

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

MARCIA McCREA, *Applicant*

vs.

**ADELANTO ELEMENTARY SCHOOL DISTRICT, permissibly self-insured member of
CSRMA JPA, administered by YORK RISK SERVICES GROUP, a SEDGWICK
COMPANY, *Defendants***

**Adjudication Number: ADJ12385071
Anaheim 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 except as to the discussion of a possible windfall to applicant at p. 4, and for the reasons below, we will deny reconsideration.

Applicant agreed to dismiss her claim for cumulative trauma injury based on the reporting of QME Dr. Georgis, dated June 25, 2020, which did not identify a cumulative trauma injury. (Stipulation and Order, dated December 1, 2020.) The Report and Recommendation on Petition for Reconsideration (Report) noted that the stipulation to dismiss this case was filed prior to the issuance of Dr. Georgis' October 26, 2020 report, where he attributed causation to the cumulative trauma claim for the first time. (Report, p. 2.) Accordingly, we agree with the WCJ that the subsequent change in opinion of the QME constitutes good cause to reopen the claim. (Cal. Lab. Code § 5803.)

Additionally, we note that on March 26, 2021, defense counsel submitted a request for supplemental reporting to QME Dr. Georgis, requesting he further address his causation analysis regarding the claimed cumulative trauma injury of January 9, 2009 through July 19, 2019. In a report dated March 31, 2021, Dr. Georgis affirmed his prior opinion that applicant had sustained

cumulative injury, explaining that a review of new diagnostic testing contributed to his change in opinion. (Ex. 1, report of QME Theodore Georgis, M.D., dated March 31, 2021, p. 2.) Thus, the QME identified a cumulative trauma injury for the first time on October 26, 2020, and explicated his reasoning and affirmed his findings in a report of March 31, 2021, followed by applicant's July 28, 2021 petition to vacate the order of dismissal. On this record, we agree with the WCJ that defendant's assertion of a lack of due diligence does not overcome the good cause established by the intervening change in the QME's opinion. (Report, at p. 3.)

We write to clarify the assertion in the Report that "applicant's percentage of permanent disability does not change; what changed was the apportionment of the disability to the CT claim." (Report, at p. 4.) The record suggests that the AESD may have entered into different insurance and self-insurance arrangements as of the dates of the specific injury of December 13, 2016 and the instant claimed cumulative trauma. (See March 24, 2022 Minutes of Hearing, at 2:21.) Thus, the attribution of compensable permanent disability in the cumulative trauma claim may result in liability for a different entity from applicant's specific injury. However, we note that the *possibility* of an overlapping award would not preclude applicant from seeking to reopen her claim, or the appropriate exercise of WCAB jurisdiction over the claimed injury. We also observe that once the WCJ issues a decision in this matter, any party aggrieved thereby may seek reconsideration. (Lab. Code §§ 5900; 5903.)

Here, applicant agreed to a dismissal of her claim without prejudice, and we agree with the WCJ that the subsequent change in opinion of the QME on October 26, 2020 and the supplemental reporting of March 31, 2021, establishes good cause to reopen the case. (Lab. Code § 5803.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

MARGUERITE SWEENEY, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 29, 2022

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

**MARCIA McCREA
TOUS LAW GROUP
FLOYD, SKEREN, MANUKIAN & LANGEVIN
O' CONNOR TELEZINSKI**

SAR/abs

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

**REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE
ON PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

On approximately 7/22/19, Applicant filed an Application for Adjudication of Claim for an alleged cumulative trauma injury 1/9/09 to 7/19/19 to the back, nervous system, and other body systems. Applicant also filed an Application for Adjudication of Claim for a specific injury on 6/25/19 to her back (ADJ12312407).

Defendant, Adelanto Elementary School District, filed a timely and verified Petition for Reconsideration under Labor Code §5903 following the undersigned judge's Order Reopening Applicant's claim. At the time of preparing this Report and Recommendation on Reconsideration, Applicant had not filed an answer thereto. Defendant contends that the undersigned WCJ erred in reopening the case because Applicant failed to timely file her petition to vacate, failed to show good cause to support the petition to vacate, and Applicant would obtain a windfall if the order dismissing is set aside.

**II.
STATEMENT OF FACTS**

Applicant filed two claims; one specific and one cumulative trauma. Parties used Dr. Georgis as a Panel QME. In his report, Dr. Georgis found Applicant's cervical spine disability was 75% due to the specific injury and the remainder was due to the natural progression of the Applicant's underlying degenerative disease. Dr. Georgis deferred his opinion on causation regarding the cumulative trauma. Applicant's Exhibit 1 dated 6/25/2020.

In late September 2020, Applicant executed a Stipulation to dismiss her cumulative trauma claim without prejudice. Defendant's Exhibit A. The signed Stipulation was submitted to the court on 10/12/2020. Stipulation and Award and/or Order, EAMS Doc. ID 34111341. The court did not act on the Stipulation immediately because it did not create a task for the undersigned judge. The Stipulation was finally signed on 12/1/2020. Stipulation and Order EAMS Doc ID 73568864.

After the signed Stipulation by the Applicant, Dr. Georgis issued a supplemental report. After reviewing additional diagnostic studies, Dr. Georgis opined that 10% of Applicant's

disability to the cervical spine was due to the cumulative trauma. Applicant's Exhibit 1 dated 10/26/2020. Based upon this report, Applicant filed a Petition to Vacate the Order Dismissing the Case. Petition to Vacate Order, EAMS Doc ID 37627989. Defendant filed an Objection to the Petition on or around 11/16/21. On the same day, parties set the issue for trial.

The court found because parties stipulated to dismiss the claim without prejudice, there was no adjudication on the merits, the Petition to Vacate was granted and Applicant's claim was reopened. It is from this Findings & order that Defendant Petitions for Reconsideration under Labor Code §5903.

III. DISCUSSION

As to defendant's assertion that Applicant filed to timely file her petition to vacate, the court offers the following:

Applicant cites to Cal. Code of Reg. §10850 in order to argue that Applicant's petition was not timely. Cal. Code of Reg. §10850(a) states "Order of dismissal of Applications for Adjudication of Claim shall issue forthwith upon request by the employee under there is good cause to not issue an order." Upon notification by the parties that a Stipulation was filed to dismiss the claim, the undersigned judge issued the order. A Notice of Intention was not necessary since the Applicant stipulated to the dismissal hence an objection to a notice of intention was also not necessary.

Defendant further argues that Applicant did not file her Petition to Vacate until 7 months later, which was not a reasonable amount of time. A dismissal without prejudice leaves a case as if no application had been filed, therefore, an Applicant may reopen a dismissed claim as long as the petition is filed within five years of the date of injury. Associated Indemnity Co. v. WCAB (Jacobowitz) (1969) 34 CCC 70 (writ denied). An Applicant may also be able to reopen a claim for good cause under Labor Code §5803. At the time, Applicant entered into the Stipulation she was not aware she had any disability due to her cumulative trauma injury.

As to defendant's assertion that Applicant failed to show good cause to support her petition to vacate, the court offers the following:

As stated above, Applicant entered into the Stipulation prior to the supplemental report of Dr. Georgis finding disability due to the cumulative trauma claim. Defendant continues to assert

that because Applicant filed the Petition to Vacate seven months after the Order Dismissing this somehow negates good cause. At the time Applicant signed the stipulation and submitted the fully executed Stipulation, parties were not in possession and had no knowledge that Dr. Georgis would find disability due to the CT claim. It was not until after the fully executed Stipulation was submitted to the court, did Applicant discover this. Therefore, based upon the evidence submitted to the court, it was newly discovered and there was good cause to reopen the claim.

As to defendant's assertion that Applicant will obtain a windfall if the order of dismissal is set aside, the court offers the following:

Defendant has failed to show how Applicant would obtain a windfall. Applicant's percentage of permanent disability does not change; what changed was the apportionment of disability to the CT claim.

IV. RECOMMENDATION

It is the undersigned's recommendation that Defendant's Petition for Reconsideration be denied and the WCAB uphold and affirm the Findings & Order of the undersigned judge dated 5/5/22.

DATE: June 8, 2022

Katharine Holmes
Workers' Compensation
Administrative Law Judge