

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

**CELSO GUTIERREZ, *Applicant***

**vs.**

**ALEX MOVING AND STORAGE and CLARENDON NATIONAL INSURANCE COMPANY, administered by ENSTAR (US) INC. dba ENSTAR ADMINISTRATORS; CIGA, by its servicing facility INTERCARE, for LEGION INSURANCE COMPANY in liquidation; IAT INSURANCE GROUP, administered by GALLAGHER BASSETT SERVICES, INC; AMERICAN HOME ASSURANCE, administered by AIG CLAIMS; VANLINER INSURANCE COMPANY, administered by LWP CLAIMS SOLUTIONS, INC., *Defendants***

**Adjudication Numbers: ADJ2199336 (AHM 0123310), ADJ1668427 (AHM 0123309), ADJ1023247 (AHM 0143677), ADJ1612175 (AHM 0123312), ADJ257991 (AHM 0143655)  
Anaheim District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

Applicant, acting in pro per, seeks reconsideration of the Findings Awards & Orders (F&A) issued by the WCJ on October 20, 2020, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that while employed by defendant as a driver/furniture mover, applicant: (1) sustained injury arising out of and occurring in the course of employment (AOE/COE) to his lumbar spine and psyche, during the period from October 9, 1999, through September 21, 2004, but did not sustain injury AOE/COE to his upper or lower extremities, and that the injury caused 21% permanent disability (ADJ2199336); (2) sustained injury AOE/COE to his lumbar spine and psyche, on October 8, 1999, but did not sustain injury AOE/COE to his upper or lower extremities, and that the injury caused 17% permanent disability (ADJ1668427); (3) sustained injury AOE/COE to his lumbar spine and psyche, on August 31, 2002, but did not sustain injury AOE/COE to his upper or lower extremities, and that the injury caused 6% permanent disability (ADJ257991); (4) sustained injury AOE/COE to his lumbar spine and psyche, on May 28, 2003, but did not sustain injury AOE/COE to his upper or lower extremities, and that the injury caused 6% permanent disability (ADJ1612175); and (5) sustained injury AOE/COE to his cervical spine, lumbar spine, and psyche, on July 1, 2003, but did not sustain injury AOE/COE to his upper

or lower extremities, and that the injury caused 13% permanent disability. The WCJ also found that applicant was in need of future medical treatment for his cervical and lumbar spine injuries but not for his psychiatric injuries. Pursuant to the parties' stipulation, the WCJ ordered that the cumulative injury claim in case number ADJ8228780 was dismissed with prejudice.

Applicant contends that in addition to his cervical and lumbar spine and psychiatric injuries, he sustained injury to his head, ears, teeth, shoulders, elbows, wrists, tailbone/coccyx, knees, ankles, lungs, liver, and prostate gland.<sup>1</sup>

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received Answers from defendants Clarendon National Insurance Company administered by Enstar Administrators, CIGA, administered by Intercare Insurance for Legion Insurance Company, in liquidation, and Vanliner Insurance Company, administered by LWP Claims Solutions, Inc.

We have considered the allegations in the Petition for Reconsideration (Petition) the Answers, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will deny reconsideration.

## **BACKGROUND**

Applicant claimed that while employed by defendant as a driver/furniture mover, he injured his back, lower extremities, nervous system, and psyche, during the period from October 9, 1999, through September 21, 2004 (ADJ2199336), that he injured his back, lower extremity and psyche, on October 8, 1999 (ADJ1668427), that he injured his cervical spine, psyche, and lower extremity on July 1, 2003 (ADJ1023247), that he injured his lumbar and cervical spine, psyche, and lower extremity, on May 28, 2003 (ADJ1612175), that he injured his lumbar spine, lower extremity, and psyche on August 31, 2002 (ADJ257991), and that he injured his back, shoulders, upper extremity and nervous system/psyche, during the period from October 8, 1999 through September 19, 2000 (ADJ8228780).<sup>2</sup>

On March 16, 2006, applicant was evaluated by orthopedic agreed medical examiner (AME) Stuart A. Green, M.D. (Board Exh. A, Dr. Green, March 16, 2006.) Dr. Green examined

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<sup>1</sup> Applicant also asserts that he was not paid for overtime, that he was "shot at during work hours" and that his attorneys "never filed the lawsuit against Alex Moving and Storage." (Petition, p. 3, paragraph 4 [last paragraph].) None of these assertions are issues that are subject to the jurisdiction of the Appeals Board and will not be addressed.

<sup>2</sup> The injury claim in case number ADJ8228780 was dismissed with prejudice. (F&A, see Joint Exh. 30.)

applicant, took a history, reviewed the medical record, and diagnosed applicant as having right lumbar herniated nucleus pulposus, cervical sprain, and lumbar sprain. (Board Exh. A, p. 17.) He concluded that, “The applicant is limited to substantial work, a disability halfway between a preclusion from heavy work and a limitation to light work.” (Board Exh. A, p. 19.)

Applicant was evaluated by defendant’s psychiatric qualified medical examiner (QME) Brain P. Jacks, M.D., on August 6, 2008. (Def. Exh. K, Dr. Jacks, August 6, 2008.) Dr. Jacks diagnosed applicant as having a Major Depressive Disorder and he determined that applicant’s industrial injuries were the predominate cause of his psychiatric injury. (Def. Exh. K, pp. 18 – 20.) Regarding future medical treatment, Dr. Jacks stated:

Mr. Gutierrez is not a very suitable candidate for psychiatric treatments. He is not naturally introspective nor is he psychologically minded. ... [A]t this time, no further psychiatric treatment is needed or indicated and the psychotherapy should be tapered and discontinued. If he is on any anti-anxiety and/or antidepressant medication, this should also be tapered down and discontinued now.  
(Def. Exh. K, p. 30.)

On November 10, 2009, AME Dr. Green re-evaluated applicant and requested that he be provided additional medical records. (Board Exh. E, Dr. Green, November 10, 2009.) Dr. Green again re-examined applicant on June 8, 2015. (Board Exh. O, Dr. Green, June 8, 2015.) He diagnosed right lumbar herniated nucleus pulposus, and cervical sprain, and stated that, “The work restriction imposed on [sic] the applicant's lumbar spine subsumes any potential work restriction the applicant's cervical spine since it is a general spinal work restriction.” (Board Exh. O, p. 26.) On a number of occasions, Dr. Green was provided additional medical records to review and in his supplemental reports he repeatedly noted that the review of the medical records did not change his previously stated opinions. (see e.g. Board Exh. F, Dr. Green, January 12, 2010; Board Exh. G, Dr. Green, September 26, 2011; Board Exh. P, Dr. Green, December 17, 2015.) The doctor also had his deposition taken three times. His testimony was consistent with his reports, and he did not change his opinions as to applicant’s injured body parts or permanent disability. (see Board Exhs. H, I, and J, Dr. Green, deposition transcripts.)

The parties proceeded to trial on August 18, 2014. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 18, 2014.) The matter was tried and continued for further development of the record at proceedings in 2014, 2015, 2018, and 2019. At the July 16, 2020

trial, the WCJ stated that, “The parties have stipulated that the cases are all to be rated using the old schedule [1997 permanent disability rating schedule] for all dates of injury...” (MOH/SOE, July 16, 2020, p. 3; Joint Exh. 30, p. 2.) The parties also stipulated to apportionment based on the opinions of treating psychologist Dabney Blankenship, Ph.D. and AME Dr. Green. (Joint Exh. 30, [EAMS pp. 6 – 10], proposed ratings.) The matter was submitted for decision after the WCJ received ratings from the Disability Evaluation Unit.

## DISCUSSION

As a preliminary matter, applicant’s Petition for Reconsideration is timely. Applicant filed the Petition on November 13, 2020. However, the Petition did not come to the attention of the Appeals Board until January 22, 2021. Applicant’s Petition was not timely acted upon by the Appeals Board, which has 60 days from the filing of a petition for reconsideration to act on that petition. (Lab. Code, § 5909.) Here, however, through no fault of applicant, the timely-filed Petition did not come to the attention of the Appeals Board until after the expiration of the statutory time period. Consistent with fundamental principles of due process, and in keeping with common sensibilities, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a petition for reconsideration begins no earlier than the Appeals Board’s actual notice of the Petition, which occurred on January 22, 2021. (See *Shipley v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107-1108 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers’ Comp. Appeals Bd. (Felis)* (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622].)

We first note that, as stated by the WCJ in her Report, the proof of service attached to applicant’s Petition was prepared by the DWC secretary Angela Morales when she served the F&A. There is no proof of service indicating that the Petition was properly served on the parties. Pursuant to Appeals Board Rule 10940:

(c) Every petition and answer shall be verified upon oath in the manner required for verified pleadings in courts of record. A verification and a proof of service shall be attached to each petition and answer. Failure to file a proof of service shall constitute valid ground for dismissing the petition.  
(Cal. Code Regs., tit. 8, § 10940.)

Also, the Petition was filed by applicant acting in pro per. Our review of all six of the EAMS ADJ files indicates that applicant has not filed a Notice of Dismissal of Counsel nor a Substitution of

Attorney. In the Petition applicant notes that, "... due to the passing of Attorney Joel Tomas, the Law Firm of DiMarco Araujo & [sic] Montevideo has assigned attorney Lupe Morales to my case." (Petition, p. 2.) Based thereon (and on the Official Address Record), it appears that applicant is still represented by the Law Offices of DiMarco Araujo & Montevideo and cannot properly file a Petition acting in pro per. (Code Civ. Proc. §§ 284 and 285.) These could both be grounds for dismissing the Petition, but under the circumstances of this matter, we have decided it is appropriate to address the issues raised by applicant's Petition.

As noted earlier, Dr. Green examined applicant in the capacity of an AME. "[W]orkers' compensation law favors agreed medical examiners in resolving medical disputes fairly and expeditiously." (*Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1444 [70 Cal.Comp.Cases 294].) The AME was presumably chosen by the parties because of his expertise and neutrality. Therefore, an agreed medical evaluator's opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive. (*Power v Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

It is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (See *Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 372, [35 Cal.Comp.Cases 525].) To be substantial evidence a medical opinion must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Based on our review of the reports from Dr. Green it is clear that he examined applicant on three occasions, that he reviewed the extensive medical record, and he explained in detail the basis for his opinions and conclusions. Thus we see no reason to find his opinions unpersuasive. His reports, and his opinions stated therein, constitute substantial evidence.

In explaining the basis for her decision, the WCJ stated that:

Dr. Green has found no injury to applicant's shoulders, knees, head, prostate, ulcers, or any additional parts of the body. ... Other than the alleged lower extremity injury and the shoulder injury raised during the applicant's testimony at his first trial, none of the additional parts of the body were alleged as industrial injuries all these years.  
(Report, p. 4.)

Again, having reviewed the trial record and all six of the EAMS ADJ files, we agree with the WCJ that none of the body parts applicant argues about in the Petition were alleged in any of his injury claims.

Finally, regarding the psychiatric injuries, the WCJ stated:

The parties have stipulated to applicant's psychiatric injury. No additional medical treatment was awarded because Dr. Jacks found the applicant lacked the insight necessary to benefit from psychiatric treatment.  
(Report, p. 5.)

As quoted above, Dr. Jacks explained the basis for his opinion that applicant would not benefit from additional psychiatric/psychological treatment and that the medication should be "tapered down and discontinued now." (Def. Exh. K, p. 30.) Dr. Jacks' report is substantial evidence and thus is an appropriate basis for the WCJ's decision that applicant would not be awarded future psychiatric treatment.

Accordingly, we see no reason to disturb the WCJ's F&A and we deny reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings Awards & Orders issued by the WCJ on October 20, 2020, is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

I CONCUR,

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ DEIDRA E. LOWE, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**March 9, 2021**

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

**CELSO GUTIERREZ  
WALL, MCCORMICK & BAROLDI  
LAW OFFICES OF JAMES T. WELLS & ASSOCIATES  
HANNA BROPHY MACLEAN, MCALEER & JENSEN  
SKEBBA, ISSAC, & BISHOP  
GUILFORD, SARVAS & CARBONARA  
DIMARCO ARAUJO**

**TLH/pc**

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