

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

JUAN RUIZ, *Applicant*

vs.

**SK FLOOR COVERING and STATE COMPENSATION INSURANCE FUND,
*Defendants***

Adjudication Number: ADJ11060751

San Jose District Office

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant, in pro per, seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on August 22, 2022, wherein the WCJ found in pertinent part that applicant did not prove injury to the additional body parts claimed in his December 1, 2021 Petition to Reopen and that he did not submit any evidence indicating that he had sustained any new and further disability; the WCJ ordered that applicant take nothing by reason of his Petition to Reopen.

Applicant contends that he submitted evidence indicating his liver and kidneys are swollen as a result of the medication he takes for his injury, but the evidence was not accepted into the record; that he has developed sores on his legs, feet, and hands as a result of his injury; that he has been denied psychiatric treatment; and that he was not allowed to seek additional evidence from his doctors in support of his claims.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied.¹ We received an Answer from defendant.

¹ Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist was appointed in her place.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to his left shoulder, chest, low back, both knees, both ankles, psyche, and nose/sense of smell, while employed by defendant as a carpet installer during the period from July 20, 2016, through July 20, 2017. After numerous proceedings, the WCJ issued a Findings and Award on January 6, 2021, that included a finding of injury to the body parts noted above and awarding 23% permanent disability. We affirmed the Findings and Award by our April 6, 2021, Opinion and Decision After Reconsideration, which we adopt and incorporate by this reference thereto.²

Applicant filed a Petition to Reopen on December 1, 2021, indicating that he claimed additional injury to his throat, chest (broken sternum), liver, coccyx, hips, and in the form of sores on his feet and hands; and that he needed to receive medical treatment to various body parts. On December 8, 2021, defendant filed an Objection to Petition to Reopen and a Declaration of Readiness to Proceed regarding the Petition to Reopen.

The parties again proceeded to trial on July 18, 2022. The issues submitted for decision were permanent disability and additional body parts as claimed in the Petition to Reopen. (Minutes of Hearing and Summary of Evidence (MOH/SOE), July 18, 2022, p.3.)

DISCUSSION

Preliminarily, we note that a petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that “it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice . . .” (*Shiple v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shiple*, the Appeals Board denied the applicant’s petition for reconsideration because it had not acted on the petition within the statutory

² The Opinion and Decision After Reconsideration contains a detailed discussion of the facts underlying the injury claim and the WCJ’s January 6, 2021 decision.

time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the Appeals Board failed to act on applicant's petition within 60 days of its filing on September 8, 2022, through no fault of applicant. Therefore, considering that the Appeals Board's failure to act on the petition was in error, we find that our time to act was tolled.

Pursuant to Labor Code section 4061(i):

No issue relating to a dispute over the existence or extent of permanent impairment and limitations resulting from the injury may be the subject of a declaration of readiness to proceed unless there has first been a medical evaluation by a treating physician and by either an agreed or qualified medical evaluator. With the exception of an evaluation or evaluations prepared by the treating physician or physicians, no evaluation of permanent impairment and limitations resulting from the injury shall be obtained, except in accordance with Section 4062.1 or 4062.2. Evaluations obtained in violation of this prohibition shall not be admissible in any proceeding before the appeals board.
(Lab. Code, § 4061.)

Administrative Director rule 10109 states:

- (a) To comply with the time requirements of the Labor Code and the Administrative Director's regulations, a claims administrator must conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for a workers' compensation benefit.
- (b) A reasonable investigation must attempt to obtain the information needed to determine and timely provide each benefit, if any, which may be due the employee.
 - (1) The administrator may not restrict its investigation to preparing objections or defenses to a claim, but must fully and fairly gather the pertinent information, whether that information requires, or excuses benefit payment. The investigation must supply the information needed to provide timely benefits and to document for audit the administrator's basis for its claims decisions. The claimant's burden of proof before the Appeal Board does not excuse the administrator's duty to investigate the claim.
 - (2) The claims administrator may not restrict its investigation to the specific benefit claimed if the nature of the claim suggests that other benefits might also be due.
- (c) The duty to investigate requires further investigation if the claims administrator receives later information, not covered in an earlier investigation, which might affect benefits due.
- (d) The claims administrator must document in its claim file the investigatory acts undertaken and the information obtained as a result of the investigation. This documentation shall be retained in the claim file and available for audit review.
- (e) Insurers, self-insured employers and third-party administrators shall deal fairly and in good faith with all claimants, including lien claimants. (Cal. Code Regs., tit. 8, § 10109.)

Here, although not clearly drafted, the Petition to Reopen does allege that applicant has developed internal medicine problems, including liver damage, due to pain medication he used to treat his industrial injury, that he has developed sores on hands and feet as a result of the medication, and that the loss of sensation in his right foot is related to his right knee injury.

As noted above, defendant filed its Objection to Petition to Reopen and its Declaration of Readiness to Proceed regarding the Petition to Reopen, one week after applicant filed his Petition to Reopen. Based on our review of the record, it appears that the claims administrator did not conduct a reasonable and timely investigation after receiving notice that applicant was claiming entitlement to workers' compensation benefits. (Cal. Code Regs., tit. 8, § 10109.)

Also, the Petition to Reopen raised issues as to the extent of the permanent impairment caused by applicant's injury. Therefore, a declaration of readiness to proceed, pertaining to the

Petition to Reopen cannot properly be filed until there is a medical evaluation by a treating physician and by a qualified medical evaluator. (Lab. Code, § 4061(i).)

The Appeals Board has the discretionary authority to develop the record when appropriate to provide due process or fully adjudicate the issues. (Lab. Code §§ 5701, 5906). “The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers’ compensation claims.” (*Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Under the circumstances of this matter, it is necessary that it be returned to the WCJ for further development of the record in order to comply with the requirements of Labor Code 4061(i) and Administrator Rule 10109, as cited above.

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued by the WCJ on August 22, 2022, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 22, 2022, Findings and Order is **RESCINDED**, and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 20, 2023

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

**JUAN RUIZ, IN PRO PER
STATE COMPENSATION INSURANCE FUND, LEGAL**

TLH/mc

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

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, in pro per, seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on January 6, 2021, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his left shoulder, chest, low back, both knees, both ankles, psyche, and nose/sense of smell; that the injury caused 23% permanent disability; and that the permanent disability indemnity rate was \$290.00 per week.

Applicant contends that he is entitled to an additional 5% permanent disability for his psychiatric injury, that he was not allowed to present testimony from witnesses at trial, that the additional material he was allowed to provide after the trial was not considered, and that further development of the record is needed regarding his earnings.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition for Reconsideration (Petition) the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate, and for the reasons discussed below, we will affirm the F&A.

BACKGROUND

Applicant claimed injury to his left shoulder, chest, low back, both knees, both ankles, psyche, and nose/sense of smell, while employed by defendant as a carpet installer during the period from July 20, 2016, through July 20, 2017.

On April 5, 2018, applicant was evaluated by pain medicine qualified medical examiner (QME) Ilya Sabsovich, M.D. (Def. Exh. D, Dr. Sabsovich, April 5, 2018.) Dr. Sabsovich examined applicant, took a history, and reviewed the medical record. The doctor diagnosed applicant as having left shoulder bursitis, left shoulder rotator cuff syndrome, sternum pain, thoracic sprain/strain, lumbar sprain/strain, lumbago, right knee sprain/strain, and bilateral ankle pain, and he noted that applicant's condition had reached maximum medical improvement/permanent and stationary (MMI/P&S) status. (Def. Exh. D, p. 16.)

On June 26, 2018, applicant was seen for a psychological evaluation by clinical psychologist Robert Perez, Ph.D. (App. Exh. 5, Robert Perez, Ph.D., July 3, 2018.) Dr. Perez diagnosed, “Depressive Disorder, NOS Somatic Symptom Disorder with Predominant pain,” and determined that the predominate cause of applicant’s psychiatric condition was his employment with defendant. (App. Exh. 5, pp. 4 – 5.)

Otolaryngology QME Ronald L. Rubenstein, M.D., evaluated applicant on November 12, 2018. (Def. Exh. I, Dr. Rubenstein, November 12, 2018.) Dr. Rubenstein re-evaluated applicant on September 10, 2019, and he found that applicant had reached MMI/P&S status. (Def. Exh. I, p. 1.) In his supplemental report, Dr. Rubenstein concluded that applicant’s “difficulty in smell” did not cause any whole person impairment (WPI). (Def. Exh. E, Dr. Rubenstein, October 18, 2019.) On January 21, 2020, QME Dr. Sabsovich re-evaluated applicant. (Def. Exh. A, Dr. Sabsovich, January 21, 2020.) The doctor’s re-examination of applicant and review of the interim medical record, did not change his opinions previously stated in his April 5, 2018 report. He also noted that there was “no medical evidence of compensable consequence injury to the left hip.” (Def. Exh. A, p. 15.)

The parties proceeded to trial on October 6, 2020, and the matter was continued for the parties to develop the record and clarify the issues to be tried. The Minutes of Hearing (MOH) include the following:

Applicant is to meet with an I&A [information and assistance] officer and revise the Issues page of the pre-trial conference statement (5-pager) to the worker's compensation claims he intends to make and excluding non-worker's comp issues. ... Applicant is to meet with I&A and revise his exhibit list to include any psychiatric reports needed to prove his claim and exclude any material not having to do with this case.
(MOH, October 6, 2020, p. 2.)

At the December 14, 2020 trial the parties stipulated that the proper permanent disability indemnity rate was \$290.00 per week; the issues submitted for decision included parts of body injured and permanent disability/apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 14, 2020, p. 2.) In the MOH/SOE, the WCJ stated:

LET THE MINUTES REFLECT that it is the Court's understanding that the parties wish to admit the matter for decision on the existing record without testimony. Also it is the Court's understanding that Mr. Ruiz wishes the Court to accept the written statements contained in his Exhibit 1, which are parts 1 and 2 of that exhibit, in lieu of his testimony.
(MOH/SOE, December 14, 2020, p. 4.)

DISCUSSION

In his Report, the WCJ stated:

I have read the contentions set forth in the Petition. Several are simply incorrect. Applicant claims that his documents were not reviewed. This is simply incorrect, as set forth above. Applicant claims his witnesses were disallowed. This is not true ... ¶ The errors alleged in the medical record, which Applicant's documents described, seem trivial in nature. Try as I might, I am unable to understand how any of these 'errors', if correctly described, could have produced or contributed to any errors in the doctor's conclusions or changed the result reached on those reports.
(Report, p. 4.)

We have reviewed the trial record and the complete EAMS ADJ file. Based on our review of these proceedings, for the reasons explained by the WCJ, we see no factual and/or legal basis for disturbing the WCJ's F&A.

Finally, we note that "Earnings" was an issue raised at trial and mentioned in defendant's Answer. The F&A notes that applicant's earnings warranted a permanent disability indemnity rate of \$290.00 per week and the permanent disability benefits were awarded based thereon. Review of the December 14, 2020 MOH/SOE indicates that the parties stipulated to the \$290.00 weekly rate. (MOH/SOE, December 14, 2020, p. 2.) More importantly, Labor Code section 4453(b)(9) identifies \$290.00 per week as the maximum permanent disability rate. (Lab. Code, § 4453.) Since temporary disability indemnity was not an issue raised by the parties, and permanent disability benefits were awarded at the maximum rate, applicant's earnings are not relevant to any issue to be addressed by the Appeals Board.

Accordingly, we affirm the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued by the WCJ on January 16, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 6, 2021

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

**JUAN JOSE RUIZ
STATE COMPENSATION INSURANCE FUND**

TLH/pc

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

REPORT AND RECOMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

1. Applicant, Juan Jose Ruiz, while employed during the period 7/20/2016 through 7/20/2017, as a carpet installer (group 481) at Newark, California, by SK Floor Covering, insured for worker's compensation liability by State Compensation Insurance Co., sustained cumulative injury arising out of and in the course of this employment to his low back, left shoulder, nose/smell, right knee, left knee, both ankles, chest , and psyche.

2. A Petition for Reconsideration has been filed by the Applicant. The Petition was timely filed, and verified in accordance with law. Defendant has filed an Answer.

3. Applicant seeks Reconsideration from a Findings and Award which issued 1/6/2021, which awarded, among other things, 23% PD and further medical care to body parts which had been in dispute.

4. Applicant seeks Reconsideration based upon; (1) an additional 5% PD should have been awarded for the psyche, based upon informal remarks Applicant claims were made to him at the MSC by WCALJ Suh, the MSC judge; and (2) Applicant was not allowed to present testimony from additional witnesses; and (3) this WCALJ failed to review the additional material provided (with permission) post trial to rebut the PQME opinion; and (4) further discovery was necessary to clarify the earnings issue.

II

SUMMARY of FACT

The parties agree that Applicant suffered a CT injury during his employment as a carpet installer during the period ending 7/20/2017. Multiple body parts were in dispute, all of which have been found to be part of the injury. Since Defendant has not filed for Reconsideration, these body parts are no longer in dispute and will not be discussed.

The case was set for trial on 12/14/2020 and went forward as scheduled. Applicant then, for the first time, indicated a desire to call two previously undisclosed witnesses. Since injury was admitted, it was unclear what lay witnesses could contribute. Nevertheless, I told Mr. Ruiz (through the interpreter) that if his witnesses were available that day to testify, I would

consider accepting their testimony. He indicated to me that they were not available to testify. Since these witnesses had not been identified to anyone prior to trial and were

unavailable in any event, I declined to delay proceedings in order to secure their testimony. I was unable to learn from Applicant which issues this testimony would concern.

Following this, we discussed a format for taking Applicant's testimony since he was unrepresented. Mr. Ruiz stated that he wished to make the Court aware of a number of errors he had found in some of the medical reports. I pointed out to him that his proposed Exhibit 1 already contained such a discussion. He responded that he had found additional errors and wanted to point them out. In an effort to accommodate Applicant's wishes, I ruled Applicant's Exhibit 1 admissible in the nature of an offer of proof. After more discussion, the parties agreed that Applicant would be given additional time to prepare an additional document setting forth his objections of the medical record in lieu of testimony, and that this document would be considered. Without objection, Applicant was given until close of business 12/20/2020 to file this additional statement, and Defendant requested and was granted until 1/4/21 to respond. The matter was submitted for decision as of 1/4/21. Applicant did submit a document dated 12/19/20 which was indistinguishable from his Exhibit 1. Defendant advised that they had decided not to present any further argument prior to submission.

Neither document gave the reader any basis for determining what if any additional earnings Applicant had been entitled to over and above that described in the documents provided by Defendant. Applicant did show that he had obtained a substantial settlement from the Employer, which covered a number of issues, one of which was the underpayment of wages. The documents provided did not set forth any means of determining that portion attributable to unpaid past wages.

After a careful review of all of the documents submitted, I issued a Findings and Award on 1/6/2021. From this Award, Applicant seeks Reconsideration. After the issuance of the F&A, the case was set for conference. I have no idea how this occurred, but it appears to have been a clerical error brought on by short staffing due to the pandemic. Both parties appear to have been advised not to appear at this setting, although Applicant appeared anyway. He was advised that the case had been decided and the hearing set in error.

III

DISCUSSION

I have read the contentions set forth in the Petition. Several are simply incorrect. Applicant claims that his documents were not reviewed. This is simply incorrect, as set forth above. Applicant claims his witnesses were disallowed. This is not true, since additional witnesses were never identified and not available at trial. The decision was not to disallow Applicant's witnesses. The decision was to deny Applicant's request for a continuance, since it was a request made at the last minute and without any showing of the most basic due diligence. Since we have no idea what purpose such testimony would serve, there was never any basis for delaying a trial to permit this last-minute request.

The errors alleged in the medical record, which Applicant's documents described, seem trivial in nature. Try as I might, I am unable to understand how any of these 'errors', if correctly described, could have produced or contributed to any errors in the doctor's conclusions or changed the result reached on those reports. Finally, Applicant appears to have prepared this list of 'errors' several months before the MSC, and never asked the various QME's to correct the errors or to state whether correction of these 'errors' would change the result of their respective evaluations.

In summary, I do not understand the basis of Applicant's Petition, nor do I understand what errors the Applicant believes I committed, nor do I understand what Applicant believes I should have done instead.

IV

RECOMMENDATION

DENY Reconsideration.

David L. Lauerman,
Workers' Compensation Judge