WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RONALD WILSON, *Applicant*

vs.

ETHEL WHARTON and AAA NORTHERN CALIFORNIA; NEVADA & UTAH INSURANCE EXCHANGE administered by TRISTAR RISK MANAGEMENT, *Defendant*

Adjudication Numbers: ADJ9499284, ADJ9499303
Stockton District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings and Order of February 14, 2020, the workers' compensation judge ("WCJ") found (per stipulation) that applicant sustained industrial injury to his low back on May 7, 2013, and that "in the companion case, there has been a finding that applicant did not sustain an [industrial] injury…for the period ending May 7, 2013." The WCJ also issued "findings of fact based on evidence," finding that applicant "is not entitled to a finding of mistake, inadvertence, or excusable neglect per CCP 473 for failing to file a petition for reconsideration timely," and that "the petition to reopen was not sufficiently equivalent to act as a petition for reconsideration." Pursuant to these findings, the WCJ issued an Order taking the matter off calendar.

Applicant filed a timely Petition for Reconsideration of the Findings and Order of February 14, 2020. Applicant contends that the WCJ erred in failing to recognize that no final decision had been rendered at the time of the filing of the petition to reopen, that the petition to reopen meets the requirements of WCAB Rule 10974 for newly discovered evidence, that applicant is entitled

[1] Commissioner Marguerite Sweeney signed the Opinion and Orders Granting Petition for Reconsideration dated March 26, 2020 and May 6, 2020. As Commissioner Sweeney is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

to a decision that applies Code of Civil Procedure section 473, and that "equitable considerations" should be applied to applicant's claim.

Defendant filed an answer.

The WCJ submitted a Report and Recommendation dated March 4, 2020. At the request of the Appeals Board, the WCJ submitted a second Report and Recommendation dated May 1, 2020.

Based on applicable law and our review of the record, including both of the WCJ's Reports, which we adopt and incorporate to the extent indicated in the attachments to this opinion, we conclude that there is no basis to disturb the WCJ's July 22, 2019 Findings and Award (ADJ9499284) and Orders (ADJ9499303) or the WCJ's February 14, 2020 Findings and Order. As our Decision After Reconsideration, we will affirm both of those decisions.

We begin by further addressing applicant's petition to reopen the Findings and Award (ADJ9499284) and Orders (ADJ9499303) of July 22, 2019.[2]

Preliminarily, we note that if the petition to reopen had been filed as a petition for reconsideration, it was timely because it was filed within 25 days of the WCJ's July 22, 2019 decision. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) We further note that ordinarily, "good cause" does not exist where an issue raised on reopening could have been raised by a timely petition for reconsideration. (*Nicky Blair's Restaurant v. Workers' Comp. Appeals Bd.* (*Macias*) (1980) 109 Cal.App.3d 941, 956 [45 Cal.Comp.Cases 876, 885]; *Royster v. Workmen's Comp. Appeals Bd.* (1974) 40 Cal.App.3d 412 [39 Cal.Comp.Cases 513, 514–516]; *Young v. Industrial Acc. Com.* (1944) 63 Cal.App.2d 286 [9 Cal.Comp.Cases 79, 82–85].)

In order to do substantial justice, however, we treat applicant's petition to reopen as a timely-filed petition for reconsideration of the Findings and Award of July 22, 2019. Nevertheless, we are not persuaded that the decision should be disturbed. In the verified petition to reopen, applicant alleged that after "the date of the last evidence," the disability caused by the specific injury of May 7, 2013 had recurred, including a change in the nature and extent of applicant's

[2] Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Workers' Compensation Appeals Board (Appeals Board) acts on the petition within 60 days of filing. (Lab. Code, § 5909.) Applicant's petition to reopen the WCJ's decision of July 22, 2019, considered as a petition for reconsideration, was filed on or about August 13, 2019. However, the Appeals Board did not receive notice of the petition to reopen/reconsideration until approximately March 7, 2020. (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 [57 Cal.Comp.Cases 493] [allowing tolling as a matter of due process.].) Accordingly, the Appeals Board's Opinion and Order Granting Petition for Reconsideration of May 6, 2020 was timely because it was issued within 60 days of the Appeals Board receiving notice of the petition to reopen/reconsideration. (*Id*.)

medical condition that aggravated or exacerbated the industrial injury, and which caused significant pain, the need for further medical treatment, further temporary disability, and new and further permanent disability. In his petition to reopen, applicant also alleged that his treating physicians indicated to him that his back disability had worsened, and that "he should undergo a new back surgery." Finally, the petition to reopen alleged that "applicant will submit medical reports from applicant's treating doctors," and that "these reports will be served as soon as they are received by applicant's attorney." (Petition to Reopen, pp. 1-2.)

Although the petition to reopen was verified, it was subject to dismissal as a skeletal petition for reconsideration. (WCAB Rule 10972, Cal. Code Regs., tit. 8, § 10972.) That is, the petition to reopen included unspecified allegations with no reference to any evidence, including the lack of any reference to the record as it existed at the time. For instance, the petition to reopen did not specifically allege that the record needed further development in relation to the WCJ's finding of 36% permanent disability. Most importantly, at no time following the petition to reopen did applicant produce any of the promised medical reports to demonstrate the possibility he was suffering new and further disability near the time of the WCJ's July 22, 2019 decision. In fact, on January 30, 2020, when the petition to reopen eventually proceeded to trial before the WCJ, applicant still had no new evidence to bring to light. The trial minutes of that date reflect that "no evidence has been provided today." For these reasons, we are not persuaded that the petition to reopen, taken as a petition for reconsideration, established any valid grounds for disturbing the Findings and Award issued by the WCJ on July 22, 2019.

Further, it appears that in filing the petition to reopen, applicant sought to extend the jurisdiction of the Board beyond five years, in order to modify the July 22, 2019 award for a potential future increase in disability. This is contrary to settled law. (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 301–302 [56 Cal.Comp.Cases 476]; *Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 925 [72 Cal.Comp.Cases 778]; *Hartsuiker v. Workers' Comp. Appeals Bd.* (1993) 12 Cal.App.4th 209 [58 Cal.Comp.Cases 19].)

Turning to the Findings and Order dated February 14, 2020, applicant contends in the present petition for reconsideration that under *Beverly Hilton Hotel v. Workers' Comp. Appeals Bd.* (*Boganim*) (2009) 176 Cal.App.4th 1597 [74 Cal.Comp.Cases 927] ("*Boganim*"), an award does not become final until the end of all appeals, which has not happened here. In *Boganim*, the Court held that because the Board had not issued a "final determination" of the applicant's right

to vocational rehabilitation benefits, before the repeal of Labor Code section 139.5 on January 1, 2009, applicant was not entitled to such benefits.

Applicant's reliance on *Boganim* is misplaced because the Court's holding was issued in the context of a statute's repeal, which is not involved here. Further, there is no question in this case that the WCJ's award of July 22, 2019 was a "final order," subject to review by petition for reconsideration, because it determined the substantive right of permanent disability; likewise there is no question that absent a timely petition for reconsideration of the WCJ's award of July 22, 2019, the Board would not have jurisdiction to disturb it. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65 Cal.Comp.Cases 650].)

In the present petition for reconsideration, applicant also contends that under Code of Civil Procedure ("CCP") section 473 and *Fox v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196 [57 Cal.Comp.Cases 149], he is entitled to relief from his mistake of (previously) filing a petition to reopen instead of a petition for reconsideration. Above, we already addressed the merits of the petition to reopen, taken as a petition for reconsideration. In order to fully respond to the present petition for reconsideration, however, we proceed to address applicant's claim of relief under CCP 473.

We note that the Board has, on appropriate occasion, invoked CCP 473 to grant relief from the petitioning attorney's procedural mistakes. (See *Portillo v. Etchison* (2022) 2022 Cal. Wrk. Comp. P.D. LEXIS 150.) Yet in *Portillo*, relief was granted under section 473 where ignoring the mistake(s) of the petitioner's attorney, in attempting to vacate a dismissal, would have resulted in a complete forfeiture of a widow's death claim. However, the circumstances of this case are different, as applicant's rights to permanent disability and medical treatment were not forfeited. Although applicant's award of 36% permanent disability cannot be reopened, he has an award of further medical treatment and may be able to obtain the back surgery he says he needs. For these reasons, it appears the case for applying CCP 473 to provide relief from mistake is not of the sort found compelling in the *Portillo* case. Similarly, we are not persuaded by applicant's contention that "equitable considerations" weigh in favor of changing the WCJ's award of July 22, 2019.

Finally, applicant alleges that he has "newly discovered evidence," consistent with WCAB Rule 10974, to justify further development of the record in connection with the WCJ's prior award of 36% permanent disability. (Cal. Code Regs., tit. 8, § 10974.)

WCAB Rule 10974 states that where reconsideration is sought on the ground of newly discovered evidence that could not with reasonable diligence have been produced before submission of the case or on the ground that the decision had been procured by fraud, the petition must contain an offer of proof, specific and detailed, providing:

(a) The names of witnesses to be produced;

(b) A summary of the testimony to be elicited from the witnesses;

(c) A description of any documentary evidence to be offered;

(d) The effect that the evidence will have on the record and on the prior decision; and

(e) As to newly discovered evidence, a full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case.

In this case, applicant alleges[3] that his witnesses would be his treating physicians (Rule 10974, subd. (a)); that his "summary of the evidence" will show he "needs further surgery" (Rule 10974, subd. (b)); that his "documents to be submitted" consist of "treating physician's reports" (Rule 10974, subd. (c)); that the effect of this proposed evidence would be to show "new and further disability" (Rule 10974, subd. (d)); and that this evidence could not be discovered before trial because "it was newly discovered information." (Rule 10974, subd. (e).)

We are not persuaded. Applicant's allegations are lacking in at least two respects. First, applicant offers no explanation why his "newly discovered evidence" could not with reasonable diligence have been identified before his case was submitted for decision by the WCJ. Secondly, Rule 10974 requires a "specific and detailed" offer of proof. Here, the list of "newly discovered evidence" found on page eight of the petition for reconsideration does not name any treating physicians or provide descriptions or dates of their reports. Likewise, applicant does not specify any "newly discovered evidence" that suggests he may have sustained new and further disability.

We further note that under WCAB Rule 10974, a petition for reconsideration sought upon grounds of "newly discovered evidence" may be denied if it fails to meet the rule's requirements or if it is based upon cumulative evidence. We reject applicant's claim of "newly discovered evidence" because it lacks specificity and because applicant gives no explanation why this supposedly new evidence could not have been discovered previously. In this regard, we note that during the time this matter has been pending on reconsideration, applicant still has not attempted

[3] See Petition for Reconsideration dated February 25, 2020, p. 8.

to file a supplemental pleading that includes a detailed offer of proof of new and further disability. (WCAB Rule 10964, Cal. Code Regs., tit. 8, § 10964.)

However, applicant further contends that his claim of "newly discovered evidence" is supported by *Blanchard v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 590 [40 Cal.Comp.Cases 784]. In *Blanchard*, the Court of Appeal found that a technically deficient petition to reopen, filed within five years of the date of injury, preserved the jurisdiction of the Board to receive evidence in support of the deficient petition and to reopen the case after the five-year period had elapsed. (Lab. Code, §§ 5803, 5804, 5410.)

We are not persuaded that *Blanchard* helps the applicant here. Unlike *Blanchard*, here the applicant did not file any petition to reopen before expiration of the five-year period following the date of his specific injury. Further, and as already explained above, the essential problem here is not the technical label of applicant's petition (reopening or reconsideration), but the lack of substance in its contents, i.e., the complete failure to identify with any specificity some evidence suggesting applicant may have sustained new and further disability. To repeat, applicant has never come forward with any specific offer of proof.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the "Joint Findings of Fact, Award in ADJ9499284, Orders in ADJ9499303" of July 22, 2019, as well as the "Findings of Fact, Orders" of February 14, 2020 (captioning ADJ9499284 and ADJ9499303) are **AFFIRMED**.

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 15, 2023

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

RONALD WILSON
LAW OFFICES OF WILLIAM MORRIS
MULLEN & FILIPPI, LLP

JTL/*ara*

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 ON PETITION FOR RECONSIDERATION [DATED MARCH 4, 2020]

I INTRODUCTION

Ronald Wilson by and through his of attorney of record, filed a timely and verified Petition for Reconsideration challenging the decision issued by WCJ John Durr.

II FACTS

This case involves two separate claims of injury, the first being plead as a specific, ADJ9499284, which occurred on May 7, 2013. In a Joint Findings and Award dated July 22, 2019, the applicant was found to have a level of 36% permanent disability after apportionment as well as an ongoing entitlement to further medical care to his low back. In that same Joint Decision, it was found that the applicant did not suffer the second injury pied as a cumulative trauma to his low back ending on May 7, 2013 in ADJ9499303.

The date of injury in both claims (specific and Cumulative Trauma) was alleged as May 7, 2013.

The five-year jurisdictional time limit was May 7, 2018. […]

The date of the trial was June 3, 2019.

The date of the Joint Findings, Award, Orders and Decision was July 22, 2019.

A Verified Petition to Reopen for New and Further Disability Benefits and or Correct the Record [Labor Code §5410; Labor Code §5803] was filed only in ADJ9499284 on August 13, 2019.

The applicant's attorney filed a Declaration of Readiness to Proceed to a mandatory settlement conference. This was done on October 7, 2019 with the MSC set for November 13, 2013.

The defendants filed a timely and verified objection to the Declaration of Readiness to Proceed based on the statute of limitations, lack of WCAB jurisdiction, failure to declare good faith efforts to informally resolve the disputed issues, and all other defenses pursuant to the California Labor Code.

At the November 13, 2019 Mandatory Settlement Conference, the matter was set for trial on January 30, 2020.

The matter went forward to trial on January 30, 2020. After a thorough discussion with the parties the issues for determination were refined as follows:

1. Is the applicant entitled to a Finding of mistake, inadvertence, or excusable neglect per CCP 4 73 for failing to file a Petition for Reconsideration timely?

2. Was the Petition to Reopen sufficiently equivalent to act as a Petition for Reconsideration, as the parties were put on Notice of the applicant's petition at that time?

3. Was the defendant's failure to provide discovery within five years causative of the delay raising an issue of equity to be found in favor of the applicant?

Both parties submitted pretrial briefs, no exhibits and judicial notice was taken of the two claims files, including the prior [Joint Findings, Award, Orders and Decision [of] July 22, 2019].

Subsequent to the January 30, 2020 trial, a Findings, Order and Opinion issued on February 14, 2020 finding in part that:

[6] The applicant was not entitled to a Finding of mistake, inadvertence, or excusable neglect per CCP 473 for failing to file a Petition for Reconsideration timely.

[7] The Petition to Reopen was not sufficiently equivalent to act as a Petition for Reconsideration.

[8] The alleged failure of the defendants to provide discovery within five years is irrelevant to the failure to file a Petition for Reconsideration to preserve jurisdiction.

III
DISCUSSION

The applicant raises the same issues on reconsideration as were addressed in his trial brief. The record still fails to rise to a sufficient level to support a finding of mistake, inadvertence or excusable neglect.

[…] A Petition to Reopen must be filed within 5 years of the date of injury and [here] it was not.

The applicant had the opportunity prior to the matter going to trial to raise and resolve discovery disputes, as well as complete his medical discovery. When there was no timely filing of a Petition for Reconsideration, to the July 22, 2019 decision; that decision became the final decision in this case. […] The WCAB does maintain the ability to correct or enforce [the Joint Findings, Award, Orders and Decision [of] July 22, 2019]. However, not as to the issue of a supposedly pending increase in permanent disability beyond that which was known and supported by the medical evidence at the time of trial. Reliance was appropriately made on the medical reporting.

IV
RECOMMENDATION

Based on the foregoing it is recommended, as no evidence was provided to support the applicant's contentions at trial, or a showing of abuse of discretion and that the evidence does in fact justify the facts and decision; that the applicant's Petition for Reconsideration be denied.

Respectfully submitted,

3/4/2020
DATE

JOHN E. DURR
Worker's Compensation Judge

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION [DATED MAY 1, 2020]

I INTRODUCTION

Pursuant to an email from the Office of the Commissioners I have been directed to provide a Report and Recommendation of the applicant's August 13, 2019, Petition to Reopen for New and Further Disability Benefits and or Correct the Record. [Labor Code §5410; Labor Code §5803] as if it were a Petition for Reconsideration.

II FACTS

On June 19, 2014, the applicant filed an Application for Adjudication, alleging a May 7, 2013 date of injury, alleging that an injury occurred: WHILE WORKING FOR EMPLOYER PULLING A PIECE OF LINOLEUM FLOORING. The Application for Adjudication was accompanied by DWC-1, unsigned by the employer, indicating a date of injury of May 7, 2013 with the DWC-1 being completed on June 12, 2014.

On January 9, 2015 an Order quashing a Subpoena Duces Tecum dated 11/18/2014 was [issued]. The defendants filed a subsequent motion to quash and the applicant filed a Declaration of Readiness to Proceed on the Defendant's Petition to Quash. On April 13, 2015 an Order Quashing a Subpoena Duces Tecum dated 3/12/2015 issued.

On April 9, 2015 a Declaration of Readiness to proceed was filed by the defendant, in this case [ADJ9499284] and ADJ9499303, indicating that on March 24, 2015 the defendant demanded applicant dismiss with prejudice the claim of injury. In light of evidence developed, Applicant objected in this case [ADJ9499284] and ADJ9499303, indicating there was a need for further discovery and questioned the motives of the defendant. The applicant's attorney made a specific reservation of rights to depose the employer and her personal attorney subject to the penalty of perjury in regard to the "missing evidence."

On June 22, 2015 the Mandatory Settlement Conference was continued with the applicant specifically not waiving the objections to the MSC.

On July 15, 2015 an invoice was filed, indicating that pursuant to Labor Code §5710 the applicant's attorney was requesting fees for the deposition of the applicant which had taken place on November 3, 2014.

A hearing was held on August 31, 2015 and the dispute was resolved by agreement. The Minute Order contains no specificity as to the nature of the dispute.

On March 2, 2016, the applicant provided approximately 72 invoices alleged to be self-procured medical treatment. These were primarily for 2013, 2014 and 2015. Then on October 27, 2016, a second bill of particulars of approximately 25 statements for services in 2016 was filed.

On December 22, 2016, the applicant filed a Declaration of Readiness to Proceed on the issues of discovery and the employer deposition and panel QME. At a hearing that took place on March 6, 2017, the employer, Ethel Wharton, was ordered to appear at a deposition.

On October 27, 2017. The Defendant filed a Declaration of Readiness to Proceed listing the issues as Employment and AOE/COE, indicating that a significant dispute exists as to injury AOE/COE as well as that of the employment relationship. No further discovery has been scheduled [,] WCAB assistance is needed to resolve the claim or set the case for trial. The applicant objected and indicated that further medical discovery is needed unless the claim is accepted. They also contend that the defendant had previously objected to block discovery based on the assertion that the applicant was not employed and that was a threshold issue.

On December 20, 2017, the parties reached an agreement at a Mandatory Settlement Conference to use Dr. Joel Renbaum as an Agreed Medical Evaluator.

On September 15, 2018, the applicant filed a Declaration of Readiness to Proceed listing the principal issues as: Compensation rate; temporary disability; permanent disability; AOE/COE; future medical treatment. The declarant was relying upon the reports of Dr. Joel Renbaum and stated that the applicant's attorney has sent letters regarding settlement on 9/15/18, 7/18/18 and 5/15/18. Defendant is still asserting AOE/COE defenses with no offers for settlement.

On October 17, 2018, the parties appeared at a Mandatory Settlement conference at which time discovery was Ordered closed with the exception of an agreement that the deposition of the employer, Ethel Wharton, may be taken as she may become unavailable for trial testimony. At issue was employment; injury AOE/COE earnings; temporary disability; permanent disability; apportionment; occupational group; need for further medical treatment; attorney's fees; other issues: the applicant claiming no wage statement provided, untimely denial of specific injury (no claim form provided) and the defense claiming a statute of limitations defense.

Following a continuance due to an attorney's illness, the matter went forward for trial on June 3, 2019. The two cases, ADJ9499284 and ADJ9499303 were consolidated for trial, with the following issues being agreed to by the parties without objection (except as noted):

1. Employment. Injury arising out of and occurring in the course of employment.

2. Occupation. The applicant is claiming Occupational Group No. 340. The defendant is claiming Occupational Group No. 240. The difference is the arduousness of the employment.

3. The applicant is claiming $800.00 per week based on the employer's failure to provide a wage statement. The defendant claims minimum.

4. Temporary disability. The applicant is claiming periods of temporary disability from May 20, 2013 through January 16, 2014, May 27, 2014 through May 27, 2015 and August 24, 2015 through March 8, 2018.

5. Permanent disability.

6. Apportionment.

7. The need for further medical care.

8. Attorney fees.

9. The lien of Boehm and Associates for Blue Shield is deferred.

10. The applicant's issue regarding reimbursement for self-procured medical is also deferred.

11. At trial, the applicant is raising penalties and sanctions which are deferred.

OTHER ISSUES:

12. The applicant is claiming that no wage statement was provided and there was an untimely denial of the specific injury with no claim form being provided.

13. The defendant is claiming Statute of Limitations.

LET THE MINUTES REFLECT THAT applicant is raising the issue that defendants have not fully complied with the discovery request. Defendants object to any new issues currently being raised that were not previously claimed based upon due process.

On July 22, 2019 a Joint Findings of Fact, Award in ADJ9499284, Orders in ADJ9499303 and Joint Opinion on Decision issued. The decision found that the applicant sustained injury AOE/COE in a specific injury on May 7, 2013, but did not suffer a cumulative trauma for the period ending on May 7, 2013. That decision also found that the injured body part was the low back, the applicant was working as an attendant/driver (group 250), earnings of $164 per week with indemnity rates of $160 for temporary disability and $160 for permanent disability, that the applicant had been totally temporarily disabled from May 27 to 14 to May 27, 2015. It was found, based on the reporting of the AME that the Applicant was 36% permanently disabled after apportionment. There was a need for further medical treatment and the value of the applicant's attorney services were $5400.

On August 13, 2019 the applicant filed a "Petition to Reopen for New and Further Disability Benefits and or Correct the Record. [Labor Code §5410; Labor Code §5803]." This contains three numbered paragraphs:

1. Confirmation of the specific injury on May 7, 2013 and that an award had been issued on July 22, 2019. That included applicant's permanent disability of 36%.

2. The applicant is "now," alleging that since the last date of evidence, the disability caused by the injury has reoccurred and there's been a change in nature and extent of the back condition. Alleging additional aggravation, pain, medical treatment, further periods of temporary disability and new and further injury as a compensable consequence and causing the need for vocational rehabilitation benefits.

3. In support, the applicant will submit medical reports from the Applicant's treating doctors indicating an increase in disability and recommendations for surgery. It should be noted that these reports will be served as soon as they are received by the Applicant's attorney.

On August 22, 2009 the defendant objected to the Petition to Reopen for New And Further Disability benefits and/or correct the record. The basis of the objection is Labor Code §5804 provides that "no award of compensation shall be rescinded, altered, or amended after 5 years from the date of injury ..." Indicating the date of injury was May 7, 2013 and the petition to reopen was on August 13, 2019. The defendant asserting that as more than 5 years had passed since the date of injury the WCAB no longer had jurisdiction regarding the applicant's Petition to Reopen.

On October 7, 2019, the applicant filed a Declaration of Readiness to Proceed listing the principal issues as: compensation rate; temporary disability; permanent disability; AOE/COE; employment; self-procured medical treatment; future medical treatment; and discovery. The comment box indicated that the dispute is the Right to Reopen.

On October 17, 2019, defendants objected to the Declaration of Readiness to Proceed based on the statute of limitations, lack of WCAB jurisdiction, and failure to declare good faith efforts to informally resolve the disputed issues.

On October 29, 2019 defendants filed a petition requesting an order quashing the Subpoena Duces Tecum dated October 16, 2019 issued to Stanford Hospitals & Clinics and also to Sutter Medical Foundation.

The parties attended a mandatory settlement conference on November 13, 2019 and the matter was set for trial on the issue of: the 8/13/19 petition to reopen for new and further disability benefits, statute of limitations, cost for interval discovery. Applicant contends continuing jurisdiction or right to reconsideration of award. On January 30, 2020, the matter went to trial resulting in a Finding of Facts and Decision dated February 14, 2020. Based on the trial briefs, the findings found that the applicant was not entitled to a finding of mistake, inadvertence, or excusable neglect per CCP 473 for failing to file a Petition for Reconsideration timely; the Petition to Reopen was not sufficiently equivalent to act as a Petition for Reconsideration; and the alleged failure of the defendants to provide discovery within 5 years is irrelevant to the failure to file a Petition for Reconsideration to preserve jurisdiction. The applicant filed a Petition for Reconsideration on February 25, 2020, the defendant filed an answer on March 6, 2020 and the Appeals Board issued an Order and Opinion Granting the Petition for Reconsideration on March 26, 2020.

On April 29, 2020, I received a clarifying email requesting that I prepare a Report and Recommendation as if the Petition to Reopen [filed back on August 13, 2019] was a Petition for Reconsideration.

III
DISCUSSION

The basis of a Petition for Reconsideration is enumerated in Labor Code §5903. In first looking to see if the Petition to Reopen met the criteria as a Petition for Reconsideration it is necessary to look at the basis for a Petition for Reconsideration. There are five enumerated grounds listed for reconsideration:

1. That by the order, decision, or award made and filed by the appeals board or a workers' compensation judge, the appeals board acted without or in excess of its powers.

    a. Nothing in the applicant's petition indicates that there was a contention that the workers' compensation judge acted without or in excess his powers.

2. That the order, decision or award was procured by fraud.

    a. Nothing in the applicant's petition indicates that there was a contention that that the order, decision or award was procured by fraud.

3. That the evidence does not justify the findings of fact.

    a. Here the applicant "NOW ALLEGES" that there is supposedly evidence, not in his possession, that shows that the applicant has had a change in the nature and extent of his condition. Therefore, this was not evidence that was the basis of a finding of fact. The evidence relied upon was the medical reporting of the AME Dr. Joel Renbaum dated March 8, 2018, May 5, 2018 and September 15, 2018. These three medical reports were admitted into evidence as a joint exhibit agreed to by both parties.

4. That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.

    a. The applicant is claiming new evidence material to have. However, this fails on the reasonable diligence issue. The reasonable diligence standard is a very low bar for the injured worker. The applicant alleges that the doctors have "indicated" to him that his back disability is worse and he should undergo a new back surgery. [Applicant] is alluding to documentary evidence that he has neither seen nor has in his possession. The applicant has an Award of further medical care to his low back. Therefore, the applicant is not precluded from receiving covered treatment for any changes related to his industrial injury.

As to the level of temporary disability, permanent disability and other benefits, there was no claim as to when this "change in condition" occurred. The parties jointly agreed to the submission of the AME reports of Dr. Renbaum. Discovery was closed at the Mandatory Settlement Conference on October 17, 2018. It should be noted that the claim made in the Petition to Reopen does not indicate that there was any actual medical evidence at the time the said petition was filed.

5. That the findings of fact do not support the order, decision, or award.

    a. No contention is raised in the Petition to Reopen by the applicant that the findings of fact do not support the order, decision or award.

Regarding the second heading on the applicant's Petition to Reopen, invoking Labor Code §5410: The applicant has been found to have an injury that occurred on May 7, 2013 and this date was acknowledged in the applicant's pleading. The five-year period in the statute (§5410) began to run on the date of injury of May 7, 2013. The 5 years expired on May 7, 2018. The case remained active and […] there was no actual Petition for Reconsideration, only a Petition to Reopen […]

IV
RECOMMENDATION

The applicant's Petition to Reopen failed to substantiate one of the five enumerated reasons for a Petition for Reconsideration. Having failed that: there was no timely Petition for Reconsideration and the Award issued on July 22, 2019 became final on August 17, 2019. The parties requested a trial as to the status of the Petition to Reopen and said trial did go forward on January 30, 2020, but that is separate from the analysis of the August 13, 2019 petition to reopen with a Findings and Order dated February 14, 2020 and currently being reviewed based on the applicant's Petition for Reconsideration of February 25, 2020. There being no basis supporting the Petition for Reconsideration contained within the Petition to Reopen; it is recommended that Reconsideration be denied […].

Respectfully submitted,

5/1/2020
DATE

JOHN E. DURR
Worker's Compensation Judge