

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

ARMIDA HERNANDEZ, *Applicant*

vs.

**BEST WESTERN FRONTIER HOTEL;
INSURANCE COMPANY OF THE WEST, *Defendants***

**Adjudication Numbers: ADJ11319185, ADJ11319193
San Bernardino District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
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, and for the reasons stated in the WCJ's report, which we adopt and incorporate except as noted below, we will dismiss applicant's Petition for Reconsideration as untimely and grant reconsideration on our own motion pursuant to Labor Code¹ section 5900(b) to amend the August 27, 2021 Joint Findings and Award and Orders as recommended in the report and to otherwise affirm the WCJ's decision.

There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1) (eff. Jan. 1, 2020).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, former § 10508, now § 10600 (eff. Jan. 1, 2020).) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, former § 10845(a), now § 10940(a); former § 10392(a), now § 10615(b) (eff. Jan. 1,

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

2020).) In addition, a Petition for Reconsideration filed via EAMS² is deemed filed on the date received by the Appeals Board if it is received prior to 5:00 p.m. on a court day. (Cal. Code Regs., tit. 8, former § 10392, now § 10615(b) (eff. Jan. 1, 2020).) Any Petition for Reconsideration “received after 5:00 p.m. of a court day shall be deemed filed as of the next court day.” (Cal. Code Regs., tit. 8, former § 10392, now § 10615(b) (eff. Jan. 1, 2020).)

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v. Workers’ Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com.* (*Hinojoza*) (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73].)

In this case, the WCJ’s decision issued on August 27, 2021 and was served by mail on applicant and applicant’s attorney to their addresses as listed in the Official Address Record. Based on the authority cited above, applicant had until Tuesday, September 21, 2021 by 5:00 p.m. to file a timely Petition for Reconsideration. Here, applicant’s Petition for Reconsideration was filed in EAMS on Tuesday, September 21, 2021 at 6:31 p.m., making it untimely and subject to dismissal. Nevertheless, we grant reconsideration on our own motion pursuant to our authority pursuant to section 5900(b).

We do not adopt or incorporate the report to the extent it refers to applicant’s petition as timely nor to the extent it refers to the error in the amount of permanent disability advances as clerical. A change in the amount of benefits owed is a substantive or material change involving the exercise of judicial discretion, as opposed to a “clerical error.” (*Nestle Ice Cream Co., LLC v. Workers’ Comp. Appeals Bd. (Ryerson)* (2007) 146 Cal.App.4th 1104 [72 Cal.Comp.Cases 13].) However, we do otherwise follow the WCJ’s recommendations to amend the award for the reasons stated in the report.

² EAMS is an acronym for Electronic Adjudication Management System, a computerized system used by the Division of Workers’ Compensation (DWC) to store and maintain Appeals Board electronic case files. (See Cal. Code Regs., tit. 8, §§ 10269(p), 10215 et seq.)

For the foregoing reasons,

IT IS ORDERED that reconsideration of the August 27, 2021 Joint Findings and Award and Orders is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the August 27, 2021 Joint Findings and Award and Orders is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. Permanent disability indemnity was paid at the weekly rate of \$266.47 for the period of October 25, 2017 to July 27, 2018 in the amount of \$10,475.60.

* * *

13. The reasonable attorney's fee is found to be 15% of applicant's permanent disability, equal to \$1,848.64.

AWARD

AWARD IS MADE in favor of **ARMIDA HERNANDEZ** against **BEST WESTERN FRONTIER MOTEL; INSURANCE COMPANY OF THE WEST** of:

- a. Permanent disability of 14%, equivalent to 46.25 weeks of disability indemnity, payable at the rate of \$266.47 per week in the total sum of \$12,324.24, less credit to defendant for all sums heretofore paid on account thereof, less reasonable attorney fees in the sum of \$1,848.64, payable to the Law Offices of Ramin Younessi, whose lien is hereby allowed.
- b. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

c. Reasonable attorney fees as stated above.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 22, 2021

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

**ARMIDA HERNANDEZ
LAW OFFICES OF RAMIN YOUNESSI
TOBIN LUCKS**

PAG/abs

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 RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

I.

INTRODUCTION:

1. Applicants Occupation: Housekeeper
2. Applicants Age: 58 years old (52 years old on DOI)
3. Date of Injury: 8/3/15 (ADJ11319185 MF) 3/25/05-8/3/15 CT (ADJ11319193)
4. Parts of Body Claimed: lumbar spine, thoracic spine, gastritis, hypertension and urology(bladder) (ADJ11319185 MF). Low back, arms, neck, thoracic spine, hands, fingers, wrists, legs, knees, feet, diabetes, high blood pressure, gastritis and headaches.(ADJ11319193)
5. Identity of Petitioner: **Applicant** has filed the Petition.
6. Timeliness: Timely filed on September 22, 2021
7. Verification: A Verification is attached to the Petition
8. **Petitioners Contentions:**

1. **By the order, decision, or award, the Board acted without or in excess of its powers by not developing the record by not ordering additional panels in internal medicine and urology.**
2. **That the finding with regard to the amount of permanent disability paid is not supported by the evidence, and that the figure of \$14,675.60, was a clerical mistake which should be revised to \$10,475.60, as reflected on the Pre-Trial Conference Statement.**

II.

FACTS:

Applicant, Armida Hernandez, while employed as a housekeeper by Defendant Best Western Frontier Motel has alleged a specific injury of August 3, 2015 and a cumulative trauma claim for the period of March 25, 2005 through August 3, 2015.

The August 3, 2015 injury to the lumbar spine has been accepted. The defendant disputes injury to the thoracic spine, gastritis, hypertension and urology (bladder). Applicant was evaluated by Panel Qualified Medical Examiner (PQME) Dr. Timothy Brox, M.D. and he determined that applicant sustained industrial injury to the lumbar and thoracic spine as a result of the August 3, 2015 injury.

The cumulative trauma injury for the period of March 25, 2015 through August 3, 2015 was denied by defendant. The PQME Dr. Timothy Brox did not find orthopedic injury on a cumulative trauma basis.

PQME Dr. Timothy Brox issued two reports following his examination of the applicant on January 10, 2018 and March 21, 2019. A supplemental report also issued on August 31, 2020. In addition, PQME Dr. Timothy Brox had his deposition taken on September 6, 2019.

The matters were placed on the courts calendar after Defendant filed a Declaration of Readiness to Proceed on March 6, 2020 (EAMS Doc ID: 31826991) based on the Maximum Medical Improvement (MMI) Report of Dr. Timothy Brox dated March 21, 2019. There was no objection to this Declaration of Readiness to Proceed.

The matter then proceeded to a Mandatory Settlement Conference (MSC) on May 18, 2020. At the May 18, 2020 MSC it was noted that Applicant did not object to the Declaration of Readiness to Proceed and the matter was set for trial over Applicant's objection. (EAMS Doc ID: 72747239). A Petition for Removal was not filed in response to the matter being set for trial.

The matter was then set for trial before Judge Pusey, and it was noted on the Minutes of Hearing that there was a PQME supplemental report of Dr. Brox pending, and it was also noted that discovery remained closed absent further order by the trial judge. The matter was then continued to a new trial date at the joint request of the parties. (EAMS Doc ID: 72933054). The matter was set for trial again on August 8, 2020 before Judge Hughes. It was noted that the parties were still waiting for the supplemental report of PQME Dr. Brox, and the parties jointly requested a trial continuance, which was granted. It is unclear why, but the matter was taken off calendar despite the Minutes of Hearing clearly reflecting the matter was to be continued to a new trial date. (EAMS Doc ID: 73151776)

As the August 20, 2020, matter appears to have been taken off calendar in error, Defendant filed a Declaration of Readiness to Proceed on September 10, 2020 (EAMS Doc ID: 33737246). Applicant attorney replied by filing an Objection to Declaration of Readiness to Proceed dated September 25, 2020, however in the objection Applicant stated, "Applicant has no objection to this matter getting back on the trial calendar as per the agreement reached at the trial on August 20, 2020." (EAMS Doc ID No. 33926807).

The matter was then set for MSC on October 21, 2020 and the parties jointly requested a trial date. (EAMS Doc ID: 73488848). The matter eventually proceeded to trial on May 24, 2021 at which time the Stipulations and Issues were read into the record, and the matter was then continued to trial on July 13, 2021 for testimony. At the trial on July 13, 2021 the parties confirmed the Minutes of Hearing/Summary of Evidence from the May 24, 2021 trial was accurate (MOH/SOE 7/13/21 Pg. 2 Lines 1-3). Applicant testified on July 13, 2021 and the matter was submitted.

III.

DISCUSSION:

This court recommends the Petition for Reconsideration be granted in part and denied in part. The Petition for Reconsideration should be granted with regard to correcting the clerical error made with regard to permanent disability advances and attorney fees, but denied with regard to the request for further development of the record.

I. Clerical Error with Regard to Permanent Disability Advances

Applicant's assertion that there was a clerical mistake with regard to the permanent disability advances is correct. Defendant also confirmed in their Answer to the Petition for Reconsideration (EAMS Doc ID: 38414906) that the amount of permanent disability advances is \$10,475.60 as reflected on the Pre-Trial Conference Statement. The figure of \$14,675.60 that was listed in the May 24, 2021 Minutes of Hearing/Summary of Evidence and the August 27, 2021 Findings and Award is inaccurate. As such, it is recommended that the Board return this matter to this WCJ to correct the clerical error, or alternatively the Board amend the Findings and Order in an Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration.

The August 27, 2021 Findings and Award incorrectly states in Finding 13., "[t]he reasonable attorney's fee is found to be 15% of the applicant's permanent disability, equal to \$1,848.64, to be paid over and above the amount of permanent indemnity paid to applicant." The latter part of that statement, "to be paid over and above the amount of permanent indemnity paid to applicant" should be stricken.

In addition, it is recommended in the Award that subsections (a.) be amended and subsection (c.) be stricken. The modified language recommended for subsection (a.) is "Permanent disability of 14%, equivalent to 46.25 weeks of disability indemnity, payable at the rate of \$266.47 per week in the total sum of \$12,324.24, less credit to defendant for all sums heretofore paid on account thereof, less reasonable attorney fees in the sum of \$1,848.64 payable to the Law Offices of Ramin Younessi."

II. Applicant Contends that Further Development of the Record is Warranted.

Applicant argues that the record should have been further developed with regard to applicant's alleged internal and urological injuries, citing *Tyler v. Workers Comp. Appeals Bd.* 62 Cal. Comp. Cases 924 and *McClune v. Workers' Comp. Appeals Bd.*, 63 Cal. Comp. Cases 261, and *Lundberg v. Workmen's Compensation Appeals Bd.* 69 Cal. 2d 43, as authority for the same. Applicant asserts that the WCAB should allow further development of the record pursuant to Labor Code §§5701 and 5906, because the "QME Dr. Timothy Brox stated applicant's aggravation of diabetes, gastritis, high blood pressure, and urological injury are outside his area of expertise."

Tyler, *McClune* and *Lundberg* are distinguishable from this case. In *Tyler*, the WCJ did not feel the medical evidence presented at trial was substantial, and as such it was determined that the WCJ had authority to develop the record. In the instant matter, the medical reporting of PQME Dr. Timothy Brox whom this court relied on constituted substantial medical evidence as it was well

reasoned with citation and discussion of medical research into the issues, and the rational for PQME Dr. Timothy Brox's opinions were explained thoroughly in his reporting and his deposition.

With regard to *McClune*, the court felt that the medical reporting presented was not substantial medical evidence as neither parties' expert witnesses discussed the effect of work-related trauma on McClune's left hip condition, and the expert opinions were in conflict with each other so the court had authority to direct the taking of additional evidence. This case is distinguishable from *McClune*, because there is no evidence of an industrial nexus to applicant's alleged internal and urological conditions and thus there is no dispute between any physicians with regard to whether the alleged internal and urological injuries are industrial.

Applicant also cited *Lundberg v. Workmen's Compensation Appeals Bd.* 69 Cal. 2d 436, arguing that it is the established legislative policy that the Workmen's Compensation Act must be liberally construed in the employee's favor and all reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of the employee. This case is distinguishable from *Lundberg*, because in *Lundberg* the court stated "It should be stressed that where the undisputed evidence points towards an industrial injury had the board any doubts as to the cause of the injury, it has to resolve those doubts." (Id at 439). In *Lundberg*, the court had conflicting evidence with Applicant's physician finding an industrial injury and Defendant's physician finding the injury non-industrial. The WCJ, in *Lundberg* found neither opinion persuasive, however there was evidence presented that pointed to an industrial injury. This case is distinguishable because Applicant failed to introduce into evidence any documentation substantiating an industrial nexus to applicant's internal or urological conditions.

The decision of *McKernan* is more applicable to this case. In *McKernan*, it was noted the court's power to further develop the record under Labor Code §5701 or Labor Code §5906 may not be used to circumvent the clear intent and language of Labor Code §5502(d)(3), which states, "Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." *San Bernardino Community Hospital v. WCAB (McKernan)* (1999) 64 CCC 986.

Applicant attorney has not demonstrated that they acted with due diligence prior to the settlement conference with regard to obtaining medical evidence establishing an industrial nexus to applicant's internal and urological complaints. As such, there is no good cause to allow applicant to further develop the record with regard the allegations of internal and urological injury. As noted in *McKernan*, due process is "simply notice and the opportunity to be heard," and "diligence and good faith are required of both sides." (Ibid at 992,993)

Applicant had notice and the opportunity to be heard and there is no infringement on applicant's due process rights with adjudicating the matter on the current record.

Applicant filed her Application for Adjudication on May 17, 2018, (ADJ11319193) for the cumulative trauma claim of March 25, 2005 through August 3, 2015, which asserted internal injury in the form of diabetes, high blood pressure, headaches, sleep disorder, and gastritis. (EAMS Doc ID: 26310570). Moreover, applicant filed an Amended Application for Adjudication with regard

to case number (ADJ11319185) on July 25, 2018, wherein Applicant asserted internal injury in the form of diabetes, gastritis, and urological issues. A further Amended Application was also filed on July 25, 2018 alleging kidneys, bladder, intestines.

(EAMS Doc ID: 26874974). The Declaration of Readiness Proceed, filed by defendant that led to the trial setting was filed on March 5, 2020, more than 19 months after applicant asserted her internal injuries. As such, applicant should have with due diligence obtained medical reporting within that 19 months to support the allegation of internal and/or urological injury but failed to do so.

Furthermore, Applicant did not object to the Declaration of Readiness to Proceed filed March 5, 2020 and did not file a Petition for Removal when the matter was set for trial. Then in the Petition referenced as Objection to Declaration of Readiness to Proceed filed by Applicant in response to the September 10, 2020 Declaration of Readiness to Proceed filed by Defendant, Applicant stated “Applicant has no objection to this matter getting back on the trial calendar as per the agreement reached at the trial on August 20, 2020.” (EAMS Doc ID No. 33926807).

Title 8 CCR §10744(a) and (c) states:

- (a) “Any objection to a Declaration of Readiness to Proceed shall be filed and served within 10 calendar days after service of the declaration. The objection shall set forth, under penalty of perjury, the specific reason why the case should not be set or why the requested proceedings are inappropriate.”
- (c) “If a party has received a copy of the Declaration of Readiness to Proceed and has not filed an objection under this rule, that party shall be deemed to have waived any and all objections to proceeding on the issues specified in the declaration, absent any extraordinary circumstances.”

As such, Applicant failed to object to the Declaration of Readiness to Proceed dated March 5, 2020, which originally placed the matter on calendar for a Mandatory Settlement Conference. Furthermore, when the August 20, 2020 trial setting which was continued as reflected on the Minutes of Hearing, was taken off calendar in error, Applicant responded to Defendant’s September 10, 2020 Declaration of Readiness to Proceed putting the matter back on calendar stating they were in agreement to have the matter placed on calendar. As such, any objection to the matter proceeding to trial on the current record was waived by Applicant.

Applicant also asserts that because PQME Dr. Timothy Brox stated the internal and urological issues are outside his area of expertise that applicant should be entitled to further develop the record with regard to those conditions. It should be noted, PQME Dr. Timothy Brox never recommended applicant be evaluated by a Panel Qualified Medical Examiner in internal medicine or urology, and he noted in his reporting that, “There is no data presented to indicate that she sustained a consequential injury associated with her aggravation of her diabetes, gastritis, high blood pressure, or urological injury.” (Joint Exhibit A-2, Pg. 26) PQME Dr. Brox in an addendum to this March 21, 2019 report noted that he had identified injuries that are outside his area of expertise and listed, 1. Aggravation of diabetes, 2. Gastritis, 3. Aggravation of Hypertension,

4. Urological injury. (Joint Exhibit A-2, Pg. 35) Applicant attorney set the deposition of PQME Dr. Timothy Brox which took place on September 6, 2019.

At the deposition, PQME Dr. Timothy Brox was questioned with regard to his statement that there was no data to suggest an aggravation of applicant's diabetes, hypertension, gastritis, or urological injury. He was asked if he would defer to an internal medicine doctor to comment on the applicant's internal complaints and he responded "If there is data about the gastritis, hypertension, diabetes, blood pressure, then I would be prepared to defer to an appropriate specialist." PQME Timothy Brox did not recommend an internal or urological evaluation but instead indicated he was "okay with a QME assessment" in those fields. (Joint Exhibit A-5, Pg. 11 Ln. 12 – Pg. 12 Ln. 12.) Despite the medical reporting and deposition testimony of PQME Dr. Timothy Brox, Applicant took no action before the MSC to obtain an additional panel in either internal medicine or urology.

This March 21, 2019 report was served on Applicant's counsel on April 4, 2019, based on the attached proof of service. As such, Applicant had knowledge going back to April of 2019 that PQME Dr. Timothy Brox indicated there were internal and urological issues outside his area of expertise. Applicant had plenty of time to petition for additional panels in internal medicine and/or urology and failed to do so. Applicant also had the opportunity to obtain medical reporting in internal medicine and urology to support the Applications for Adjudication that asserted internal and urological injuries and failed to do so.

Therefore, this court finds no need for further development of the record in relation to the alleged internal injuries as it has not been demonstrated that Applicant acted with due diligence to obtain medical reporting to demonstrate an industrial nexus for the alleged internal and/or urological injuries.

IV.

RECOMMENDATION:

For the reasons stated above, this WCJ recommends that the Board Amend the Findings and Award to reflect the correct amount of permanent disability advances in the amount of \$10,475.60, and revise the August 27, 2021 Award to reflect the attorney fees being deducted from applicant's indemnity owed, rather than paid over and beyond the indemnity paid. Alternatively, the Board may remand the matter back to this WCJ to issue a revised Findings and Award.

It is also recommended that Applicant's request for further development of the record be denied.

DATE: October 4, 2021

Sevan Setian
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE