

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

ANDREW GLICK, *Applicant*

vs.

**KNIGHT-SWIFT TRANSPORTATION HOLDINGS, INC.,
PERMISSIBLY SELF-INSURED, *Defendants***

**Adjudication Number: ADJ11799924
Van Nuys District Office**

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration.¹ Having completed our review, we now issue our Decision After Reconsideration.

Defendant seeks reconsideration of the December 17, 2020 Findings, Award and Order (F&A) wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a truck driver on November 26, 2018, sustained industrial injury to his left knee, lumbar spine, neurological, and ophthalmology/vision/eye. The WCJ found that applicant's injury was caused by a high velocity impact, entitling him to up to 240 compensable weeks within a period of five years from the date of the injury.

Defendant contends that applicant's injury was not a "high-velocity eye injury" as contemplated by Labor Code section 4656(c)(3)(F).²

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

¹ Commissioner Lowe, who was on the panel that granted reconsideration in this case, is no longer a member of the Workers' Compensation Appeals Board. Commissioner Dodd has been substituted in her place.

² All further statutory references are to the Labor Code unless otherwise stated.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&A.

FACTS

Applicant claimed injury to his left knee, lumbar spine, neurological system, and “ophthalmology/vision/eye,” while employed as a truck driver by defendant Knight-Swift Transportation Holdings, Inc., on November 26, 2018.

Applicant was struck by a motor vehicle while crossing the street. (Ex. 1, Police Report, dated November 26, 2018.) The vehicle was traveling at approximately 30 miles per hour at the time of impact, and applicant was thrown approximately 10 feet, landing on the ground on his left side. (Joint Ex. 2, report of Mechel M. Henry, M.D., dated June 9, 2020, p. 2.) Applicant was knocked unconscious, and was transported by ambulance to Riverside Community Hospital, where he was diagnosed as having sustained a fractured left tibia, left fibula, left femur, right scapula, right clavicle, right and left temporal bones, L1 vertebrae, L2 vertebrae, L3 vertebrae, L4 vertebrae, and a left “brain bleed.” (Ex. 1, Police Report, dated November 26, 2018, p. 8.)

On June 9, 2020, physiatrist Mechel M. Henry, M.D., evaluated applicant as the Qualified Medical Evaluator (QME) in Physical Medicine and Rehabilitation. Dr. Henry noted applicant’s “number one problem” was vision difficulty:

[Applicant] has been trying to get some prism glasses. He always has this problem. It is made worse with any kind of stress, reading, forward activities, looking at a computer, better with prism glasses and some treatment which is still pending. The eye problems do not cause him pain per se, but it makes it difficult for him to ambulate and navigate spaces. He was told he has nerve damage behind the right eye, so if he drives or does activities requiring any kind of balance or proprioception, he closes the right eye and only uses the left. He does not have an eye patch currently. He was wearing a patch for some time and he never had surgery. (Joint Ex. 2, report of Mechel M. Henry, M.D., dated June 9, 2020, p. 27.)

Dr. Henry further noted applicant’s complaints of difficulty with attention and concentration, and a near constant headache, devolving into a migraine headache on a daily basis. (*Ibid.*) Applicant also complained of right shoulder and left knee pain. Following a clinical examination and record review, Dr. Henry identified eighteen diagnoses, including postconcussive syndrome with right-sided headaches and visual disturbance, nystagmus, decreased balance, and

antalgic gait, fracture of the bilateral temporal bones, and right-sided subarachnoid hemorrhage with right 6th nerve palsy and possible partial complex seizures. (*Id.* at p. 41.) Applicant remained temporarily totally disabled (TTD).

On August 17, 2020, David A. Sami, M.D., evaluated applicant as the QME in ophthalmology, and noted a history of right hemisphere subarachnoid hemorrhage and fracture of the right temporal bone (extending to the external auditory canal with blood in the right middle ear) and fracture of the left temporal bone (extending to the left external auditory canal with blood in the left middle ear). (Joint Ex. 1, report of David A. Sami, M.D., dated August 17, 2020, at p. 5.) Applicant complained of post-concussive symptoms, including double vision. (*Ibid.*) Following a review of the submitted medical record and a clinical examination, Dr. Sami diagnosed post-concussive syndrome, associated with chronic headaches, light sensitivity, short term memory difficulty and sleep difficulty, as well as a right post-traumatic 4th nerve palsy. (*Id.* at p. 9.) Dr. Sami also indicated applicant was not yet permanent and stationary, and required a strabismus (eye muscle) surgery to address superior oblique palsy, because “[t]he function of the 4th nerve cannot be restored, however the antagonist, (the inferior oblique muscle) may be weakened to reestablish some of the balance.” (*Id.* at p. 10.)

On November 11, 2020, Valerie Quan, M.D., evaluated applicant’s complaints of diplopia in both eyes. (Ex. 2, Report of Valerie Quan, M.D., dated November 11, 2020, at p. 1.) Following her examination of applicant, Dr. Quan diagnosed diplopia symptoms at distance and near, convergence insufficiency, and right hypertropia, as well as acquired strabismus related to trauma, with minimal suppression. (*Ibid.*)

On December 17, 2020, the parties proceeded to Expedited Hearing and framed the issue of whether applicant was entitled to “temporary disability continuing from the last date paid of approximately 11/24/20 and continuing, pursuant to the applicability of Labor Code § 4656 (c)(3)(F).” The parties submitted the matter for decision on the documentary record. (Minutes of Hearing, dated December 17, 2020.)

On December 21, 2020, the WCJ issued his F&A, finding in relevant part that applicant sustained injury to the “ophthalmology/vision/eye,” caused by a “high velocity impact,” resulting in “temporary total disability for which defendant has paid 104 weeks and which said benefit is ongoing.” (F&A, Findings of Fact Nos. 1 and 2.) The WCJ found defendant liable for ongoing temporary total disability pursuant to Labor Code section 4656(c)(3)(F).

On January 14, 2021, defendant filed its Petition for Reconsideration (Petition), contending that the “plain language or common meaning” of the term “high-velocity eye injuries,” as set forth in Labor Code section 4656(c)(3)(F) refers to “at least some impact of the eye.” (Petition, at 5:1.)

On January 20, 2021, the WCJ filed his Report, observing that the statutory requirements were met because applicant sustained a high velocity impact to his person, which was the direct cause of both a concussion and a resulting eye injury. (Report, at p. 3.)

On January 29, 2021, applicant filed his Answer, averring defendant’s “construction of the statutory language...is both too narrow and too rigid...because cases involving high velocity eye injuries are naturally fact-intensive.” (Answer to Petition for Reconsideration (Answer), dated January 29, 2021, at 3:9.) Applicant avers “the plain wording of the exception is high velocity eye injuries; not high velocity injuries to the eyes.” (*Id.* at 3:13.)

DISCUSSION

A petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that “it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice...” (*Shipley v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied the applicant’s petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code 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. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the WCJ issued the F&A on December 21, 2020 and defendant filed a timely petition on January 14, 2021. Thereafter, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties. Therefore, considering that defendant filed a timely petition and that the Appeals Board’s failure to act on that petition was in error, we find that our time to act on defendant’s petition was tolled.

Temporary disability is defined as incapacity to work that is reasonably expected to be improved with medical treatment. (*Chavira v. Workers’ Comp. Appeals Bd.* (1991) 235

Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631].) Temporary disability indemnity is intended primarily to substitute for the worker's lost wages, in order to maintain a steady stream of income. (*Ibid.*)

Labor Code section 4656, subd. (c), provides:

(c)

(1) Aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payment.

(2) Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury.

(3) Notwithstanding paragraphs (1) and (2), for an employee who suffers from the following injuries or conditions, aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 240 compensable weeks within a period of five years from the date of the injury:

- (A) Acute and chronic hepatitis B.
- (B) Acute and chronic hepatitis C.
- (C) Amputations.
- (D) Severe burns.
- (E) Human immunodeficiency virus (HIV).
- (F) High-velocity eye injuries.
- (G) Chemical burns to the eyes.
- (H) Pulmonary fibrosis.
- (I) Chronic lung disease.

Here, defendant has paid 104 weeks of temporary disability. (Opinion on Decision, p. 1; see also, Petition, at 2:5; Answer, at 7:20.) However, QME Dr. Henry has determined that applicant remains temporarily totally disabled pending additional medical treatment. (Opinion on Decision,

p. 1; Joint Ex. 2, report of Mechel M. Henry, M.D., dated June 9, 2020, p. 41; see also Ex. 2, Report of Valerie Quan, M.D., dated November 11, 2020, at p. 2.)

Applicant asserts he has sustained a “high-velocity eye injury” as contemplated by section 4656(c)(3)(F), such that he is entitled to temporary disability for up to 240 compensable weeks within five years of the date of injury. The WCJ agrees, observing:

While a plain reading of the statute may at first glance lead one to the conclusion that the exception pertains to a direct injury to the eye from coming in contact with an object traveling at high velocity, it is not clearly established that the high velocity impact need be direct to the eye or whether the eye injury is simply a result of high velocity impact.

Here, there is no doubt applicant was a pedestrian struck by a motor vehicle traveling at 30 mph launching him 10 feet, leaving him unconscious. Thus, applicant’s injury was a result of a high velocity impact resulting in injury to his eye which is not yet mmi and necessitates surgery. Labor Code §3202 provides for liberal construction of statutes within the division for the purpose of extending benefits for the protection of injured workers in the course of employment. No authority directing to the contrary, the determination regarding the exceptions must be done on a case-by-case basis. Here, pursuant to the foregoing, it is found the high velocity impact to applicant’s person was the direct cause of the concussion and resulting eye injury and is thereby under the umbrella of the §4656(c)(3)(F) exception to the 104 week cap on temporary total disability. (Opinion on Decision, at p. 2.)

Defendant’s Petition contends that the WCJ’s interpretation of section 4656(c)(3)(F) is inconsistent with legislative intent to limit compensable temporary disability to 104 weeks. (Petition, at 6:8.) Defendant cites our decision in *Cruz v. Mercedes-Benz of San Francisco* (2007) 72 Cal. Comp. Cases 1281 [2007 Cal. Wrk. Comp. LEXIS 247] (Appeals Bd. en banc), where we determined that “amputations,” as used in section 4656(c)(2)(C) meant severance or removal of limb, part of limb, or other body appendage, and that a back surgery including anterior L5-S1 discectomy, partial L5-S1 vertebrectomy, L5-S1 fusion with graft from left iliac crest bone, bilateral L4-L5 laminotomy, and decompression of L5 nerve roots bilaterally was not an amputation pursuant to section 4656(c)(2)(C). Defendant notes that in *Cruz, supra*, we applied a “common sense and ordinary meaning” to the term “amputation,” and that a similar analysis of section 4656(c)(2)(F) requires there be “some impact to the eye.” (Petition, at 5:11.)

Defendant asserts:

Had the Legislature wished to include high velocity impact to the person, it could have included that in the exceptions. Instead, the Legislature specifically identified impact to the eye. It did not intend for the exception to apply to any high-velocity impact. The language is specific. (Petition, at 6:12.)

Applicant's answer responds that the analysis required in applying the exceptions to the 104 week cap on temporary disability found in section 4656(c)(2) is "naturally fact intensive." (Answer, at 10:25.) Applicant further contends that "high velocity eye injuries do not encompass just injuries to the eyeballs." (*Id.* at 10:25.) In support of this contention, applicant cites to *Glover v. ACCU Construction* (June 15, 2009, ADJ665716 (BAK 0154393) [2009 Cal. Wrk. Comp. P.D. LEXIS 301] (*Glover*). In *Glover*, applicant was operating a mulching mower when he was struck by a metal fragment that entered his nostril, lacerating the nose and fracturing the eye socket before traveling through the brain and lodging in the back of the skull. (*Glover, supra*, at pp. 27-28.) Defendant therein argued that "because the eyeball was not struck[,] the consequences of the injury were the consequences of damage to Applicant's brain rather than damage to his eye," and that applicant had not sustained a "high-velocity eye injury" as contemplated by section 4656(c)(2)(F). (*Id.* at 41.) The WCJ nevertheless considered the injury as falling under the rubric of section 4656(c)(2), and following defendant's Petition for Reconsideration, we agreed:

We are not persuaded that "eye" should be defined so narrowly, yet we need not delineate the outer limits of our definition at this time. We have examined applicant's medical records and find ample evidence of injury to and treatment of the right eye. The nursing and physician emergency records both contain diagrams indicating eye injury. That this eye injury may have been overshadowed by the damage caused as the metal fragment continued its path through applicant's brain does not negate the existence of his eye injury. Defendant selectively cites descriptions of applicant's injury which do not include discussions of the eye, or which mention the undamaged structures and functions of the eye. Defendant ignores those parts of the record that show laceration, repair, medication, and other treatment, with respect to the eye. We agree with the WCJ's determination that applicant did sustain a high-velocity eye injury, and with the reasons explained in his Report. (*Glover, supra*, at pp. 10-11.)

Thus, although the initial medical reports in *Glover* did not identify injury to the *organ* of the eye, we were persuaded that the evidence of subsequent medical treatment to the eye was sufficient to establish an "eye injury."

Here, the facts support a similar analysis. Applicant was struck by a vehicle estimated to be traveling at 30 miles per hour. (Joint Ex. 2, report of Mechel M. Henry, M.D., dated June 9, 2020, p. 2.) Applicant was struck with such force that he was bodily thrown some ten feet. (*Ibid.*) Applicant then struck the ground with sufficient force to fracture both right and left temporal bones, sustaining a subarachnoid hematoma, and subsequently developing diplopia, strabismus, and “post-traumatic 4th nerve palsy as a result of concussive injury.” (Joint Ex. 1, report of David A. Sami, M.D., dated August 17, 2020, at pp. 9-10.) Applicant’s ongoing complaints of double vision and strabismus have resulted in multiple ophthalmologic consultations and treatment. Both Dr. Quan and Dr. Sami recommend consultation with a “strabismus surgeon” for surgery to help “reduce the ocular misalignment,” to “reestablish some balance” between applicant’s right and left eyes. (*Ibid.*; *see also* Ex. 2, Report of Valerie Quan, M.D., dated November 11, 2020, at p. 2.) We are thus persuaded that applicant’s significant and documented complaints of altered vision, strabismus, and eye pain and discomfort support the WCJ’s determination that applicant sustained an eye injury as a result of his industrial injury generally.

Defendant contends the legislature used “specific” language to require an “impact” to of a high-velocity object with the eye, rather than an impact to the person. (*Id.* at 6:13.) Defendant contends that “while the term ‘velocity’ may raise issues as to what is high velocity or not, the adjective itself in any meaning describes at least some impact to the eye.” (*Id.* at 5:4.) However, we note that “velocity” is defined in the Merriam-Webster dictionary as “quickness of motion, rapidity of movement or the speed imparted to something” or “the rate of occurrence or action, (b) rate of turnover.”³ The requirement of a concomitant impact is neither integral nor even contemplated in the definition of velocity. We also note that neither the terms “impact” nor “object” are found in the statute. Additionally, section 3208.1 defines a specific injury as “the result of one incident or exposure which causes disability or need for medical treatment.” (Lab. Code § 3208.1.) We observe that applicant’s industrial injury directly compromised applicant’s vision, resulting in the need for a surgical repair to the muscles of the eye to correct for the alignment of the eyes and to address applicant’s diplopia.

Based on the above analysis, which is limited to the facts of this case, we are persuaded that the WCJ appropriately exercised his discretion to find that applicant sustained a high-velocity eye injury, and that the provision of up to 240 weeks of temporary disability is available to

³ Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/velocity>.

applicant pursuant to section 4656(c)(2)(F). We decline to disturb the WCJ's decision, accordingly.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the December 17, 2020 Findings, Award, and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 2, 2022

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

**ANDREW GLICK
LAW OFFICES OF SEF KRELL
GODFREY, GODFREY, LAMB & ORTEGA**

SAR/abs

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