

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

MARY ANN SUNSHINE MEDINA, *Applicant*

vs.

**SAVERS FUEL MART; CALIFORNIA INSURANCE
GUARANTEE ASSOCIATION for CASUALTY
RECIPROCAL EXCHANGE, in liquidation,
administered by SEDGWICK CMS, *Defendants***

**Adjudication Number: ADJ4528679 (OAK0333491); ADJ4398568 (FRE0238221)
Fresno District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Defendant Lowe's Companies, Inc. seeks reconsideration of the Findings and Order and Decision (F&O), issued by the workers' compensation arbitrator on February 14, 2020, wherein the arbitrator found, in pertinent part, that there is substantial medical evidence that applicant sustained cumulative trauma injury to the knees and made the following apportionment: 35% to preexisting degenerative joint disease aggravated by significant obesity; 30% to the work injury of January 5, 2002 with Savers Fuel Mart; 20% to cumulative trauma resulting from work activities with Lowe's; and 15% to the non-industrial fall at McDonald's.

Lowe's contends that the arbitrator erred in finding that CIGA is entitled to contribution. Lowe's also contends that the reports of the Agreed Medical Evaluator and the orthopaedic Panel Qualified Medical Examiner are not substantial medical evidence to support the F&O.

We received an answer from CIGA.¹ The arbitrator issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

¹ The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19). The March 16, 2020 DWC Newslines may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-18.html>. In light of the district offices' closure, the Appeals Board

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons discussed below, we will rescind the February 14, 2020 F&O, and return the matter to the trial level for further proceedings consistent with this decision.

BACKGROUND

We will briefly review the relevant facts.

Applicant claimed injury to various body parts, including her bilateral knees, while employed by defendant Savers Fuel Mart while working as a cashier/stock person on January 5, 2002 (ADJ4398568). Savers Fuel Mart was insured for workers' compensation benefits by Casualty Reciprocal Exchange at the time of injury. Casualty Reciprocal Exchange was placed into liquidation on August 18, 2004, which triggered CIGA's statutory obligations pursuant to the Insurance Code section 1063 et seq. and CIGA assumed responsibility for Casualty Reciprocal Exchange's claims.

Applicant also claimed industrial cumulative trauma to her bilateral knees while employed by defendant Lowe's as a sales representative during the period from September 7, 2001 to September 7, 2002 (ADJ4528679).

Applicant underwent medical-legal evaluations relative to both claims.

On January 9, 2007, CIGA filed an Application for Adjudication of Claim against Lowe's alleging injuries by way of cumulative trauma to the bilateral knees from repetitive activity from September 7, 2001 through September 7, 2002.

On April 3, 2007, Lowe's denied the claim.

On June 28, 2012, CIGA filed a petition for reimbursement, seeking reimbursement from Lowe's for all benefits paid to or on behalf of the applicant for those body parts for which it is joint and severally liable.

On July 6, 2012, Lowe's filed an objection and response to the petition for reimbursement.

issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (In re: COVID-19 State of Emergency En Banc (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc); the April 3, 2020 DWC Newslines regarding reopening the district offices for filing may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-29.html>.) The district offices reopened for filing on April 13, 2020.

Based on the foregoing, CIGA's answer was timely. However, to the extent that the answer was considered untimely, we accept the pleading pursuant to our authority. (Cal. Code Regs., tit. 8, § 10964.)

On October 31, 2016, CIGA filed an amended petition for reimbursement.

On December 4, 2019, the matter proceeded to arbitration, over CIGA's objection, on the sole issue of whether Lowe's owes CIGA reimbursement in case numbers ADJ4398568 and ADJ4528679. (F&O, pp. 1-2.)

On February 13, 2020, the arbitrator issued a Findings, Order, and Decision "based on a preponderance as well as range of arbitration medical and other evidence, relevant portions as referenced above." (F&O, p. 12.) The arbitrator listed the summary of evidence as follows: "[t]he evidence taken included statements by the representative for the parties, multiple briefs as well as the Exhibits which will be selectively referenced as required to support the basis of findings, decisions, orders and opinions below." (F&O, p. 3.) Per the F&O, stipulations, admissions, and issues were memorialized in a certified transcript of oral arguments. (F&O, p. 2.) Per the F&O, the arbitration transcript was served on the parties² by the certified court reporter. (F&O, p. 1.)

CIGA filed an answer on April 3, 2020.

DISCUSSION

As a preliminary matter, Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.³) However, "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 the Appeals Board had not acted on the petition within the statutory time limits of 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. (*Id.*, at 1108.) Like the Court in *Shiple*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shiple, supra*, at 1108.) Here, the Petition was timely filed on March 9, 2020. Our failure to act was due to a procedural error and our time to act on the Petition was tolled.

² The transcript is not marked as an exhibit and it is not readily identifiable in EAMS.

³ All further statutory references are to the Labor Code, unless otherwise noted.

Arbitrators generally have the same duties and responsibilities as workers' compensation administrative law judges. The arbitrator's decision "shall have the same force and effect as an award, order, or decision of a workers' compensation judge." (Lab. Code, § 5277(c).) Like a workers' compensation judge, an arbitrator is required to "make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313; see also *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Bd. en banc).)

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." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 (Appeals Bd. en banc) (*Hamilton*), emphasis added.) Moreover, an arbitrator's decision must be based on admitted evidence. (Lab. Code §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635-637 [35 Cal.Comp.Cases 16].)

The arbitrator is also required to prepare an opinion on decision, setting forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on. (Lab. Code § 5313; *Hamilton, supra*, at 476.) The purpose of this requirement is to enable "the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].) In *Hamilton*, we held that the record of proceeding must contain, at a minimum, "the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence." (*Hamilton, supra*, at 477; see Lab. Code, § 5313.) We also noted that "the Labor Code and the Board's rules contain explicit instructions concerning the contents of the record of a case. It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record." (*Hamilton, supra*, at 477.)

Here, the summary of evidence lacks a descriptive listing of the exhibits. The F&O summarizes the evidence as follows: “[t]he evidence taken included statements by the representative for the parties, multiple briefs as well as the Exhibits which will be selectively referenced as required to support the basis of findings, decisions, orders and opinions below.” (F&O, p. 3.) WCAB Rule 10787(c) requires a descriptive listing of all exhibits in evidence, as well as the identity of the party offering the same. (Cal. Code Regs. tit. 8, § 10787(c)(3).) The documents referenced in the arbitrator’s F&O by name were not formally admitted into evidence and, as such, they are not part of the record. Per the F&O, stipulations, admissions, and issues were memorialized in a certified transcript of oral arguments, which was served on the parties. (F&O, pp. 1-2.) However, no such transcript appears in the adjudication file in EAMS.

This matter proceeded to arbitration in December 2019. Effective January 1, 2020, WCAB Rule 10914 sets forth the requirement that the arbitrator make and maintain a record of the arbitration proceeding and describes the content of that record. (Cal. Code Regs., tit. 8, § 10914 (eff. Jan. 1, 2020).) Specifically, WCAB Rule 10914 sets forth the following requirements for arbitration proceedings:

- (a) The arbitrator shall make and maintain the record of the arbitration proceeding and shall file the record with the Appeals Board when required by this rule or rule 10940.
- (b) The parties shall provide the arbitrator with a copy of the Arbitration Submittal Form and the Order Appointing Arbitrator.
- (c) The record of arbitration proceedings shall include the following:
 - (1) Order Appointing Arbitrator;
 - (2) Notices of appearance of the parties involved in the arbitration;
 - (3) Minutes of the arbitration proceedings, identifying those present, the date of the proceeding, the disposition and those served with the minutes or the identification of the party designated to serve the minutes;
 - (4) Pleadings, petitions, objections, briefs and responses filed by the parties with the arbitrator;
 - (5) Exhibits filed by the parties;
 - (6) Stipulations and issues entered into by the parties;
 - (7) Arbitrator’s Summary of Evidence containing evidentiary rulings, a description of exhibits admitted into evidence, the identification of witnesses who testified and summary of witness testimony;
 - (8) Verbatim transcripts of witness testimony if witness testimony was taken under oath.
 - (9) Findings, orders, awards, decisions and opinions on decision made by the arbitrator; and

(10) Arbitrator's report on petition for reconsideration, removal or disqualification.

(d) The arbitrator shall file any finding, order or award together with the opinion on decision with the Appeals Board when it is served on the parties.

(Cal. Code Regs., tit. 8, § 10914, emphasis added.)

Lowe's Petition extensively references a transcript of applicant's testimony, taken January 4, 2005, but the transcript is not in the record. (Petition, pp. 2, 3, 9, 10, 16, 19, 20.) In the absence of an evidentiary record, we are unable to evaluate the basis of the arbitrator's F&O. Therefore, we must return this matter to the trial level for further proceedings. Because further proceedings will be conducted after January 1, 2020, the arbitrator and parties should consult WCAB Rules 10914 and 10995 for guidance on the requirements of an arbitration record and petitions for reconsideration from an arbitrator's decision. (Cal. Code Regs., tit. 8 §§10914, 10995.)

Accordingly, we rescind the February 14, 2020 F&O, and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the February 14, 2020 Findings and Order and Decision is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 25, 2022

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

**MARY ANN SUNSHINE MEDINA
BRADFORD & BARTHEL
YRULEGUI & ROBERTS**

JB/abs

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