

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

JOSE MENCHACA, *Applicant*

vs.

**STAR INSURANCE COMPANY, administered by MEADOWBROOK INSURANCE
GROUP, insurer for BC LABOR CONTRACTORS, INC., *Defendants***

**Adjudication Number: ADJ12245760
Salinas 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. 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 reconsideration.

Contrary to the WCJ, we find applicant's petition timely filed. There are 20 days allowed within which to file a petition for reconsideration from a "final" decision. (Lab. Code, §§ 5900(a), 5903.) This time is extended by 10 calendar days if service is made to an address outside of California but within the United States. (Cal. Code Regs., tit. 8, § 10605(a)(1).) While applicant and her attorney received service of the decision within California, defendant was served at an address outside of California. Accordingly, and to observe due process for all parties, we interpret Rule 10605 as extending the time to file for all parties being served. Nevertheless, while we find the petition timely we deny it on the merits for the reasons stated in the WCJ's Report.

Lastly, we note that this matter was continued from April 28, 2021 to June 16, 2021 due to applicant's attorney illness. We remind applicant's attorney to be accurate in portraying the litigation history in his pleading.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 11, 2022

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

**JOSE MENCHACA
LEXA LAW GROUP
BRADFORD & BARTHEL LLP**

PAG/pc

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

On 2/9/22, Applicant has filed an *untimely*, verified Petition for Reconsideration of the undersigned's 12/10/21 Findings and Order.

II FACTS

Applicant claimed injury AOE/COE to his neck, right arm, and right shoulder, while employed during the period from 1/1/08 through 1/8/19 as a mechanic, at Gonzales, California, by BC Labor Contractors, Inc., then insured by Star Insurance Company.

The court found that Applicant did not sustain injury AOE/COE and shall take nothing by virtue of his Application. (Findings and Order, 12/10/21, Finding No. 1, p. 1 and Order, p. 2.)

Applicant petitions for reconsideration of this finding, as well as the court's Finding number 7, which found that no further discovery was warranted.

Applicant also alleges that the undersigned did not explain her reasoning pursuant to Labor Code section 5313 and failed to prepare and serve a summary of evidence.

III DISCUSSION

A WCJ's report "cures any technical or alleged defect in satisfying the requirements of Labor Code section 5313." (*City of San Diego v. W.C.A.B. (Rutherford)* (1989) 54 Cal.Comp.Cases 57 (writ den.); *Smales v. W.C.A.B.* (1980) 45 Cal.Comp.Cases 1026 (writ den.)) To the extent that the undersigned failed to elaborate on her conclusions, they will be discussed below.

With respect to the alleged failure to prepare a summary of evidence, there was no testimony to be summarized. The parties submitted the matter for decision on the documentary record. (Trial, 9/16/21, Minutes of Hearing.)

The Application alleging a CT through 1/8/19 was filed on 6/1/19. (EAMS Doc ID: 29390397.) Applicant was evaluated on 11/5/19 by QME Dr. Leo Van Dolson. (JOINT EX. J-6: QME Report, Leo Van Dolson, M.D., 12/20/19 [correction: 12/2/19].) Applicant gave a history consistent with a specific injury

occurring on 1/1/18, rather than a cumulative trauma through 1/8/19. Applicant gave a history of being “fired” in February 2018. (Id., p. 3.)

“Mr. Menchaca indicates that he was at work and working for ‘BC Labor Contractor’ when he was injured on 1/1/18. He indicates that a “transmission fell from jack, rolled, and struck me on the right shoulder.” I did ask for further explanation. Based on his account, my understanding is that he was in a cavity in the floor underneath the truck. He and a coworker were using a lift to install an 1800 pound transmission for a semi-truck. Somehow the transmission fell, but did not hit Mr. Menchaca directly. However, it then rolled and struck his right shoulder. Again, my understanding is that he was down inside a cavity work area beneath the floor level. He was able to continue working despite the injury.” (Id., p. 2.)

Based on the history given by Applicant, Dr. Van Dolson initially indicated that he would find that Applicant injured himself on 1/1/18. (Id., p. 10, “Causation.”) He also indicated that, “Please note that the conclusions presented above regarding causation are based on the account presented by the applicant. I do not see of any indication otherwise that he did not sustain the injury to the right shoulder at work. Therefore, I have concluded that he does have a right shoulder injury related to the work injury. [¶] The cover letter reviewed above does reference a cumulative trauma claim for January 1, 2008 through January 8, 2019. The information I have from Mr. Menchaca, which he provided at the time of this evaluation was that a transmission fell and hit the right shoulder.” (Id., p. 11, “Discussion,” last 2 paras.)

Later, Dr. Van Dolson found insufficient evidence to support an industrially-caused cumulative trauma. “In sorting through my prior reports, I am reminded that in my Supplemental Report dated March 8, 2020, I had concluded, based on medical probability principles, that there was insufficient evidence of cumulative trauma injury to the right shoulder or specific work injury on January 1, 2008 [sic]. [¶] Based on this additional information, my opinion in regard to causation remains unchanged. This MRI demonstrates evidence of definitive right shoulder pathology. However, based on the information available to me, I am not able to determine that this was caused by a work injury.” (JOINT EX. J-1: QME Report, Leo Van Dolson, M.D., 3/4/21, p. 2.)

“In looking back at my QME Report dated November 5, 2019, I am reminded that Mr. Menchaca told me that he had injured his right shoulder while working on January 1, 2018. It is interesting to note, that would have been New Year's day.” (JOINT EX. J-5: QME Report, Leo Van Dolson, M.D., 3/8/20, p. 2.) Dr. Van Dolson further stated, “As I sort through the information currently available to me, I do not seem to find evidence of a specific injury on January 1, 2018, or evidence of a cumulative trauma injury dating from 1/1/08 through

1/8/19.” (Ibid.) There were no records to support either a cumulative trauma or a specific injury on 1/1/18.

On 5/20/20, the undersigned took the matter off calendar over Defendant’s objection to allow Applicant to request a supplemental report or deposition and to file a second claim against a different carrier. (Minutes of Hearing, 5/20/20, “Comments,” EAMS Doc ID: 72775186.)

Defendant filed a DOR on 6/25/20, because no additional discovery had been done. (EAMS Doc ID: 32878922.) On 8/4/20, the parties jointly requested the matter be taken off calendar, because Applicant had commenced his promised discovery. (Joint Request for Order Taking Off Calendar, 8/4/20; EAMS Doc ID: 33310271.)

The parties took Dr. Van Dolson’s deposition on 8/26/20. The doctor did not change his mind. While still on the record, Defense attorney, Louis Larres, asked Applicant’s attorney, Sergey Nalbandyan, if he had any documentation of an injury of which he was unaware. Mr. Nalbandyan replied, “The problem -- the biggest problem is that I don’t have any medicals, but I will get everything.” (JOINT EX. J-4: Deposition Transcript, Leo Van Dolson, M.D., 9/17/20, p. 27, lines 12-15.) Mr. Nalbandyan went on to explain that he filed the case as a CT, rather than a specific, because his client could not remember when he was injured, and because his client told him that he kept working and reinjuring himself. (Id., p. 27, lines 23-25; p. 28, lines 1-6.) ***Applicant’s counsel admitted that he had no medical records.*** Several months went by before Defendant next filed a DOR on 4/5/21. (EAMS Doc ID: 36181987.)

On 4/28/21, the MSC was continued per Applicant’s request, because Applicant’s attorney was ill and still in Armenia at that time. Discovery was closed. (Minutes of Hearing, 4/28/21, “Comments”; EAMS Doc ID: 74153459.) On 6/16/21, over Applicant’s objection, the matter was set for Trial. Further discovery was deferred to the trial judge. (Minutes of Hearing, 6/16/21, “Comments”; EAMS Doc ID: 74313190.)

Applicant had had ample time to obtain the medical evidence necessary to prove his case and to file a second Application alleging a specific injury. He did not. “As the Board concluded, Labor Code section 3202.5 expressly provides that the Labor Code section 3202 rule of liberal construction shall not relieve a party from meeting the evidentiary burden of proof by a preponderance of the evidence.” (Rogers v. W.C.A.B. (1985) 172 Cal.App.3d 1195, 1202; 50 Cal. Comp. Cases 550.) Applicant also failed to demonstrate that the evidence he seeks “was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference.” Without such a showing, any evidence not disclosed or obtained after the MSC shall be inadmissible. (Lab. Code, § 5502(d)(3).)

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be dismissed as untimely or denied on its merits.

ROISILIN RILEY
Workers' Compensation Administrative Law Judge