

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

LESLIE SUMMERS, Applicant

vs.

**SAN JOAQUIN COUNTY SHERIFF'S DEPARTMENT, permissibly self-insured,
administered by TRISTAR RISK MANAGEMENT, INC., Defendants**

**Adjudication Numbers: ADJ11621404, ADJ11621405, ADJ11621406
Stockton District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on December 1, 2020, wherein the WCJ found in pertinent part that applicant did not sustain injury arising out of and occurring in the course of employment (AOE/COE) to her cervical spine and/or bi-lateral knees. The WCJ ordered that applicant take nothing by way of her injury claim.

Applicant contends that the report from orthopedic qualified medical examiner (QME) Timothy Brox, M.D., is not substantial evidence so the F&O is not supported by substantial evidence.

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) 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.¹

¹ We note that the Petition caption includes ADJ11621404, ADJ11621405, and ADJ11621406. The trial, the F&O, and the subsequent pleadings actually pertain only to case number ADJ11621404. No issues regarding the other injury claims were raised and in turn, those injury claims are not addressed herein.

BACKGROUND

Applicant claimed injury to her cervical spine and bi-lateral knees while employed by defendant as a correctional officer during the period from February 15, 1999, through August 31, 2018. Defendant denied the injury claim. (Joint Exh. AA, Notice of Denial, October 26, 2018.)

On February 14, 2019, applicant was evaluated by QME Dr. Brox. The doctor performed an orthopedic physical examination of applicant's cervical spine, shoulders, elbows, wrists/hands, lumbar spine, hips, knees, ankles and feet. (Joint Exh. BB, Dr. Brox, February 14, 2019, pp. 8 – 17.) Dr. Brox took a history, reviewed the medical record, and concluded that applicant had not sustained an "occupational injury" to her cervical spine or to her bi-lateral knees. (Joint Exh. BB, p. 20.)

The parties proceeded to trial on October 29, 2020, and the issue submitted for decision was injury AOE/COE, with all other issues deferred. (Minutes of Hearing and Summary of Evidence (MOH/SOE), October 29, 2020, p. 2.)

DISCUSSION

We must first point out, it is well established that any award, order or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310].) Decisions of the Appeals Board, and in turn, the WCJs, "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (2001) (Appeals Board *en banc*) 66 Cal.Comp.Cases 473, 476.) "The evidence submitted by the parties must be formally admitted and must be included in the record to enable the parties to comprehend the basis for the decision. Furthermore, a proper record enables any reviewing tribunal, be it the Board on reconsideration or a court of further appeal, to understand the basis for the decision." (*Hamilton, supra*, at 475.)

Here, the WCJ and both parties make various references to the transcript of Dr. Brox's September 3, 2019 deposition which they identify as Joint Exh. CC. The MOH/SOE do not mention the transcript or identify it as an exhibit. Our review of the Electronic Adjudication Management System (EAMS) ADJ file indicates that the deposition transcript was not identified as an exhibit and was not admitted as evidence into the trial record.

Also, in the MOH/SOE the WCJ states "the Court will take judicial notice of the entire EAMS file." (MOH/SOE, October 29, 2020, p. 2.) The Opinion on Decision contains references

to medical reports from “neurological panel QME Dr. Weinmann,” and “from Dr. Lerman, DPM.” (F&O, p. 5, Opinion on Decision.)

Appeals Board Rule 10670 states:

The filing of a document does not signify its receipt in evidence, and, except for the documents listed in section 10803 of these Rules, *only those documents that have been received in evidence shall be included in the record of proceedings* on the case.

(Cal. Code Regs., tit. 8, § 10670, italics added.)

Appeals Board Rule 10803 states:

(a) The Workers' Compensation Appeals Board's record of proceedings is maintained in the adjudication file and consists of: the pleadings, minutes of hearing and summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits marked but not received in evidence, notices, petitions, briefs, findings, orders, decisions and awards, and the arbitrator's file, if any. Each of these documents is part of the record of proceedings, whether maintained in paper or electronic form. *Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings.*

(Cal. Code Regs., tit. 8, §10803, italics added.)

Based on the case law and regulations cited above, documents not properly identified and admitted into the trial records as exhibits are not evidence, and decisions must be based only on admitted evidence. Additionally, although when requested by the parties, a WCJ may take judicial notice of various documents in the adjudication file, e.g. notices, petitions, briefs, findings, orders, decisions, and awards (see Evid. Code § 452), there is no legal basis upon which judicial notice of all documents contained in the EAMs ADJ file may be taken.

Thus, the record as it now stands is not adequate to make a determination regarding the issue of injury AOE/COE. Upon return, we recommend that the WCJ schedule a status conference so the parties and the WCJ can decide what evidence should be submitted and to have that evidence admitted into the trial record. Thereafter, the WCJ may conduct further proceedings as appropriate.

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 of Fact and Order issued by the WCJ on December 1, 2020, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the December 1, 2020 Findings of Fact and Order is **RESCINDED** and the matter is **RETURNED** 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.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 16, 2021

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

**LESLIE SUMMERS
GROVE LAW
LENAHAN, LEE, SLATER, PEARSE & MAJERNICK, LLP**

TLH/pc

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