

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

PAULINA GONZALEZ, *Applicant*

vs.

**SERVICON SYSTEMS, INC., UNITED STATES FIRE COMPANY, administered by
CRUM & FORSTER, *Defendants***

**Adjudication Number: ADJ8878645
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.¹

In the Findings and Order of September 26, 2019, the workers' compensation arbitrator ("Arbitrator") found that applicant filed a timely petition to reopen, that because "the medical report of Dr. Jae Hyung Chon has been received...the record is complete to issue a decision," and that "there are not sufficient grounds to support a petition to reopen for new and further disability." Pursuant to the above findings, the Arbitrator denied applicant's petition to reopen.

Applicant filed a timely petition for reconsideration of the Arbitrator's decision. Applicant contends that the Arbitrator issued his decision prematurely and denied applicant an opportunity to complete discovery and submit evidence in support of her petition to reopen, and that before closing the record and issuing a decision, the Arbitrator was obliged to develop the record on the issue of permanent impairment, as set forth in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].

We did not receive an answer to applicant's petition for reconsideration.

The Arbitrator submitted a response to applicant's petition. We deem the response to be a Report and Recommendation ("Report") addressing applicant's contentions.

¹ Earlier in this case, the Appeals Board issued an Order Dismissing Petition for Reconsideration dated March 18, 2015. Commissioner Frank M. Brass signed that decision, but he is now deceased. A new panel member has been substituted in his place.

We begin by noting that in the previous Findings and Award dated December 15, 2014, Arbitrator Howard Goodman found that on December 7, 2012, applicant sustained industrial injury to her low back, and in the form of headaches, causing permanent disability of 16% and the need for further medical treatment. Arbitrator Goodman based his findings on the medical opinion of Dr. Hose Kim, Panel Qualified Medical Evaluator (PQME).

Subsequent to the Findings and Award dated December 15, 2014, applicant filed a timely petition to reopen, and proceedings were held by the current Arbitrator, Leonard J. Silberman. In the decision disputed here, Arbitrator Silberman essentially issued a summary denial of applicant's petition to reopen. Based on our review of this matter, we conclude that Arbitrator Silberman's decision lacks evidentiary and legal support. Therefore, we will rescind the Findings and Order of September 26, 2019, and we will return this matter to Arbitrator Silberman for further proceedings and new decision.

First, we observe that Arbitrator Silberman evidently did not create a record, as no record has been deposited in EAMS for our review. In *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 477 [en banc],² the Appeals Board summarized the requirements of a proper record as follows:

The Labor Code and the Board's rules set forth what must be included in a proper trial record. It is the responsibility of the parties and the WCJ to ensure that the record of the proceedings contains at a minimum, the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence.

The issues and stipulations of the parties set forth the matters to be decided by the WCJ and enable the WCJ to understand exactly which matters the parties agree upon and which must be decided.

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 on further appeal, to understand the basis for the decision.

... [T]he WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.

² The same requirements for a proper record apply to an electronic record created in EAMS. (*Hernandez v. Staff Leasing* (2011) 76 Cal.Comp.Cases 343 [Significant Panel Decision].)

Secondly, we observe that Arbitrator Silberman did not issue an Opinion on Decision, so his denial of applicant's petition to reopen is not fully explained. The purpose of the requirement that evidence be stated and reasons be detailed "is to assist the reviewing court to ascertain the principles relied upon by the lower tribunal, to help that tribunal avoid careless or arbitrary action, and to make the right of appeal or of seeking review more meaningful." (*Evans v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

Arbitrator Silberman did submit a Report in response to applicant's petition for reconsideration, as noted at the outset. In his Report, Arbitrator Silberman states that a medical report dated August 27, 2019 from applicant's treating physician, Dr. Chon, found that her condition had not worsened, and that Dr. Chon gave "the same factors of disability as had existed at the time Judge Goodman issued his original Findings and Award." Arbitrator Silberman further states that he "allowed the arbitration to be continued three times to allow applicant to obtain a report from Dr. Chon that her condition had worsened. Based on the report received by Dr. Chon her condition has not worsened. This Arbitrator thinks that the year and nine months since the petition to reopen has been filed is sufficient time for applicant to [obtain] medical evidence to prove her case. Just as the applicant has a right to have a speedy trial, the defense has a right to have a timely conclusion to this matter."

We disagree that the "right to a speedy trial" is a relevant factor in determining applicant's petition to reopen under the circumstances of this case. To the extent the Findings and Order of September 26, 2019 is based on Arbitrator Silberman's perceived need to expedite the proceedings, the decision is not supported by evidence and must be rescinded. In addition, it appears that Arbitrator Silberman's description of Dr. Chon's August 27, 2019 report is inaccurate. Although the record is incomplete, a copy of Dr. Chon's August 27, 2019 has been made available for our review as an attachment (exhibit "D") to applicant's petition for reconsideration. Contrary to what Arbitrator Silberman has indicated, we find no statement in Dr. Chon's report that applicant's condition has not worsened. In fact, Dr. Chon found that applicant did not become permanent and stationary until August 27, 2019, suggesting a possibility that she may have been temporarily disabled before then. However, Dr. Chon did not further address the issue of temporary disability (if any). Dr. Chon also stated that applicant "cannot return to her usual line of work," but his August 27, 2019 report makes no comparisons or statements concerning any change in applicant's medical condition in reference to her condition as it existed at the time of the previous Findings

and Award dated December 15, 2014. We conclude that Dr. Chon's August 27, 2019 report is not comprehensive or thorough enough to constitute substantial evidence on the question of new and further disability. (*Heggin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) Accordingly, further development of the medical record is required. (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 (66 Cal.Comp.Cases 1290) [The Board "may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence."].)

In addition, we note that the previous Findings and Award was based upon the medical opinion of Dr. Kim, PQME. However, Arbitrator Silberman does not explain why the parties did not return to Dr. Kim to evaluate applicant's claim that she has suffered new and further disability. In further proceedings, Arbitrator Silberman should address and resolve this issue, and he should further develop the medical record in accordance with *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc].) Upon completion of the medical record, Arbitrator Silberman also should create a proper trial record as set forth in *Hamilton, supra*.

Finally, we note that in further developing the record, the issue is not whether *Almaraz-Guzman* applies, as contended in applicant's petition for reconsideration, but whether her condition has worsened to the extent she has suffered new and further disability. In other words, the fact that applicant has filed a timely petition to reopen does not mean she is entitled to obtain a different rating of permanent impairment if her medical condition is the same as her medical condition at the time of the previous Findings and Award. However, we express no final opinion on the merits of applicant's claim of new and further disability. When the Arbitrator issues a new decision, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq.*

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of September 26, 2019 is **RESCINDED**, and this matter is **RETURNED** to the Arbitrator for further proceedings and new decision, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY 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.

**PAULINA GONZALEZ
SCHOCHET SOLOMON, LLP
SOLOV TEITELL
LEONARD SILBERMAN (ARB.)**

JTL/bea

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

CS