

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

**MICHAEL GONZALES, *Applicant***

**vs.**

**CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION,  
CORCORAN STATE PRISON, lawfully uninsured;  
administered by STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Numbers: ADJ1848184 (BAK 0144817);  
ADJ4372957(BAK 0143105); ADJ904905 (BAK 0148018)  
Bakersfield 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, we will deny reconsideration.

Further, we note that the Appeals Board lacks jurisdiction to address the issues brought up by applicant in his Petition upon the ground that the original injury has caused new and further disability as the Petition was filed well beyond five years after the date of the injury. (Lab. Code, § 5410.) Additionally, proceedings for increased compensation based on discrimination against an injured worker, or for reinstatement and reimbursement for lost wages and work benefits, are to be instituted by filing an appropriate petition with the appeals board within one year from the discriminatory act or date of termination of the employee. (Lab. Code, § 132a.) As applicant did not file his Petition within the statutory deadlines, the Appeals Board does not have jurisdiction to address these issues.

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**KATHERINE A. ZALEWSKI, CHAIR**  
**CONCURRING NOT SIGNING**



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

**August 1, 2023**

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

**MICHAEL GONZALES**  
**STATE COMPENSATION INSURANCE FUND**

**JMR/pc**

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

**STATE OF CALIFORNIA  
Division of Workers' Compensation  
Workers' Compensation Appeals Board**

**Case Number(s): ADJ 4372957 mf/ADJ 1848184/ADJ 904905 (BAK)**

**Applicant-Petitioner Michael Gonzales**

v.

**Defendant State of California: California Department of Corrections &  
Rehabilitation: Corcoran State Prison, lawfully uninsured, administered  
by State Compensation Insurance Fund**

**Workers' Compensation Judge: Robert K. Norton**

**Dates of Injury:**

- 1. August 6, 2003**
- 2. CT 2/21/1998 to 8/06/2004**
- 3. CT 8/07/2003 to 8/07/2004**

**Recommendation: Deny**

**Report and Recommendation on  
Petition for Reconsideration**

**I. Introduction:** Applicant-Petitioner Michael Gonzales, then 28 years of age, sustained a specific industrial injury to his lumbar spine on August 6, 2003 when he slipped and fell while responding to an altercation during his employment in Corcoran, California, as a Correctional Officer by Defendant State of California: California Department of Corrections & Rehabilitation: Corcoran State Prison. This specific injury claim is being heard as case ADJ 4372957, formerly designated case BAK 143105. It is the master file and depository of documentary exhibits

Mr. Gonzalez also claimed to have sustained cumulative injuries during the periods from February 21, 1998 to August 6, 2004 and from August 7, 2003 to August 7, 2004, also while employed by Defendant in Corcoran, California, as a Correctional Officer. These cumulative injury claims have been heard as cases ADJ 1848184 (formerly designated case BAK 144817) and ADJ 904905 (formerly designated case BAK 148018).

On August 6, 2003 and during the periods from February 21, 1998 to August 6, 2004 and from August 7, 2003 to August 7, 2004, Defendant State of California: California Department of Corrections & Rehabilitation: Corcoran State Prison was lawfully uninsured for workers' compensation liability. Its program of workers' compensation is administered by State Compensation Insurance Fund.

Joint Findings of Fact & Orders issued on May 9, 2023. Petitioner's motion for relief from the dismissal of his first petition to reopen case ADJ 4372957

(regarding the specific injury of August 6, 2003) was denied. Petitioner's second petition to reopen was denied. Petitioner's motion for relief from the dismissal of case ADJ 1848184 (concerning the claimed cumulative injury from February 1998 to August 2004) was denied. Petitioner's petition for increased benefits for alleged discrimination prohibited by Lab.C. §132a was denied. *Joint Findings of Fact & Orders 5/09/2023 pp. 8-9 (Orders)*.

By timely<sup>1</sup>, verified and sufficiently served petition<sup>2</sup>, Petitioner seeks reconsideration. Petition for Reconsideration 6/02/2023 pp. 10-11 (verification), p. 12 (Proof of Service). Authorized grounds for reconsideration are not expressed with clarity but the arguments of the pending petition appear to address questions of the proper application of the WCAB's authority and/or whether the orders were supported by the findings. These questions are authorized grounds for reconsideration. See, Lab.C. §5903 {a} & {e}.<sup>3</sup>

The pending petition begins with an initial section making what appear to be five arguments without subject headings and in no particular order. *Petition for Reconsideration 6/02/2023 pp. 1-4*. Thereafter, the petition offers three main arguments that 1) The WCJ Erred as a matter of law for not granting relief for 2012 dismissal without prejudice (2008 Petition to Reopen). The WCJ failed to consider presumption of service is rebuttable. The WCJ failed to consider whether the presumption of service was rebutted by the material fact of evidence in the record of proceedings (*Petition for Reconsideration 6/02/2023 pp. 5-7*) 2) The WCJ's Erred for failing to consider the "extent" of *permanent* disability requires. Clear error in original award, aggravation of 2005, apportionment and causation, temporary total disability, extent of when petitioner became permanent and stationary, new and further, the 1997 PDRS schedule (*Petition for Reconsideration 6/02/2023 pp. 7-9-corrected spelling error in italics.*) and 3) Temporary Total Disability 4656{c} 4661.5 (2003) (*Petition for Reconsideration 6/02/2023 pp. 9-10*).

Defendant has filed a timely,<sup>4</sup> verified and properly served Answer to the pending petition. *Answer to Petition for Reconsideration 6/14/2023 p. 10 (verification), Proof of Service 6/16/2023*. Defendant argues that 1)The Court did not err when it denied relief from the stipulated dismissal on February 2, 2012 of the first petition to reopen Case ADJ 4372957 (*Answer to Petition for Reconsideration 6/16/2022 p. 5 line 15 to p. 6 line 5*), 2)Judge Norton did not

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<sup>1</sup> The pending petition was filed at the Bakersfield District Office on Friday, June 2, 2023 the 24th day after the Joint Findings of Fact & Orders of May 9, 2023.

<sup>2</sup> The pending petition was not provided to Lien Claimant Alan Moelleken, M.D. However, the arguments of the pending petition do not appear to address the validity of Dr. Moelleken's lien. Therefore, Dr. Moelleken is not an "affected party" within the meaning of WCAB Rule 10625 {a} and providing him with a copy of the pending petition was optional.

<sup>3</sup> Parts of the pending petition also discuss potential new medical evidence and/or allegations that prior determinations were obtained by fraud. However, the pending petition lacks the Offer of Proof required by WCAB Rule 10974.

<sup>4</sup> Defendant's Answer was filed on June 16, 2023, the 12 day after the filing of the pending petition

error when considering the extent of permanent disability, aggravation of 2005, Apportionment and Causation, 1997 PDRS Schedule (*Answer to Petition for Reconsideration 6/16/2023 p. 6 line 7 to p. 7 line 4*) 3) Applicant was not entitled to Temporary Total Disability from January 7, 2007 to December 31, 2008 and January 1, 2009 to April 9, 2010 (*Answer to Petition for Reconsideration 6/16/2023 p. 7 lines 6-24*) and 4) Applicant's Petition presents the Court alleged facts not in evidence (*Answer to Petition for Reconsideration 6/16/2023 p. 8 lines 1-7*).

Denial of Mr. Gonzales' motions and petitions was required under the relevant rules of law, including the finality of prior determinations and applicable time limitations. Denial of the pending petition is recommended.

**II. Facts:** Prior to August 7, 2003, Petitioner Michael Gonzales had been employed by Defendant as a Correctional Officer at Corcoran State Prison for about 2 ½ years. On August 7, 2003, he slipped and fell while responding to an altercation in a housing facility. He felt an immediate onset of pain, tingling and stiffness in his lower back. When the symptoms did not subside after two hours, he reported the injury and sought medical treatment. *Defendant's Exhibit B-3: Report of Carol Hamilton, D.C. 1/08/2004 pp. 1-2*. Industrial medical treatment was provided including medications, physical therapy and work restrictions. Petitioner continued to suffer from pain and stiffness in his back with radiation of symptoms to his left knee and left ankle. Nevertheless, Petitioner eventually returned to full duty work. *Defendant's Exhibit B-3: Report of Carol Hamilton, D.C. 1/08/2004 pp. 1-2*.

Carol Hamilton, D.C. served as a Qualified Medical Evaluator with respect to Petitioner's specific injury of August 7, 2003. She initially examined Petitioner on January 8, 2004 and provided a report. She opined that Petitioner was not yet permanent and stationary from the effects of his specific injury because he was likely to benefit from additional treatment. *Defendant's Exhibit B-3: Report of Carol Hamilton, D.C. 1/08/2004 p.8*.

Petitioner retained the Law Offices of Adams, Ferrone & Ferrone as his legal counsel and initiated his claim for the specific injury of August 7, 2003, then designated case BAK 143105. *Notice of Representation; Application for Adjudication of Claim; Claim Form 2/23/2004*.

Diagnostic testing was provided. An MRI scan provided on September 3, 2003 indicated a "left posterior focal protrusion of the L4/5 disc with resulting left foraminal stenosis and "associated crowding of the existing left L4 nerve root." A Nerve Conduction Study/EMG was provided on February 18, 2004 was reported as "all normal except for a very minimal nerve root irritation..." which "does appear to be a very minor nature." *Defendant's Exhibit B-2: Report of Carol Hamilton, D.C. 3/21/2004 pp. 3-4 (reviewing MRI scan of Comprehensive Open MRI of Bakersfield (Norman Liu, M.D. 9/03/2003 and NCS/EMG report of Antonia Chalmers, M.D. 2/18/2004)*.

Additional treatment was also provided, reportedly with some benefit. Notwithstanding on-going symptoms, Petitioner was able to continue with full-duty work as a Correctional Officer. *Defendant's Exhibit B-2: Report of Carol Hamilton, D.C. 3/21/2004 p.1 &, p. 4.*

Dr. Hamilton re-evaluated Petitioner and reported again on March 21, 2004. She opined that Petitioner's condition had become permanent and stationary with permanent disability consisting of intermittent minimal to slight pain in the lower lumbar area becoming moderate on rare occasions confirmed by the MRI results with a normal range of motion and a loss of 10% of pre-injury capacity for lifting but no loss of "overall work capacity." All of this disability was attributed to the specific work injury of August 7, 2003. *Defendant's Exhibit B-2: Report of Carol Hamilton, D.C. 3/21/2004 pp. 4-5.*

On September 13, 2004, Petitioner filed an Application for Adjudication of Claim in case ADJ 1848184 (then designated case BAK 144817) alleging cumulative injury during the period from February 21, 1998 to August 6, 2004. The available records do not specify the allegedly injured bodily system.

Seventy days later, on November 22, 2004, case ADJ 1848184 was dismissed. *Defendant's Exhibit S: Events Printout 12/01/2022.* The legacy (i.e. pre-EAMS paper file) is not available to explain.<sup>5</sup>

Primary proceedings regarding the specific injury of August 7, 2003 were resolved by a Stipulated Award on December 28, 2004. The parties relied on the expert opinion of QME Dr. Hamilton and agreed that Petitioner had sustained 7% permanent partial disability as a result of the specific work injury and was in need of further medical treatment. An Award consistent with the Stipulations issued. *Stipulations with Request for Award & Award 12/28/2004.*<sup>6</sup>

Petitioner thereafter fell under a food cart some time in 2005. Defendant's Exhibit B-1: *QME Report of Carol Hamilton, D.C. 4/22/2010 p. 2.* A claim file was opened by SCIF but it does not appear that a new claim form or Application for Adjudication was filed. Nor do the medical reports in evidence attribute disability or a need for treatment to the 2005 food cart incident.

On November 17, 2005, Petitioner filed case ADJ 904905, alleging cumulative injury during the period from August 7, 2003 to August 7, 2004. This new cumulative trauma claim was initially designated as case BAK 148018. This

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<sup>5</sup> However, if the allegedly injured bodily system was Petitioner's lumbar spine, then the dismissal of this cumulative injury case seventy days after filing is consistent with QME Dr. Hamilton's opinion that Petitioner's spinal disability was entirely the result of the August 7, 2003 specific injury.

<sup>6</sup> Notwithstanding the contrary indication in the pending petition, this settlement was not based on a retroactive application of the 2005 PDRS including the AMA Guides. 7% permanent partial disability based on Petitioner's objective and subjective factors is a rating consistent with the 1997 PDRS.

cumulative injury claim appears to have referred to an allegedly-industrial exposure to coccidioidomycosis (San Joaquin Valley Fever).

Defendant denied that an industrial Valley Fever injury had occurred. *Defendant's Exhibit P: Notice of Denial of Claim for Workers' Compensation Benefits 2/17/2006*. Defendant also reported that Petitioner had declined to execute medical releases and had reportedly told the claims administrator that he had not authorized the filing of the new claim. Defendant asked Petitioner's attorneys to either dismiss the Valley Fever claim or begin participating in medical-legal discovery. *Defendant's Exhibit N: Correspondence of State Compensation Insurance Fund (Tracy Bowling-Claims Representative) 4/17/2006*.

There is no indication of a response to Defendant's inquiry, whereupon Defendant sought a dismissal of case ADJ 904905 for non-prosecution. *Defendant's Exhibit M: Notice of Intention to Dismiss 2/26/2007*.

While the request for dismissal was pending, Petitioner's treating chiropractor provided duplicate reports indicating that:

Mr. Gonzales is a patient undergoing treatment for a non-industrial illness/injury. He is released from work 3/05/2007 thru 3/08/2007. Mr. Gonzalez is released to return to work March 9, 2007, without restrictions. *Defendant's Exhibits J-6 and J-7: Report of Ming & H Chiropractic (Bryon Allen Dennis, D.C.) 3/06/2007 and 3/08/2007*.

Defendant's petition was granted and ADJ 904905 (still designated case BAK 148018 at that point) was dismissed on March 26, 2007. *Defendant's Exhibit L: Order Dismissing for lack of Prosecution 3/26/2007*. A timely petition for reconsideration of the dismissal was not filed.

Thereafter, the treating chiropractor reported that:

Mr. Gonzalez is under patient care for alcohol abuse and participating in a twelve-recovery program. In an effort not to interrupt his participation in this program, he is restricted from work August 28 thru September 9, 2007. He is to return to work September 10, 2007 without restrictions or limitations and to abstain from alcohol. *Defendant's Exhibit J-5: Report of Ming & H Chiropractic (Bryon Allen Dennis, D.C.) 9/07/2007*.

Petitioner was taken off work again in December. Dr. Dennis reported that:

Mr. Gonzalez was recently involved in an ATV accident and is under care for exacerbation, "flare-up" of a previous injury.

He is restricted from work December 7 thru December 14, 2007. He is released to return to work December 15, 2007 without restrictions or limitations. *Defendant's Exhibit J-4: Report of Ming & H Chiropractic (Bryon Allen Dennis, D.C.) 12/13/2007.*

Dr. Dennis reported thereafter that Petitioner "is recovering slower than anticipated." The release to return to work was postponed to December 22, 2007, then to December 29, 2007, and then to January 16, 2008. *Defendant's Exhibits J-2, J-2 & J-1: Reports of Ming & H Chiropractic (Bryon Allen Dennis, D.C.) 12/20/2007, 12/27/2007 and 1/11/2008.*

Thereafter, Defendant initiated personnel action against Petitioner. Defendant alleged that Petitioner had been AWOL (Away without Leave) and characterized his absence as a resignation. Petitioner invoked his entitlement to a *Coleman* hearing regarding the Adverse Action. He agreed to resolve the dispute by resigning but complained later that he was not informed of his potential right to dispute the resignation. The personnel action took place between the third week of January 2008 and the first week of February 2008. *Summary of Evidence 2/02/2023 p. 9 lines 32-44.*

Via his attorneys of record, Petitioner brought a timely first Petition to Reopen case ADJ 4372957 (still designated case BAK 143105 at that point). The prior Stipulated Award was noted and Petitioner alleged a worsening of his condition "resulting in the need for medical treatment and the likelihood of greater permanent disability." *Petition to Reopen 1/14/2008.*

Petitioner was returned to QME Dr. Hamilton for re-evaluation. She reviewed the prior and interim medical records, examined Petitioner, and provided a report. Dr. Hamilton noted that Petitioner has stopped working as a Correctional Officer in February 2008 and had become a full-time student. She opined that Petitioner remained permanent and stationary since her prior examination. She opined that his level of impairment was unchanged except for "a slight decrease in lumbar ROM and more atrophy of his left lower extremity." *Defendant's Exhibit B-1: Report of Carol Hamilton, D.C. 4/22/2010 p. 17.* Dr. Hamilton opined that increase in Petitioner's subjective symptoms was the result of the ATV accident. She noted that Dr. Dennis had also reported a fall from a bicycle that might or might not be the same event as the ATV accident. She retrospectively categorized Applicant's 2004 condition as a Diagnosis Related Estimate (DRE) Category 2 with 5% Whole Person Impairment and opined that Petitioner's condition in 2010 was still within Category 2 with 5% Whole Person Impairment. *Defendant's Exhibit B-1: Report of Carol Hamilton, D.C. 4/22/2010 pp. 16-17.*

Case ADJ4372957 regarding the specific industrial injury of August 7, 2003 came on for Status Conference on February 2, 2012. The parties stipulated that:



- 1) Applicant agrees to withdraw the petition for new & further (Petition to Reopen) dated 1/14/2008, without prejudice based on the report of Carol Funk Hamilton dated 4/22/2010 (QME).

It was ordered that “petition for new & further of 1/14/08 is dismissed. *Defendant’s Exhibit D: Stipulation & Order 2/02/2012, underlining in original.*”

The Stipulation & Order withdrawing Petitioner’s timely first Petition to Reopen was served to Petitioner via his attorneys of record at the Status Conference and by mail to his address of record and two alternative addresses. The copies of the Stipulation & Order sent to Petitioner at his address of record and one of the alternative addresses were returned. *Defendant’s Exhibit D: Stipulation & Order with Proof of Service 2/02/2012; Defendant’s Exhibit E: Letter to Applicant with Dismissal 3/13/2012; Defendant’s Exhibit F: Letter to Applicant with Dismissal 3/27/2012; See, Answer to Petition for Reconsideration 6/16/2023 p. 4 line 18 to p. 5 line 2.*

A timely petition for reconsideration of the Stipulation & Order was not filed.

Thereafter, there appears to have been a nine year hiatus. On June 14, 2016, Defendant made medical payments to Quest Diagnostics and Spine & Orthopedic Center (Alan Moelleken, M.D.). *Defendant’s Exhibit X: Benefits Paid Report 12/08/2022 p. 2.* On July 6, 2014 Billing Dynamics provided notification of its representation of Dr. Moelleken. *Notice of Representation 7/06/2014.* Otherwise, there do not appear to have been any developments in these cases during the period from March 2012 to November 2021.

Litigation resumed in November 2021 when Petitioner requested and received a copy of the WCAB file in ADJ 4372957 concerning the specific injury of August 6, 2003. *Request for Public Records 11/18/2021.*

Petitioner thereafter dismissed the Law Offices of Adams, Ferrone & Ferrone as his attorney of record. *Notice of Dismissal of Attorney 1/07/2022.*

Once self-representing, Petitioner sought benefits for discrimination prohibited by Lab.C. §132a. The petition opens with forthright admission that it is “untimely barred under the statute of limitations” but seeks “an exemption to toll the statute of limitations” on the basis that “the former employer’s discriminatory actions violated the applicant’s guarantee of procedural due process” by “Fraudulent concealment and or manipulation of the truthfulness of the accord for resignation” as further explained in three causes of action. *Petition for Discrimination Benefits Pursuant to Labor Code Section 132a. 1/08/2022 p.1 ¶1.* Petitioner complained that the labor agreement memorializing his resignation had been amended without his knowledge or consent. He also

alleged that he had not been informed of the potential implications of his resignation on his entitlements to workers compensation benefits.

Petitioner's Lab.C. §132a petition was filed in cases ADJ 4372957 (the specific injury of August 6, 2003) and ADJ 905905 (the alleged cumulative injury of August 7, 2003 to August 7, 2004). Unfortunately, it was also filed in case ADJ 1825007. That claim involved a Correctional Officer named Michael Gonzales employed by Defendant California Department of Corrections & Rehabilitation but it appears to be a different Michael Gonzales (18 years younger) employed at a different prison (North Kern State Prison rather than Corcoran State Prison) and was resolved by Stipulations in April 2006.

Defendant has answered Petitioner's 132a petition, generally denying its allegations and noting the inclusion of ADJ 1825007 involving a different employee. *Answer to 132a Petition 10/04/2022.*

On January 28, 2022, Petitioner filed his second petition to reopen. This second petition included case ADJ 4372957 (the specific injury of August 6, 2003) and case ADJ 904905 (the claimed cumulative injury of August 7, 2003 to August 7, 2004). Unfortunately, it also included case ADJ 1825007, involving the other Michael Gonzalez. Petitioner argued otherwise applicable Statutes of Limitation were tolled because he was deceived or led into a false sense of security by the employer, that the dismissal of the first petition to reopen did not include consideration of all the relevant facts, that Dr. Hamilton's QME reports were not substantial medical evidence, particularly with respect to permanent and stationary status, that apportionment to the alleged bicycle/ATV injury was inappropriate, that he was entitled to 236 weeks of temporary total disability and to add psychiatric injury in the form of a Post-Traumatic Stress Disorder to his claims. *Petition to Reopen 1/28/2022.*

Defendant answered the second petition to reopen, generally denying Petitioner's allegations. *Answer to Petition to Reopen 5/05/2022.*

The parties were unable to settle these disputes. Following Trial on February 2, 2023, Findings of Fact & Orders issued on May 9, 2023. Petitioner's motions and petitions were denied as untimely including his motion for relief from the dismissal of the first petition to reopen, the second petition to reopen, the motion for relief from the dismissal of ADJ 1848184 (the 1998 to August 2003 CT claim, and Petitioner's 132a claim. *Findings of Fact & Orders 5/09/2023 pp. 8-9 (Orders).*<sup>7</sup>

Whereupon, Petitioner seeks reconsideration.

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<sup>7</sup> The evidence offered at Trial did not document the alleged "Fraudulent concealment and or manipulation of the truthfulness of the accord for resignation" offered as the basis to excuse the otherwise admittedly tardy Lab.C. §132a petition.

**III. Discussion:** The first section of pending petition argues that enforcement of the applicable time limitations on Petitioner’s motion and petitions was in error and the applicable limitations should have been found to have been tolled, estopped or waived. *Petition for Reconsideration 6/02/2023 pp. 1-4.*

The first argument of the first section argues that the Statute of Limitations on the second Petition to Reopen should have been deemed waived due to Defendant’s failure to file a timely answer to that petition. Petitioner cites *Nolan v. WCAB* [(1977) 70 Cal.App. 3d 122, 138 Cal.Rptr. 561, 42 CCC 401 (1st DCA)]; *Zurich Ins. Co. v. WCAB (Cairo)* [(1973) 9 Cal. 3d 848, 852, 109 Cal.Rptr. 211, 512 Pac.2d, 843, 38 CCC 501], *Bollinger, v. National Fire Ins. Co.* {(1944) 25 Cal. 2d 399, 154 Pac.2d 399] and 8 CCR §10330. *Petition for Reconsideration 6/02/2023 p. 1 ¶3.*

The first problem with the first argument of the first section of the pending petition is that there is no such waiver/default provision. Answers to petitions are permissive, not mandatory. 8 CCR §10510{c}. Summary judgments and judgments on the pleadings are prohibited with no exception for unanswered pleadings. 8 CCR §10515. To the contrary, the deadline for raising an applicable Statute of Limitations is not the ten days allowed for a timely answer to a petition but the “submission of the cause for decision.” Lab.C. §5409. In this case, Statutes of Limitation were raised prior to submission for decision. *Pre-Trial Conference Summary Statement 1/25/23; Minutes of Hearing 2/02/2023 p. 4 lines 6-41 (Issues).*

The second problem with the first argument of the first section of the pending petition is that the cited authority doesn’t stand for the asserted proposition.

In *Nolan*, supra, the primary proceedings were interrupted by the employee’s incarceration. The carrier promised that medical-legal discovery and potential permanent disability advances would resume upon Mr. Nolan’s anticipated release. However, when Mr. Nolan’s release was delayed, the carrier dishonored its promise and obtained a dismissal for non-prosecution of the claim. Upon his release, Mr. Nolan petitioned to re-open his case but the petition was denied as untimely. *Nolan*, supra, 42 CCC at p. 402. The First District Court of Appeals reversed the denial, holding that the carrier’s promise to resume proceedings upon the employee’s release estopped it to assert the otherwise applicable time limitation. *Nolan*, supra, 42 CCC at p. 406. There was no such promise in the present case.

In *Cairo*, supra, the First District Court of Appeals had initially rescinded an award of new and further disability because a petition to reopen had not been filed within five years. Upon rehearing, however, the District Court noted that the referee had received a medical report in a companion case indicating new and further disability and, within the five years, had issued a Notice of Intention to re-open and amend the prior award. This was held to be a sufficient institution

of proceedings to satisfy the Statute. *Cairo*, 38 CCC at p. 508. In this case, however, neither the first nor the second petition to reopen in this case was preceded by a Notice of Intention to grant it.

*Bollinger*, supra, is not a California workers compensation case at all. The California Supreme Court reversed an order granting a demurrer to a second suit by a bankruptcy trustee to recover on a fire insurance policy when the first suit had been stalled and then incorrectly non-suited as premature. The Court reasoned that the resolution of the first suit was not a determination on the merits, that the second suit had been filed within four days of the non-suit, and, therefore, the second suit was a continuation of the first suit and not barred by the Statute of Limitations. *Bollinger*, supra, 25 Cal. 2d at pp. 411-412.

At best, *Bollinger*, supra, relates to the present case only as authority for the proposition that Statutes of Limitation are not robotically or universally enforced. Nothing in *Bollinger*, supra, indicates that a workers compensation Defendant that fails to answer a petition to re-open in ten days forfeits the opportunity to assert that the petition is tardy.

If anything, *Bollinger*, supra, is better authority for the Defendant than it is for Petitioner. The holding that the bankruptcy trustee's second suit was a continuation of the first suit (and thereby not barred by the Statute of Limitations) was based on the determination that the non-suit of the first action was not on the merits and the second suit was filed very promptly (only four days after the non-suit). To the contrary, in this case, the stipulated withdrawal of the first Petition to Reopen was very much on the merits. It expressly relied on QME Dr. Hamilton's adverse medical-legal opinion. Moreover, the gap in time between the withdrawal of the first Petition to Reopen on February 2, 2012 and the filing of the second Petition to Reopen on January 28, 2022 was just short of ten years later.

Finally, 8 CCR §10330 is cited. That regulation provides:

In any case that has been regularly assigned to a workers' compensation judge, the workers' compensation judge shall have full power, jurisdiction and authority to hear and determine all issues of fact and law presented and issue any interim, interlocutory and final orders, findings decisions or awards as may be necessary to the full adjudication of the case, including the fixing of the amount of the bond required in Labor Code section 3715. Orders, findings, decisions and awards issued by a workers' compensation judge shall be the orders, findings, decisions and awards of the Workers' Compensation Appeals Board unless reconsideration is granted. 8 CCR §10330 (WCAB Rule 10330).

This regulation does not say that a workers compensation Defendant that fails to promptly answer a Petition to Reopen forfeits the opportunity to assert the Statute of Limitations against that petition.

Moreover, WCAB Rule 10330 supports the necessity of a timely petition for reconsideration when applicable. If the grounds urged as justification for reopening existed at the time that a petition for reconsideration should have been filed, a Petition to Reopen will be denied. *Young v. IAC*, (1944) 9 CCC 79, 81 (2nd DCA); *Royster v. WCAB*, (1974) 39 CCC 513, 515-516 92nd DCA); *Nicky Blair's Restaurant v. WCAB (Macias)* (1980) 45 CCC 876, 886.

In this case, as noted above, timely petitions for reconsideration of the Stipulation & Order of February 2, 2012 in ADJ 4372957 and the Dismissals of ADJ 1848184 on November 22, 2004 and ADJ 904905 on March 27, 2007 were not filed.

The next argument of the first section of the pending petition complains that the undersigned PWCJ failed to develop the medical-legal record in order to explore potential exceptions to the otherwise-applicable time limitations and notes that Defendant's Benefits Paid Report includes notations of payments to Spine & Orthopedic Institute (Alan Moelleken, M.D.) on June 14, 2016. *Petition for Reconsideration 6/02/2023 pp. 1-2; Defendant's Exhibit X: Benefits Paid Report 12/08/2012 p. 2.*

The first problem with this argument is that it is highly unlikely that whatever treatment were provided by Dr. Moelleken would have anything to do with the denial of Applicant's motions and petitions. Admittedly, the furnishing of medical treatment can extend the general one-year Statute of Limitations for the filing of an Application for Adjudication. Lab.C. §5405{c}. But this is not applicable to the specific five-year statute governing petitions to reopen or the one-year statute specific to Lab.C. §132a. Nor was any new Application or petition filed within one or five years after June 14, 2016.<sup>8</sup>

The second problem with this argument is that it is not the proper role of the Appeals Board to pick a side and then "develop the record" to create additional evidence and arguments so that the favored side can win. To the contrary, the law seems pretty clear that it is the responsibility of the litigants to identify new evidence and, thereafter, demonstrate why the new evidence could not have been previously obtained in the exercise of reasonable diligence. Lab.C. §5502{d}(3); §5903{d}; 8 CCR §10974{e} (WCAB Rule 10974{e}).

The next argument of the first section of the pending petition complains that Defendant was directed permitted to file proof of its service of the Stipulation & Order of February 2, 2012 less than 20 days prior to Trial. *Petition for Reconsideration 6/02/2023 pp. 2-3.*

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<sup>8</sup> It is worth noting that Applicant was still represented by legal counsel at that point.

The first problem with this argument is that it refers only to designated service of Petitioner himself by Defendant. Petitioner's attorney of record (Paul Ferrone, Esq. of Adams, Ferrone & Ferrone) was present at the Status Conference of February 2, 2012. He signed and received the Stipulation & Order at that time. *Minutes of Hearing 2/02/2012; Defendant's Exhibit D: Stipulation & Order 2/2/2012*. Where a compensation litigant has an attorney or representative of record, service of that attorney or representative is proper. 8 CCR §10625{a} (WCAB Rule 10625{a}).

The second problem with this argument is that the filing of Defendant's proofs of service was expressly authorized by law. When designated service was ordered in February 2012, the then-applicable regulation directed the designated party to retain the proof of service and file it only if ordered to do so. Former 8 CCR §10500{a} (Former WCAB Rule 10500{a}).<sup>9</sup> Defendant acted properly by complying with WCJ Johnson's instruction to file their proof of service, even less than twenty days before Trial.

The third problem with this argument is that service at the last known address of record, even if that address is outdated, is good service. It is the responsibility of every party or lien claimant with an interest in the case to maintain a current address and promptly file changes of address. 8 CCR 10205.5 (AD Rule 10205.5). Put another way, Petitioner is not entitled to complain that the Stipulation & Order of February 2, 2012 was sent to him at an address he provided.

The fourth problem is that service of the Stipulation & Order at one of the two alternative addresses was not returned, triggering the Mailbox Presumption that it was received. While the presumption is rebuttable, the bare assertion of non-receipt is not sufficient to rebut it.

The next argument of the pending petition questions whether the re-evaluation report of QME Dr. Hamilton was "secured in the record" prior to its formal receipt into evidence and, without it, Petitioner should have been considered to have been permanent and stationary more than once. *Petition for Reconsideration 6/02/2023 p. 3 ¶2*. In fact, Dr. Hamilton's report of April 22, 2010 was initially filed on December 16, 2011, incorporated by reference in the Stipulation & Order of February 2, 2012 and thereafter filed again on December 28, 2022 and designated as Defendant's Exhibit B-1. It was, and is, "of record."

The next argument of the first section of the pending petition complains that the denial of relief from dismissal of ADJ 1848184 was erroneous because the dismissal was supposedly indicated to have occurred on March 27, 2007 when it occurred on November 22, 2004. Petitioner also complains that the dismissal was made without consideration of his referral for mental health evaluation as

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<sup>9</sup> The current regulation instructs the party designated for service to file proof of service within ten days of the designation. 8 CCR §10629 (WCAB Rule 10629)

part of a potential claim of Post-Traumatic Stress Disorder (PTSD) arising out of sexual harassment. *Petition for Reconsideration 6/02/2023 pp. 3-4.*

The first problem with this argument is that there is no error or contradiction in noticing that different cases were dismissed on different dates. ADJ 1848184 (concerning the cumulative injury claim from February 1998 to August 6, 2004) was dismissed on November 22, 2004. ADJ 904905 (the cumulative injury claim, reportedly regarding Valley Fever exposure during the period from August 7, 2003 to August 7, 2004) was dismissed for non-prosecution on March 27, 2007.

The second problem with this argument is the scope of the dismissed cases. While the available record is sparse, ADJ 1848184 appears to have been an orthopedic cumulative injury claim probably involving the lumbar spine. ADJ 905905 was an allegedly industrial Valley Fever infection. Neither claim alleged a potential psychiatric injury of PTSD from sexual harassment. Thus, it was not error to dismiss those claims because a treatment note indicated that an inquiry regarding Petitioner's mental health had been made.

The first main argument of the pending petition is "The WCJ Erred as a matter of law for not granting relief for 2012 dismissal without prejudice (2008 Petition to Reopen). The WCJ failed to consider presumption of service is rebuttable. The WCJ failed to consider whether the presumption of service was rebutted by the material fact of evidence in the record of proceedings" *Petition for Reconsideration 6/02/2023 pp. 5-7.* Defendant responds that "The Court did not err when it denied relief from the Stipulated Dismissal on February 2, 2021 of the first Petition to Reopen case ADJ 4372957." *Answer to Petition for Reconsideration 6/14/2023 p. 5 line 15 to p. 6 line 5.*

Service of the Stipulation & Order of February 2, 2012 has been discussed herein. Briefly restated, Petitioner received proper service via his attorney of record at the time. Petitioner also received proper service via mailing to his address of record at the time, even though that copy was returned. Petitioner also received service by mail at two alternative addresses. One of the two was not returned, triggering the Mailbox Presumption, which is not rebutted by bare assertion of non-receipt.

Furthermore, even if Petitioner had not been provided with prompt service, the applicable remedy is not invalidation of the Stipulation & Order but an extension of time to seek reconsideration of it.

The second main argument of the pending petition is "The WCJ's Erred for failing to consider the "extent" of *permanent* disability requires. Clear error in original award, aggravation of 2005, apportionment and causation, temporary total disability, extent of when petitioner became permanent and stationary, new and further, the 1997 PDRS schedule" (*Petition for Reconsideration 6/02/2023*

*pp. 7-9-corrected spelling error in italics.*) This argument appears to be indicating that the Stipulation & Order of the represented parties should have been rejected and the WCAB should have taken the opportunity to correct the “clear error in original award” of only 7% permanent partial disability as well as finding that Petitioner’s condition has worsened thereafter with additional temporary and permanent disability.

Defendant responds that “Judge Norton did not err when considering the extent of permanent disability, aggravation of 2005, apportionment & causation, 1997 PDRS Schedule.” Defendant argues that then-represented parties and the WCJ appropriately relied on the expert opinion of QME Dr. Hamilton and that the resulting order has been final for years. Defendant also notes that the dismissal of ADJ 1848184 has also been final for years. *Answer to Petition for Reconsideration 6/16/2023 p. 6 line 7 to p. 7 line 4.*

Defendant is correct regarding the appropriate reliance on the substantial evidence of the QME’s re-evaluation report, including Dr. Hamilton’s awareness of the 2005 food cart incident and her carefully reasoned analysis that Petitioner’s level of impairment is unchanged regardless of whether the 1997 PDRS is used or the Diagnosis Related Estimates (DRE) of the 2005 PDRS are retroactively employed. Defendant is also correct regarding finality the dismissal and the inappropriateness of the 2022 second Petition to Reopen.

The final main argument of the pending petition is “Temporary Total Disability 4656{c} (2003) 4661.5 (2003)” Petitioner argues that he should have been found to have sustained new and further temporary disability as a result of the 2005 incident and in reliance on the reports of Dr. Dennis. Petitioner correctly points out that temporary total disability indemnity for his August 2004 injury is not subject to the Lab.C. §4656 204 week cap but is subject to increase rates after two years pursuant to Lab.C. §4661.5. *Petition for Reconsideration 6/02/2023 pp. 9-10.*

Defendant replies that first Petition to Reopen was withdrawn and dismissed in reliance on the expert opinion of QME Dr. Hamilton that Petitioner’s condition had remained permanent and stationary from her 2004 second examination to her 2010 re-examination. Defendant reiterates that this issue is not the proper subject of a 2022 Petition to Reopen of a 2004 date of injury. *Answer to Petition for Reconsideration 6/16/2023 p. 7 lines 6-24.*

Defendant is correct on both issues. It is long-settled law that the substantial medical-legal report of a physician is a sufficient basis for a WCAB determination even if other physicians disagree. And, grounds that could have been and should have been the subject of a timely Petition for Reconsideration are not a proper basis for a subsequent Petition to Reopen.



Defendant's Answer concludes with a fourth issue, "Applicant's petition present the court with alleged facts not admitted into evidence." Defendant objects to "any and all assertions of fact that are not in the current record of proceedings" and notes that Petitioner had the opportunity to identify evidence at the MSC and present it at Trial. *Answer to Petition for Reconsideration 6/16/2023 p. 8 lines 1-7.*

This argument is felt to be generally accurate although it would have been useful if Defendant had applied it to particular issues. For example, Petitioner's petition for increased benefits because his employment with Defendant allegedly ended as a result of discrimination prohibited by Lab.C. § 132a sought "an exemption to toll the statute of limitations" on the basis that "the former employer's discriminatory actions violated the applicant's guarantee of procedural due process" by "Fraudulent concealment and or manipulation of the truthfulness of the accord for resignation." *Petition for Discrimination Benefits Pursuant to Labor Code Section 132a. 1/08/2022.* At Trial, the evidence allegedly available to support the requested estoppel was not forthcoming. The reportedly handwritten original resignation and allegedly-modified typewritten resignation were not offered in evidence. Evidence supporting a specific intent to conceal or manipulate particular things by particular persons at particular times was not provided. Statements, deposition testimony, or Trial testimony from the alleged wrong-doers are not in the record. Therefore, the requested "exemption" was not granted and the one-year Statute of Limitation on Petitioner's Lab.C. §132a petition was enforced.

**IV. Recommendation:** Relief from the stipulated withdrawal of the first Petition to Reopen was appropriately denied. The second Petition to Reopen was appropriately denied. Relief from the dismissal of the dismissal of case ADJ1848184 was appropriately denied. The Lab.C. §132a petition was appropriately denied. Denial of the pending Petition for Reconsideration is recommended.

DATE: June 19, 2023

Robert Norton

PRESIDING WORKERS' COMPENSATION JUDGE