

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

JONATHAN FLUITT, *Applicant*

vs.

**CITY OF FONTANA, COLTON POLICE DEPARTMENT;
ADMINSURE ONTARIO, JT2INTEGRATED OAKLAND,
*Defendants***

**Adjudication Numbers: ADJ14657845-MF; ADJ16699214
Santa Ana 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, in part, we will deny reconsideration.

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/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 8, 2023

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

**JONATHAN FLUITT
MIX NAMANNY
LISTER MARTIN**

LN/pm

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

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

The [defendant] has filed a timely, verified Petition for Reconsideration (“petition”), seeking reconsideration of this court’s Findings of Fact and Joint Findings and Award dated 3/2/2023 upon grounds that:

1. The evidence does not justify the findings of fact.
2. The findings of fact do not support the Judge’s Order.

Petitioner seeks reconsideration only of the trial Judge’s exclusion of two exhibits (Exhibits D and E). It is recommended that the Petition for Reconsideration be denied.

In case ADJ14657845-MF the injured worker alleges cumulative traumatic injury over the period 7/16/07-9/28/2011 and in case ADJ16699214 alleges a specific injury occurring 7/18/09. Although the Petition for Reconsideration bears both case numbers, Petitioner challenges the ruling only as it relates to excluding exhibits D and E in case ADJ16699214 (the claim of specific injury occurring 7/18/09).

Petitioner specifies the “...only aspect of the Defendant’s arguments has to do with the Judge’s determination to disallow two Exhibits that were offered following the consolidation of the Specific Injury claim with the Continuous Trauma Claim at the time of the Trial in December of 2022...” (Petition, page 3:3-7.) Petitioner seeks only “...that the order of the Honorable Judge Halprin to exclude the Exhibits be rescinded and that those documents be added to the Exhibits on the part of the Specific Injury claim...” (Petition, page 4:17-21.)

I. INTRODUCTION

Applicant Jonathan Fluitt (“Fluitt”) was employed as a sworn police officer during the period 7/16/2007-9/28/2011. Fluitt was employed by the City of Colton from 7/16/2007-4/14/2011 and thereafter by the City of Fontana 4/16/2011-9/28/2011. Fluitt alleges two distinct injuries. The first, case ADJ14657845-MF is a claim of cumulative traumatic injury over the period 7/16/07-9/28/2011, filed 5/19/2021. The second, case ADJ16699214 is a claim of specific injury occurring 7/18/09 filed 9/16/2022. (Application for Adjudication of Claim dated 9/16/2022, EAMS Doc ID #43105932.)

Defense counsel Lister, Martin & Thompson LLP (“Lister Martin”) entered its appearance on behalf of the City of Colton and provided notice thereof dated 6/18/2021. (Notice of Representation, EAMS Doc ID # 37129753).

Shortly after filing its notice of representation, Lister Martin filed its Petition For Dismissal dated 10/8/2021 seeking dismissal of the Application For Adjudication Of Claim in case ADJ14657845 (the allegation of cumulative traumatic injury). The basis for relief sought in the petition was defendant's contention that applicant had failed to timely file within cited limitations periods. (Petition for Dismissal of Application for Adjudication of Claim dated 10/8/2021, EAMS Doc ID #38554228.)

Fluitt's claims of injury relating to his period of employment with the City of Fontana were resolved by Compromise and Release. Fluitt proceeded to trial only against the City of Colton over two days, 12/8/2022 and 1/26/2023.

On the first day of trial, the parties presented to the court their joint Amended Pre-Trial Conference Statement ("PTCS") bearing both case numbers, filed the day before trial. (Joint Amended Pre-Trial Conference Statement dated 12/7/2022, EAMS Doc ID #44189923.) On the PTCS, defendant did not list either Exhibit D or Exhibit E as proposed defense exhibits in either case.

On the first day of trial, the parties jointly urged consolidation of the two cases for judicial and litigant economy. The parties were in agreement that the preeminent and fulcrum issue common to both cases was whether statutes of limitation acted to bar the actions. The parties urged and stipulated that both cases involved common parties as well as common issues of fact and law, and waived Petition for and Notice of Consolidation. (MOH/SOE 12/8/2022, page 3:9-14.) Consolidation was ordered, and the parties proceeded on both cases.

Seeking reconsideration, Petitioner notes that "...a couple of days before the [trial] date, Applicant's counsel had added on the ADJ number for the Specific Injury case to the Pre-Trial Conference Statement. Defendant's Counsel was out of the office prior to the Trial date, there was a telephone conference prior to the Trial with the Judge, and the Trial would be Virtual. When the Trial commenced, Applicant's Counsel and the Judge discussed the consolidation of the Specific Injury case with the Continuous Trauma case, and while Defense Counsel was contemplating an objection to that, the matter had been continued so many times, that it seemed to be a burden on the court and the parties, so that was conceded..." (Petition, page 3:27-page 4:8.)

If defense counsel was contemplating an objection to consolidation, it was limited to silent personal contemplation only. Defense and applicant counsel jointly urged, sought and stipulated on the record to consolidation. On the first day of trial 12/8/2022, the Order of Consolidation was recited in pertinent part as follows:

“...it is ordered that Case Nos. ADJ14657845 and ADJ16699214 be consolidated for hearing, with the evidence in one to be received in the other insofar as is relevant and material...” (Order of Consolidation, MOH/SOE 12/8/2022, page 2:10-13.)

The parties waived notice of trial as to the specific claim of injury, requesting the court proceed on both cases. (MOH/SOE 12/8/2022, page 4:10-15.)

Seeking reconsideration, Petitioner contends that “...As the trial proceeded with the testimony of the applicant, Defense Counsel opened the file of the Specific Injury case and reviewed documents that had been furnished by Tristar relevant to that injury in 2009, and two letters that had been sent to the Applicant in 2010 were included, explaining what his rights were and the limitations that would be in place regarding his claims of injury...” (Petition, page 4:8-12.)

Otherwise stated, while perusing his litigation file during the first day of trial, defense counsel happened onto two letters in his file (Exhibits D and E) bearing upon the Statute of Limitations issue. This discovery was fortuitous but belated, as applicant’s counsel had for many months been demanding production of such documents.

By way of example, “...On or about May 20, 2021, Defendants were served with Applicant’s request for production of documents...” (Objection to Declaration of Readiness to Proceed dated 5/11/2022; page 3:8-19, EAMS Doc ID #42904787.)

On May 11, 2022, applicant’s counsel filed pleadings contending that “discovery has been intentionally withheld.” (Objection to Declaration of Readiness to Proceed dated 5/11/2022, page 1, EAMS Doc ID #42904787.)

There is no explanation offered as to why Exhibits D and E had not earlier been produced by defendants or their counsel in the cumulative trauma claim, nor why they could not with diligence have been discovered.

Seeking reconsideration Petitioner contends that “...at the conclusion of the day’s testimony, [defense counsel] requested that the two letters be added to the Exhibits for the defendant...” (Petition, Page 4:13-16.) Petitioner seems to contend the two letters (exhibit D and E) were discovered by defense counsel and offered at the end of the first trial day. The trial record of the first day 12/8/2022, however, reflects otherwise.

Only one of the two letters being offered, specifically Exhibit D was offered at the end of the first trial day. (MOH/SOE 12/8/2022, page 5:18-

20). Exhibit D was the subject of objection by applicant counsel, who contended it had been volitionally and wrongfully withheld.

The court instructed the parties to submit briefs addressing why Exhibit D was not previously disclosed to applicant at an earlier date. (MOH/SOE 12/8/2022, page 6:6-9.) Defense counsel submitted a brief dated 12/12/2022. In that brief, defense counsel spoke not only to Exhibit D (the letter of 3/23/10) but also revealed proposed Exhibit E (an additional notice dated 5/21/10), asking it also be entered into evidence.

Petitioner apologizes for not sharing Exhibit E promptly. Regarding Exhibit E, defense counsel concedes and "...acknowledges that during the discussion with the Hon. Nate Halprin and applicant's counsel, he only referenced the preliminary Notice dated March 23, 2010 without noticing the subsequent continuous Notice dated May 21, 2010, and apologizes for that error..."

(Trial Brief dated 12/12/2022, EAMS Doc ID#44248576.)

If petitioner happened upon Exhibit E at the same time as Exhibit D while perusing his file sometime during the first day of trial, why Petitioner did not disclose Exhibit E at the same time as Exhibit D remains an unexplained mystery.

At the second day of trial on 1/26/2023, defendant Colton stipulated to injury AOE/COE in both cases and the court entertained argument regarding the admissibility of proposed exhibits D and E. A determination of their admissibility was deferred to the time of Findings and Opinion. (MOH/SOE 1/26/2023, page 3:1-4.)

II.

HAS THE COURT ERRED IN EXCLUDING FROM EVIDENCE EXHIBITS D AND EXHIBIT E?

[...]

In the instant case, there is a robust continuing footprint of the Statute of Limitations issue throughout the litigation. The importance of documents, which might relate to the statute issue has been apparent for some time. Withholding documents relevant to this issue until completion of the first day of trial (Exhibit D) or later (Exhibit E) significantly prejudices the injured worker's ability to prepare their case for trial and impermissibly impacts due process.

More than a year before the trial, the statute issue became apparent. By May 2022, after efforts at discovery, applicant's counsel was contending that defendants were intentionally thwarting discovery by withholding documents.

Petitioner City of Colton first moved for dismissal on Statute of Limitations grounds [on] 10/8/2021: "...Mr. Fluitt filed this Application ten years after his employment with the City of Colton had ended, and the last year of alleged injurious exposure was the period of April 14, 2010 to April 14, 2011. No claim of injury was filed with the employer within thirty days of April 14, 2011 in violation of Labor Code section 5400, and the filing of the Application For Adjudication took place well more than one year beyond the time limitation for seeking the collection of benefits pursuant to Labor Code section 5405..." (Petition for Dismissal of Application for Adjudication of Claim dated 10/8/2021; page 2:6-11.)

On 2/9/2022, the parties (including petitioner) appeared before Judge Brennen who noted in the Minutes of Hearing inter alia "...Co-defendant City of Colton's Petition and its request for dismissal deferred because the applicant's attorney objects to the request, thus making it a triable issue..." (Minutes of Hearing 2/9/2022, EAMS Doc ID #75176892.)

In pleadings dated 5/11/2022, applicant counsel objected to the setting of a Mandatory Settlement Conference noting that petitioner had intentionally withheld discovery. "...On or about May 20, 2021, Defendants were served with Applicant's request for production of documents. On February 22, 2022, defendant Colton efiled and later served upon Applicant's counsel a single page of discovery (an interoffice memo dated 8/22/2009 written by Applicant describing his need to seek additional medical care after an altercation with a prisoner)...Defense appears to have cherry picked a single document from Applicant's personnel file that they believe to assist them in their Statute of Limitations defense. A police officer's personnel file is certain to have substantially more materials relevant to this claim (like, for example, the incident report referenced in the memorandum itself). Such tactics evidence a lack good faith in the discovery process and are subject to sanctions..." (Objection to Declaration of Readiness to Proceed dated 5/11/2022; page 3:8-19, EAMS Doc ID #42904787.)

On 6/22/2022, the parties appeared before WCJ Parker, who ordered "...City of Colton instructed to serve A.A. with applicant's complete personnel file..." (Minutes of Hearing 6/22/2022, EAMS Doc ID #75642574.)

By May 2022, all parties were on notice of Applicant's contention that petitioner Colton was intentionally thwarting the discovery process by withholding documents.

On 8/1/2022, defense counsel for Fontana moved for dismissal on Statute of Limitations grounds contending that applicant "...filed an Application for Adjudication of Claim more than ten years after his employment with

the City of Fontana ended...in violation of Labor Code section 5400..." (Petition for Dismissal of Application for Adjudication of Claim dated 8/1/2022, EAMS Doc ID #42482652.)

Applicant counsel responded on 8/2/2022 to the Petition for Dismissal, noting: "Good cause exists to permit the Applicant to continue to prosecute his case because the statute of limitations was never triggered by the Applicant's employers when they failed to properly notify the Applicant of his right to file a workers compensation claim..." Objection to Defendant's Petition for Dismissal dated 8/2/2022, page 2:7-10, EAMS Doc ID #42503874.)

An MSC was held in case 14657845-MF 8/3/2022 before Judge Parker. Attendees at the MSC included petitioner. The matter was set for trial and the Minutes note: "Discovery to remain open, all issues regarding admissibility of exhibits post-MSA as well as further development of record deferred to trial judge's discretion and order(s)..." (Minutes of Hearing 8/3/2022, EAMS Doc ID #75787841.)

On 8/8/2022, Judge Parker denied Fontana's Petition for Dismissal, observing: "...IT APPEARING Defendants City of Fontana and JT2 Integrated by and through their Attorney of Record having filed verified Petition for Dismissal of Application for Adjudication of Claim; Applicant by and through his Attorney of Record having filed Objection to Defendant's Petition for Dismissal; all parties having been heard at Mandatory Settlement Conference on August 3, 2022 and agreeing to set disputed issues for trial; trial having been set September 14, 2022 before WCJ Cervantes; AND GOOD CAUSE APPEARTING; IT IS ORDERED Defendants City of Fontana's and JT2 Integrated's Petition for Dismissal of Application For Adjudication of Claim be and hereby is denied..." (Order Denying Petition for Dismissal of Application for Adjudication of Claim dated 8/8/2022, EAMS Doc ID #75797865.)

The Statute of Limitations and applicant's contention that discovery was being intentionally withheld were major issues in this case by May of 2022. Allegations that City of Colton had engaged in sanctionable conduct by withholding documents were being robustly asserted by applicant. These allegations were of a nature that would place reasonable parties on notice that nonchalance in the discovery process was to be avoided.

When defense counsel serendipitously discovered Exhibit D in his file, and produced it upon completion of the first day of trial, applicant counsel renewed their contention that discovery had been intentionally withheld. The trial record is devoid of any showing by petitioner of diligence, due or otherwise, concerning Exhibits D and E. There has been no showing by Petitioner as to why the two exhibits were not earlier discovered, nor why they were not concurrently disclosed.

Petitioner is correct that a formal MSC was held only in one of the two cases. The court accepts as correct that defense counsel's awareness of Exhibits D and E in his own file first arose when he said it did, specifically mid-way through the first day of trial. Both exhibits, however, were relevant to the statute contentions in both cases. The obligation of a party to respond to reasonable requests for discovery is not a passive one. Petitioner offered (and offers) no plausible explanation as to why the letters were not earlier recognized and produced when first demanded by applicant. A failure to produce relevant documents, including those predictably destined to be exhibits on fulcrum issues, may result in their exclusion from evidence. In this case, the court determined Exhibits D and E must be excluded.

III. RECOMMENDATION

It is respectfully recommended that [defendant's] Petition for Reconsideration be denied in its entirety.

DATED: 03/23/2023

NATE HALPRIN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE