation liability by Defendant-Carrier National Interstate Insurance Company.

After prior Petitions for Reconsideration, further proceedings pursuant to 8 CCR §10961 were held on April 14, 2022. It was agreed that the issues of injures AOE- COE would be re-submitted for decision. Over Petitioner's objection, Applicant's Petition to Set Aside Dismissal was also resubmitted for decision. Other issues were bifurcated and deferred for further development of the medical-legal record. *Minutes of Hearing 4/14/2022*. Following submission for decision, Joint Findings of Fact & Orders issued on June 8, 2022. The specific and cumulative injuries were re-found to have occurred. Applicant's petition for relief from the Stipulation & Order of November 28, 2017 dismissing case ADJ 9703521 (concerning the specific injury of July 8, 2014) was granted. Other issues were bifurcated and deferred pending further development of the medical-legal record. *Joint Findings of Fact & Orders 6/08/2022 p. 3 (Findings), p. 4 (Orders)*.

Via a timely, [fn 1 The fifth petition was filed on June 14, 2022, the 6th day after the Joint Findings of Fact & Orders of June 8, 2022.] verified and fully served petition, Defendants seek reconsideration. *Defendant's Petition for Reconsideration 6/14/2022 p. 16 (verification), p. 17 (Proof of Service)*. Authorized grounds for reconsideration are alleged consistent with Lab.C. §5903 {a}, {c} & {e}. *Defendant's Petition for Reconsideration 6/14/2022 p. 2 lines 1-3*. Defendants argue that:

1. The WCJ lacks the authority to set aside the Stipulation & Order of November 28, 2017 because it is barred by Labor Code §5804.
2. Applicant's Petition to Set Aside Dismissal of ADJ 9703521 is barred by the doctrine of waiver or invited error.
3. Applicant has failed to establish good cause to be relieved of the stipulation to dismiss ADJ 9703521.
4. The WCJ has failed to explain why further development of the record is necessary pursuant to *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138. *Pending Petition for Reconsideration 6/14/2022 p. 2 lines 3-12*.

Defendants pray for orders rescinding relief from the Stipulation & Order of November 28, 2017, finding that Applicant is not entitled to an Award of compensation benefits in Case ADJ 9703521 and instructing the undersigned PWCJ to "issue a decision on the remaining issues based on the current record." *Defendant's Petition for Reconsideration 6/14/2022 p. 2 lines 3-12*.

Applicant has filed a timely [fn 2 Applicant's Answer was filed June 22, 2022, the 8th day after the filing of the pending petition for reconsideration], verified and sufficiently served Answer to the pending petition [fn 3 Applicant's Answer was not provided to Lien Claimants EDD and Ortiz Schneider Interpreters. However, neither the pending petition does not appear to specifically challenge the validity of either lien claim such that service was optional]. *Applicant's Answer to Defendant's Petition for Reconsideration [Labor Code Section 5903] (hereafter "Applicant's Answer") 6/21/2022 p. 12 (verification), Proof of Service 6/22/2022*.

It is recommended that the pending petition be denied. The undersigned PWCJ acted within the delegated powers of the Appeals Board and issued orders supported by Findings of Fact that were, in turn, well supported by substantial evidence.

**II. Facts:** Applicant Marco Magana had a workers compensation claim prior to the two claims involved in the pending petition. This prior injury appears to involve a chemical exposure from a burst pipe while working for Bell Rich Farms or about April 7, 1989. This prior claim was heard as case ADJ 192233, then designated as case BAK 100429. It was resolved via a Compromise & Release approved on May 10, 1991. See, *Joint Exhibit 05: Transcript of*

*Deposition of Applicant Marco Magana 1/29/2015 p. 30 line 19 to p. 31 line 17.* It does not appear that this prior injury claim makes any difference with respect to the issues presented by the pending petition.

Prior to July 7, 2014, Applicant Marco Magana had two periods of employment with Defendant-Employer Young's Commercial Transfer. He was previously employed for 21 years as a serviceman and truck driver for Jackson & Perkins. When that company went bankrupt, he had a period of unemployment and worked for a contractor named Ayala. He also had an initial session of employment with Defendant-Employer Young's Commercial Transfer during the period from August 11, 2013 to December 23, 2013. In 2014, he had a second period of employment with Young's Commercial Transfer during the period from July 1, 2014 to July 8, 2014. *Joint Exhibit 04: Report of Kevin Hanley, M.D. 10/28/2015 p.2; Joint Findings of Fact & Orders 6/08/2022 p. 3 (Joint Finding of Fact #2).*

The medical reports seem to indicate that prior to July 2014, Applicant was free of on- going spinal symptoms, “-no back pain, no neck pain, no weakness of the arms or legs,-nothing to suggest any kind of physical difficulties.” *Joint Exhibit 04: Report of Kevin Hanley, M.D. 10/28/2015 p. 2.* Applicant may have experienced the onset on back pain after working a 12 hours shift on July 1, 2014, the first day of his second session of work for Defendant Young's Commercial Transfer. *Joint Exhibit 04: Report of Kevin Hanley, M.D. 10/28/2015 p. 3;* With respect to Applicant's lower extremities, he testified that prior to July 8, 2014 he did experience “a little” leg pain, had experienced it for about a year before that” which he guess was the result of the “the years of working” but didn't know. *Joint Exhibit 05: Transcript of Deposition of Applicant Marco Magana 1/29/2015 p. 24 line 17 to p. 25 line 25.*

Shortly after midnight on the night of July 6-7, 2014, Applicant was driving down a dirt road and hit a large bump. He was thrown up and down in his seat and experienced “back pain which he describes as going all the way from the head down to the left leg.” *Joint Exhibit 04: Report of Kevin Hanley, M.D. 10/28/2015 p. 3.*

Applicant sought medical treatment from Premier Valley Medical Group, which appear to be his primary care physicians. An SOAP note of July 8, 2014 indicated that he had complained of feeling funny on the left side of his face with weakness in his left arm and pain in his left leg that had started that morning. Applicant was instructed to seek care at a hospital emergency room. The bump on the dirt road earlier that morning was not indicated. *Applicant's Exhibit 09: Report of Premier Valley Medical Group (PVMG) 7/08/2014 (Maria Ramos, N.P.)*

Applicant went to a hospital ER as instructed. It was felt that he might have suffered a heart attack, but “it was ultimately ruled out that he was having any

type of a cardiac issue.” *Joint Exhibit 04: Report of Kevin Hanley, M.D. 10/28/2015 p. 3.*

Applicant returned to Premier Valley Medical Group the next day. He complained of pain “that radiates from his left back to the front and down his leg. This is different pain that he had yesterday.” *Applicant’s Exhibit 09: Report of Premier Valley Medical Group (PVMG) 7/9/2014 (Maria Ramos, N.P.).* The results from the hospital were recorded as:

The report from the ER along with a CT scan of the abdomen shows no acute abdominal problems. He had an 8 mm kidney stone in the left kidney and degenerative bone disease in the spine. Otherwise nothing. *Applicant’s Exhibit 09: Report of Premier Valley Medical Group (PVMG) 7/9/2014 (Maria Ramos, N.P.).*

Applicant was provided with further medical treatment, including further diagnostic testing. X-rays indicated a spinal degenerative condition. Lumbar MRI scanning “showed L5-S1 moderate to large paracentral disc protrusion. There was also “left neural foraminal narrowing at that level, indicating that the claimant had advancing degenerative disease in the low back with the possibility of recent disc herniation.” *Joint Exhibit 04: Report of Kevin Hanley, M.D. 10/28/2015 p. 3.* EMG testing “showed the possibility of an S1 nerve root dysfunction...”. *Joint Exhibit 04: Report of Kevin Hanley, M.D. 10/28/2015 p. 4.*

On November 3, 2014, Applicant retained legal counsel and initiated case ADJ 9703521. A specific injury of July 8, 2014 was described as “While driving, Applicant hit bump in truck causing injury to spine.” *Application for Adjudication of Claim 10/29/2014 p. 3 ¶2.*

Applicant received State Disability Insurance benefits from Lien Claimant EDD. *Lien Claimant’s Exhibit 01: Notice & Request for Allowance of Lien (EDD) 12/17/2014.* EDD relied on medical certification from Nurse Ramos at Premier Valley Medical Center which denied that Applicant’s disability was caused or aggravated by his regular or customary work. *Lien Claimant’s Exhibit 02: Medical & Certification Documents of EDD: Physicians/Practitioner’s Certificate 7/18/2014 p. 3 ¶B-29.*

Kevin F. Hanley, M.D. is serving as a Qualified Medical Evaluator in the field of Orthopedic Surgery in case ADJ 9703521. He initially evaluated Applicant in October 2015 and provided a report. Dr. Hanley diagnosed degenerative disc disease of both the lumbosacral and cervical spine with radicular symptoms. *Joint Exhibit 04: Report of Kevin Hanley, M.D. 10/28/2015 p. 5.* Regarding the alleged specific injury, Dr. Hanley opined that:

There is really no evidence in the medical file or upon taking Mr. Magana's history and comparing it to the medical file to support his current symptomatology as being related to a specific industrial injury. It is entirely possible that he was driving down a dirt road, hit a bump, and developed symptoms after that, but, on the other hand, that could simply be a retrospective kind of explanation of the onset of insidious pain. The evidence would suggest that he had pain prior to that date that at least could have been worsened as a consequence of the bump-in-the-road incident but we need to have the 7/8/2014 progress report of his visit to his primary physician that day to see what specific history Mr. Magana gave at that time. There does not appear to be supporting evidence from his employer to suggest that an incident occurred. *Joint Exhibit 04: Report of Kevin Hanley, M.D. 10/28/2015 p. 5.*

Dr. Hanley was provided with a summary of the records of Premier Valley Medical Group. He responded to Defendant's claims administrator that:

With your letter, you have provided me with a summary of the subpoenaed records that I wanted to see and if those are correct- and I have no reason to believe that they are not correct- then there is absolutely no evidence in those additional records that would support this gentleman's story that he had struck a bump in the road and developed sudden and acute pain in the back on early 7/7/14 in the course of his work activities. It would appear that the he had a pre-existing problem that brought him to the doctor on the morning of 7/8/14 that did not correlate with an industrial injury of the day before. *Joint Exhibit 03: Report of Kevin Hanley, M.D. 1/10/2016 p. 2.*

QME Dr. Hanley was then provided with the actual records from Premier Medical Group (rather than just a summary). He reviewed the records and provided a supplemental report indicating that:

It is clear to my eye that when he was seen at Premiere Valley Medical Group on 7/8/14, he did not describe to the doctor that he had any type of an injury that led to the onset of symptoms. He was complaining of weakness on the left side, numbness in the fact, and it sounded as if his complaint were a result of a medical condition rather than a traumatic, acute event at work. When he was seen at the hospital, the history was that he had been a week with ongoing pain in the low back and leg. That would suggest that he was symptomatic prior to the date he started working for Young's Transfer on 7/7/14.

I believe that now that I have had the opportunity to see the actual records I had asked for in the past, I can say with assurance that there is no evidence whatsoever presented in the medical file that would support the



contention that an injury occurred while on the job. *Joint Exhibit 03: Report of Kevin Hanley, M.D. 8/08/2016 p. 2.*

On November 28, 2017, the parties stipulated that “Case ADJ 9703521 for date of injury of 7-8-14 is hereby dismissed without prejudice.” It was ordered that “The above captioned case is dismissed without prejudice.” *Stipulation & Order 11/28/2017.*

The next day, Applicant initiated case ADJ 111110715 with the filing of an Application for Adjudication of Claim. Applicant alleged therein that he had sustained a cumulative injury to his back while working for Petitioners during the period from July 1, 2014 to July 8, 2014 with a notation that “While driving, Applicant hit bump in truck causing injury to spine.” *Application for Adjudication of Claim (ADJ 111110715 p. 4 ¶2).* Defendants provided an Answer which, among other things, disputed injury AOE-COE. *Answer to Application for Adjudication of Claim 12/14/2017 p. 2.* Applicant thereafter amended his claim to indicate a cumulative injury from July 1, 2011 (rather than July 1, 2014) to July 8, 2014. *Correspondence of Ghitterman, Ghitterman & Feld (Armando Di Filioppo, H.R.) 1/04/2018.*

Steven A. Shopler, M.D. is serving as a Qualified Medical Evaluator in the field of Orthopedic Surgery in case ADJ 111110715. He initially evaluated Applicant in March 2018 and provided a report. He noted diagnostic evidence of lumbar spine pathology but also noted that “the patient displays exaggerated pain behavior with non-anatomical distribution of pain.” *Joint Exhibit 06: Report of Steven Shopler, M.D. 3/26/2018 p. 4.* Dr. Shopler indicated that:

The patient has conflicting factors in his history, physical examination, and diagnostic images. While his MRI shows multilevel disc pathology, his histrionic examination behavior, exaggerated location of “total spine pain” from cervical to lumbar, and his inconsistent mechanism of injury do not support the industrial causation of this injury. There is substantial non-organic pain behavior demonstrated on examination that clouds evaluation of this patient. *Joint Exhibit 06: Report of Steven Shopler, M.D. 3/26/2018 p. 4.*

However, Dr. Shopler also opined that:

While the patient may have sustained a transient injury by mechanism described. He currently has non-organic behaviors that have impeded his recovery. There is evidence for a back strain to have occurred in an industrial injury July 8, 2014. The cause of the lumbar disc pathology cannot be ascribed to industrial injury.

I would apportion the patient's disability 15% to injury of July 18, 2014 and 85% to non-industrial factors. *Joint Exhibit 06: Report of Steven Shopler, M.D. 3/26/2018 p. 6.*

QME Dr. Shopler was deposed on March 18, 2019. Dr. Shopler testified that he was not able to determine whether Applicant's symptoms following the July 8, 2014 incident were the result of a specific injury or cumulative trauma from the information made available to him. *Applicant's Exhibit 01: Transcript of Deposition of Steven Shopler, M.D. 3/18/2019 p. 8 lines 12-23.* He indicated that in order to determine whether there was a specific or cumulative injury he would need "Any prior medical records, MRIs, X-rays, going back a decade or so." *Applicant's Exhibit 01: Transcript of Deposition of Steven Shopler, M.D. 3/18/2019 p. 8 line 14 to p. 9 line 2.* He denied that he had made a determination that a specific injury had occurred. *Applicant's Exhibit 01: Transcript of Deposition of Steven Shopler, M.D. 3/18/2019 p. 9 line 15 to p. 10 line 3.* Dr. Shopler also agreed that a re-evaluation of Applicant was appropriate to determine permanent and stationary status and impairment. *Applicant's Exhibit 01: Transcript of Deposition of Steven Shopler, M.D. 3/18/2019 p. 13 lines 14-23.*

On cross-examination, Dr. Shopler testified that it was possible that either a cumulative or specific injury occurred but he was unable to "attribute which of the multiple findings on his studies are attributable to that particular injury." *Applicant's Exhibit 01: Transcript of Deposition of Steven Shopler, M.D. 3/18/2019 p. 14 lines 9-18.* Dr. Shopler indicated that his use of the term "transient" may have been inartful and that he meant to indicate that the incident was momentary and its effects may or may not have been temporary but his spinal disorders "are greater than would be warranted by that injury." *Applicant's Exhibit 01: Transcript of Deposition of Steven Shopler, M.D. 3/18/2019 p. 14 line 19 to p. 15 line 1.*

After review of the medical records that had been made available to Dr. Shopler, the parties agreed to a re-evaluation including "a full review of the medical file." *Applicant's Exhibit 01: Transcript of Deposition of Steven Shopler, M.D. 3/18/2019 p. 16 lines 1-9.*

Dr. Shopler provided the requested re-evaluation and reported in May 2019. Applicant was noted to have a "slightly wide based gait and is with a limp favoring the right lower extremity. He is assisted by a one-point cane." Dr. Shopler noted "There is exaggerated pain behavior with winching and withdrawal to light touch diffusedly over neck and back. *Joint Exhibit 07: Report of Stephen Shopler, M.D. 5/23/2019 p. 4.* [fn 4 This QME report was apparently transmitted in a manner that provided inconsistent pagination. The page numbers of the report itself at the bottom of the page have been followed rather than the inconsistent transmittal pagination at the top of the page.]

Dr. Shopler reviewed X-ray and MRI results. He diagnosed multi-level degenerative lumbar disc disease with a disc extrusion at L5-S1 on the right side with mild cervical spondylosis and obesity. Dr. Shopler reported that:

This patient's diffused non focal pain complaints and exaggerated pain behavior clouds his evaluation. There are diffuse abnormalities, chronic in appearance on the lumbar MRI study that do not correspond to his complaints, e.g. left leg pain with right side L5-S1 disc extrusion.

On that basis, I do not feel that any of the objective imaging findings can be related to a specific industrial injury. *Joint Exhibit 07: Report of Stephen Shopler, M.D. 5/23/2019 p. 5.*

Dr. Shopler opined that Applicant was permanent and stationary with a work restriction from very heavy lifting "90% apportioned to non-industrial factors and 10% apportioned to the injury of July 8, 2014" but with 0% whole body impairment as measured by the AMA Guides. *Joint Exhibit 07: Report of Stephen Shopler, M.D. 5/23/2019 p. 5.*

Applicant continued to receive treatment for his spinal symptoms as well as other problems via his primary care physician. See, *Applicant's Exhibit 02: Report of Norma Buenrostro and Carlos Alvarez, M.D. 5/19/2020.*

QME Dr. Shopler provided a supplemental report in July 2020. He responded to questions from Defendants' claims administrator. With respect to whether or not a cumulative trauma injury had occurred, Dr. Shopler answered:

With respect to your question of continuous trauma, I do not believe that the degenerative changes identified in the radiograph findings would be attributable to 3 years of work as a truck driver. If his employment had been for 20 years, this might be considered, but I do not believe that 3 years of intermittent lifting, carrying, bending, ect., would accrue continuous trauma to achieve x-rate changes identified. *Joint Exhibit 08: Report of Stephen Shopler, M.D. 7/17/2020 p. 1.*

Regarding his opinion that Applicant had no Whole Person Impairment despite his use of a cane and the diagnostic test results, Dr. Shopler indicated explained that it was based on Applicant's presentation at the examinations:

On both occasions, despite his large body size, only light touch over his back, barely indenting his skin would cause him to wince and whimper in pain. This is non-organic pain behavior. It is classic demonstration. Based on this and his rather histrionic pain behavior in the office, I could not attribute substantial disability to his radiographic findings since they conflicted so dramatically with the patient's dramatic behavior during the examination.

I cannot apportion industrial causation to dramatics pain behaviors and widespread total body pa(i)n complaints isolated to a single injury of July 8, 2014 which, in summary, amounted to a “hard landing” as his truck drove over a rut. *Joint Exhibit 08: Report of Stephen Shopler, M.D. 7/17/2020 p. 2 (vowel in parens added).*

The parties were not able to resolve their disputes. Following Trial before WCJ Christopher Brown on April 16, 2021. *Minutes of Hearing/Summary of Evidence 4/16/2021*; Findings of Fact issued on June 21, 2021. Judge Brown reviewed the available reports of QME Dr. Hanley, QME Dr. Shopler and the available treatment reports. He found that Applicant had not sustained his burden of proof that the alleged cumulative injury occurred. Applicant was ordered to take nothing further. *Findings of Fact & Orders 6/21/2021 p. 2 (Finding of Fact #2) p. 2 (Order #1), pp. 3-4 (Opinion on Decision).*

Applicant sought and obtained reconsideration of the Findings of Fact & Orders of June 21, 2021. *Applicant Marco Magana’s Petition for Reconsideration 6/29/2021.* The WCAB panel was persuaded that the Findings of Fact & Orders were not supported by substantial medical evidence and, more specifically, that the reporting of Dr. Shopler was unclear, inconsistent and, therefore, insubstantial. *Opinion & Order Granting Petition for Reconsideration and Decision After Reconsideration 8/30/2021.* The panel instructed a further development of the medical-legal record:

Upon return to the WCJ, it would be appropriate for the parties to request that Dr. Shopler submit a supplemental report to clarify his opinion as to whether applicant did or did not sustain a cumulative injury as claimed, and to explain his analysis and reasoning for his conclusion. We note applicant is alleging that he sustained a cumulative injury from his many years of work as a truck driver, including the years prior to his work with the employer named herein. Under Labor Code section 5500.5, the employer in the last year of injurious exposure may be held liable for a cumulative injury that includes many years of employment, including those involving different employers. Also, a party may request that a previous employer be joined as a defendant if that employer may be liable for a portion of the benefits owed to the injured worker (Lab.Code §5500.5). In the further proceedings, the parties should clarify with Dr. Shopler whether applicant has sustained a cumulative injury, and if so, the applicable period of injurious exposure for the injury. We take no position as to the issue of injury AOE/COE but, as noted, under the circumstances of this matter, further development of the record is appropriate. *Opinion & Order Granting Petition for Reconsideration and Decision After Reconsideration 8/30/2021 p. 5.*

Upon return to the Trial level, Dr. Shopler was deposed again. He testified that if Applicant had been a truck driver for 25 years rather than 3 years, it was probable that a cumulative injury had occurred, even though “everybody undergoes degenerative changes in their spine” and that “obesity badly affects the spine.” *Applicant’s Exhibit 12: Transcript of Deposition of Steven Shopler, M.D. 10/22/2021 p. 9 line 5 to p. 10 line 1.*

Dr. Shopler also testified that he was unable to define the period of the industrial injury for the cumulative trauma without knowing the particular duties at particular times. Dr. Shopler explained that truck drivers with short routes and no duty to unload the truck have “very different occupational exposures” from truck drivers with longer routes and the duty to unload heavy loads. *Applicant’s Exhibit 12: Transcript of Deposition of Steven Shopler, M.D. 10/22/2021 p. 10 lines 7-19.*

Regarding the occurrence of the alleged specific and cumulative injuries, Dr. Shopler testified that his opinion had changed. He testified that he now believed that both the specific and cumulative injuries had occurred, that the previously-allocated 10% of causation of disability represented the effect of specific injury of July 8, 2014 and that, assuming 25 years of truck driving, the cumulative injury probably also existed and accounted for 20% of causation. He testified the remaining 70% represented overweight and degeneration. *Applicant’s Exhibit 12: Transcript of Deposition of Steven Shopler, M.D. 10/22/2021 p. 10 line 10 to p. 13 line 3.*

Dr. Shopler noted his original opinion of a Diagnosis Related Estimate (DRE) Category I of 0% Whole Person Impairment but, after reviewing the AMA Guides, testified that his opinion had changed to DRE Category II with 7% Whole Person Impairment. *Applicant’s Exhibit 12: Transcript of Deposition of Steven Shopler, M.D. 10/22/2021 p. 13 line 13 to p. 15 line 10.*

On November 30, 2021, Applicant petitioned for relief from the dismissal of case ADJ 9703521 regarding the specific injury of July 8, 2014 in light of Dr. Shopler’s testimony that the specific injury had, in fact, occurred and accounted for 10% of Applicant’s impairment. *Petition to Set Aside Dismissal of ADJ 9703521.* Defendants objected, noting that Dr. Shopler was the QME only in case ADJ111110715 and that, in any event, his deposition testimony did not constitute substantial medical evidence. *Objection to Petition to Set Aside Dismissal of ADJ 9703521 12/06/2021.*

The present cases came back for Trial before the undersigned PWCJ on January 13, 2022. [fn5 These cases were reassigned to the undersigned PWCJ in light of the transfer of WCJ Christopher Brown to the DWC’s Sacramento District Office.] *Minutes of Hearing-Summary of Evidence 1/13/2022.* Findings of Fact & Award issued on February 16, 2022. Among other things, Applicant’s petition to set aside the dismissal of case ADJ 9703521 was denied as untimely since it

had been filed more than the six months allowed by CCP 473{b} and more than five years after the date of the injury. *Findings of Fact & Award 2/16/2022 p. 1 (Rulings & Orders Admitting Evidence #1), p. 3 (Finding of Fact #4-ADJ 9703521), p. 6 (Opinion on Decision)*. The cumulative injury was found to have occurred, to have resulted in 3% permanent partial disability and a need for further medical treatment. An award consistent with the findings issued.

No one was happy.

Both primary parties sought reconsideration of the Finding of Fact & Award of February 16, 2022. Defendants sought reconsideration, alleging that indemnity compensation had been awarded at the wrong rates and/or for the wrong seasonal periods that that Dr. Shopler's testimony "is filled with speculation and ambiguity regarding this claim." *Defendant's Petition for Reconsideration 3/08/2022 p. 7 lines 15-24*. Applicant also petitioned for reconsideration, arguing that Dr. Shopler's opinions on permanent disability and apportionment "lack substantial medical evidence". Applicant noted that that Defendants had previously so indicated. *Applicant's Petition for Reconsideration 3/14/2022 p. 2 lines 1-14*.

Given the consensus of the primary parties regarding the continuing deficiencies of Dr. Shopler's reporting, the Findings of Fact & Award was rescinded. *Order Rescinding Findings & Award 3/17/2022*.

Further proceedings consistent with WCAB Rule 10961 were held on April 14, 2022. It was agreed that the issue of the occurrence of the claimed Injuries AOC-COE would be re-submitted for decision. Since finding that the specific injury occurred would be somewhat pointless without relief from the dismissal of that claim, Applicant's petition for relief was also re-submitted for decision over Petitioner's objection. *Minutes of Hearing 4/14/2022 p. 2*.

Following partial re-submission, Findings of Fact & Orders issued on June 8, 2022. The specific and cumulative injuries were found to have occurred. The petition to set aside the dismissal of ADJ 9703521 was granted. An unresolved penalty petition was denied. All other issues were bifurcated and deferred pending further development of the medical-legal record. *Findings of Fact & Orders 6/08/2022*.

Whereupon Defendants Young Commercial Transfer and National Interstate Insurance Company seek reconsideration.

**III. Discussion:** Defendants argue that:

1. The WCJ lacks the authority to set aside the Stipulation & Order of November 28, 2017 because it is barred by Labor Code §5804.

2. Applicant's Petition to Set Aside Dismissal of ADJ 9703521 is barred by the doctrine of waiver or invited error.
3. Applicant has failed to establish good cause to be relieved of the stipulation to dismiss ADJ 9703521.
4. The WCJ has failed to explain why further development of the record is necessary pursuant to *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138.  
*Pending Petition for Reconsideration 6/14/2022 p. 2 lines 3-12.*

Applicant appears to be correct that:

The defense seems to acknowledge that Mr. Magana sustained a specific injury and a cumulative injury to his back, but wants to avoid liability for his specific work injury based on confusion that was not of Mr. Magana's making but arose from inconsistent medical reporting." *Applicant's Answer to Defendant's Petition for Reconsideration 6/21/2022 p. 11 line 19-22*

The first argument of the pending petition is that "The WCAB does not have jurisdiction to Award benefits for ADJ9703521 because Applicant's petition was untimely." *Defendant's Petition for Reconsideration 6/14/2022 p. 7 line 3.* The first part of first argument forthrightly acknowledges that Lab.C. §5803 authorizes the Appeals Board to "rescind, alter or amend any order, decision or award" upon a showing of good cause "at any time" upon proper notice and an opportunity to be heard but argues that this authority is nevertheless limited to five years from the date of injury pursuant to Lab.C. §5804. *Defendant's Petition for Reconsideration 6/14/2022 p. 7 line 7 to p. 9 line 2* citing *Smith v. Johns-Manville Products Corporation* (1981) 46 CCC 55, 559 (WCAB *en banc*); *Fidelity & Cas. Co. v. WCAB (Harris)* (1980) 103 Cal.App. 3d 1001, 163 Cal.Rptr. 339, 45 CCC 381 (3<sup>rd</sup> DCA) and *Butler v. Azimuth Technologies* 2010 Cal.Wk.Comp. P.D. Lexis 123.

Applicant replies that the stipulated dismissal of case ADJ 9703521 was not an "award of compensation" within the meaning of Lab.C. §5804, such that the five year limitation is inapplicable. *Applicant's Answer to Defendant's Petition for Reconsideration 6/21/2022 p. 10 lines 9-17.* Applicant's interpretation is noted to be consistent with the "plain meaning" doctrine, to wit, the Legislature is presumed to employ American English with facility such that the meaning of statutes is derived from the plain meaning of the statutory language. Under this rule, Lab.C. §5804's use of the term "awards of compensation" limits the scope of the five-year limitation and excludes other types of WCAB orders and decisions subject to rescission, alteration or amendment "at any time, upon notice and an opportunity to be heard" pursuant to Lab.C. §5803.

In the second part of the first argument, Defendants dispute that relief from dismissal was necessary for consistency with the Decision After

\Reconsideration. Defendants argue that the Decision After Reconsideration directed further development of the record only as to the cumulative trauma claim. *Defendant's Petition for Reconsideration 6/14/2022 p. 9 line 3-18.*

While it is true that the Decision After Reconsideration directed further development of the medical-legal record with respect to the cumulative trauma claim in case ADJ 11100715, that was not the only content or effect. Nor does this argument deny that if the Decision After Reconsideration anticipated further development of the medical- legal record regarding the specific injury, relief from dismissal of the specific injury claim was appropriate.

The WCAB Panel's discussion begins with the concern that Dr. Shopler had not determined whether July 8, 2014 was the date of a specific injury or the end date of a period of cumulative injury. *Opinion & Order Granting Petition for Reconsideration and Decision After Reconsideration 8/30/2021 pp. 3-4.* The Panel also noted the inconsistency between Dr. Shopler's denial that either claimed industrial injury had occurred and his apportionment of some level of disability to an industrial injury. *Opinion & Order Granting Petition for Reconsideration and Decision After Reconsideration 8/30/2021 p. 4* If such disability exists, the requested further development of the medical-legal records would necessarily include whether the disability was from the cumulative injury, the specific injury or some other source. Moreover, the instruction to the parties to obtain a supplemental report from Dr. Shopler regarding the occurrence of the cumulative injury was the first step in the anticipated further development of the record. The WCAB Panel anticipated other steps, including the potential joinder of additional parties (whose discovery rights would include discovery regarding the specific injury) and expressly indicated that it "took no position on the issue of Injury AOC-COE..." *Opinion & Order Granting Petition for Reconsideration and Decision After Reconsideration 8/30/2021 p. 5.*

Thus, the better reading of the Decision After Reconsideration is that the instruction to the undersigned PW CJ was to "conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration" including, but not limited to, the occurrence of cumulative injury claimed in case ADJ 111110715.

The second argument of the pending petition is "Applicant is barred from setting aside dismissal of ADJ 9703521 by the doctrines of waiver and invited error." *Defendant's Petition for Reconsideration 6/14/2022 p. 9 line 22.* Defendants argue that Dr. Shopler's reports were available to Applicant prior to the fifth anniversary of the July 8, 2014 specific injury but Applicant did not seek rescission of the dismissal until after the fifth anniversary. *Defendant's Petition for Reconsideration 6/14/2022 p. 9 line 23 to p. 11 line 2.*

Applicant replies that he reasonably relied on the medical record as it existed at the time of the dismissal and that contrary evidence "only surfaced much later



at the first trial and subsequent Board's order granting reconsideration." *Applicant's Answer to Defendant's Petition for Reconsideration 6/21/2022 p. 10 lines 19-25.*

The first problem with the second argument is the designation of the dismissal as "without prejudice." Applicant could not have waived a potential reinstatement of his claim nor could Defendants have reasonably relied as if the dismissal was to be with prejudice when both the stipulation and the resulting order say otherwise. Nor was any judicial error invited thereby. The parties stipulated to a dismissal without prejudice and a dismissal without prejudice was ordered.

The second problem with the second argument of the pending petition is that it over-claims the evidence. An incident becomes a specific injury if it occurs and causes disability or a need for medical treatment. Lab.C. §3208.1 Dr. Shopler opined that the incident, the bump in the road, may have occurred but initially seems to have denied that it was injurious. *Joint Exhibit 06: Report of Steven Shopler, M.D. 3/26/2018 p. 4.* This was compounded by Dr. Shopler's "inartful" use of the term "transient." As noted above, the WCAB panel expressly noted that it was not clear whether Dr. Shopler was indicating that "applicant sustained a specific injury, a cumulative injury, neither, or both, with no resulting disability." *Opinion & Order Granting Petition for Reconsideration and Decision After Reconsideration 9/30/2021 p. 4.*

Thus, it is simply not the case that Applicant was presented with clear evidence before the fifth anniversary that the specific injury had occurred, but elected to dawdle until after the fifth anniversary to seek relief from dismissal.

The third argument of the pending petition is "Reconsideration must be granted because good cause has not been established to set aside the parties' stipulation." *Defendant's Petition for Reconsideration 6/14/2022 p. 11 line 3.* Defendants argue that a showing of good cause is necessary for relief from a factual stipulation and that neither the Applicant nor the undersigned PW CJ's Opinion on Decision provide a sufficient basis. *Defendant's Petition for Reconsideration 6/14/2022 p. 11 line 4 to p. 13 line 11.*

Applicant replies that "the WCJ did address his reasons for setting aside the dismissal in his Opinion on Decision." *Applicant's Answer to Defendant's Petition for Reconsideration 6/21/2022 p. 11 line 1-4.*

Applicant is correct. At the risk of belaboring the point, the relevant dismissal was without prejudice. Thus, the timeliness of Applicant's request for relief invoked the distinction between dismissals with or without prejudice and was itself a sufficient basis for relief. Secondly, as discussed above, relief was necessary for consistency with the Decision After Reconsideration. Both of

these reasons were discussed in the Trial-level decision. *Joint Findings of Fact & Orders 6/08/2022 p. 5 (Opinion on Decision)*.

The final argument of the pending petition is “The WCJ failed to explain why further development of the record is necessary and must make a final decision based on the current evidence.” *Defendant’s Petition for Reconsideration 6/14/2022 p. 12 line 12-13*. Defendants argue that the re-submission of the issues of injuries AOE-COE and the petition to set aside the dismissal “does not give the WCJ unfettered authority to order further development of the medical record.” *Defendant’s Petition for Reconsideration 6/14/2022 p. 12 lines 18-19*. Defendants also argue that the new Trial-level decision does not explain why a further development of the medical-legal record is needed. *Defendant’s Petition for Reconsideration 6/14/2022 p. 12 line 20 to p. 15 line 3*.

Applicant responds “with incredulity” that Defendants had twice submitted verified pleadings that PQME Shopler’s reports and testimony were not substantial medical evidence and agreed to a bifurcation and further development of the un-submitted issues at the conference of April 14, 2022. *Applicant’s Answer to Defendant’s Petition for Reconsideration 6/21/2022 p. 11 lines 6-16*. See also, *Minutes of Hearing 4/14/2022 p. 2*.

The first problem with the fourth argument of the pending petition is that a separate recital of the deficiencies of the medical-legal record and the need for further development of the record would have been redundant to the Decision After Reconsideration which decided that very issue.

The second problem with the fourth argument of the pending petition is that Applicant is correct that this argument is inconsistent with Defendant’s prior pleadings and the agreement to partially re-submit issues for decision.

**IV. Recommendation:** For the reasons discussed herein, it is recommended that the pending petition be denied.

DATE: July 8, 2022

Robert Norton  
PRESIDING WORKERS'  
COMPENSATION JUDGE