

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

SHARON MCKINLEY, *Applicant*

vs.

**CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, legally
uninsured; STATE COMPENSATION INSURANCE FUND, STATE CONTRACTS
ADJUSTING AGENCY, *Defendants***

**Adjudication Numbers: ADJ8439665, ADJ10996213, ADJ2727772 (RIV0029948)
Riverside District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration filed by applicant on May 8, 2023, and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, the petition fails to make specific citations to the record and will be denied.

I.

A petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.)¹ However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice..." (*Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shiple*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision, holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.) Like the Court in *Shiple*, "we are not convinced that the burden of the system's

¹ All further statutory references are to the Labor Code unless otherwise noted.

inadequacies should fall on [a party].” (*Id.*) In this case, applicant filed the petition on May 8, 2023. Thereafter, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties. Therefore, considering that the Appeals Board’s failure to act on that petition was in error, we find that our time to act on applicant’s petition was tolled.

II.

WCAB Rule 10945(b) provides, in relevant part: “[e]very petition for reconsideration ... shall support its evidentiary statements by specific references to the record.” (Cal. Code Regs., tit. 8, § 10945(b), emphasis added.) Rule 10945(b) then goes on to specify how references to the record must be made.

The requirements of Rule 10945 regarding specific references to the record are consistent with case law regarding proper citation to the record in appellate proceedings. (*Flores v. Cal. Dept. of Corrections and Rehab.* (2014) 224 Cal.App.4th 199, 204 (“an appellant must do more than assert error and leave it to the appellate court to search the record ... to test his claim”); *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287 (“[r]ather than scour the record unguided, we may decide that the appellant has waived a point urged on appeal when it is not supported by accurate citations to the record”); *Salas v. Cal. Dept. of Transp.* (2011) 198 Cal.App.4th 1058, 1074 (“[w]e are not required to search the record to ascertain whether it contains support for [plaintiffs’] contentions”); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 (“[t]he appellate court is not required to search the record on its own seeking error” and “[i]f a party fails to support an argument with the necessary citations to the record, ... the argument [will be] deemed to have been waived”); *Nielsen v. Workers’ Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 923 [50 Cal.Comp.Cases 104] (“Instead of a fair and sincere effort to show that the trial court was wrong, appellants brief ... is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness An appellant is not permitted to evade or shift his responsibility in this manner.”); see also Cal. Rules of Court, Rule 8.204(a)(1)(C) (“Each brief must ... [s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears”).) Moreover, “[t]he larger and more complex the record, the more important it is for the litigants to adhere to appellate rules.” (*City of Santa Maria v. Adam, supra*, 211 Cal.App.4th at p. 287.)

Here, petitioner not only violated Rule 10945(b), but failed to make even a reasonable effort to include specific citations to the record. A petitioner cannot evade this responsibility and

place the burden on the Appeals Board to discover where the evidence supporting the petition can be found in the record. Accordingly, the Petition for Reconsideration will be denied.

If the petition was not being denied for failing to cite to the record, we would have denied it on the merits for the reasons stated in the WCJ's report, which we adopt and incorporate.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the April 26, 2023, Joint Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 18, 2023

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

**SHARON MCKINLEY
WHITING, COTTER & HURLIMANN, LLP
STATE COMPENSATION INSURANCE FUND
4600BOEHM**

JMR/ara

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

<u>Date of Injury:</u>	February 17, 2012
<u>Age on DOI:</u>	57
<u>Occupation:</u>	Correctional Officer
<u>Parts of Body Injured:</u>	brain/neurological system/ cognitive, psyche, vestibular/ear/vertigo, speech and sleep
<u>Identity of Petitioner:</u>	Applicant in pro per
<u>Timeliness:</u>	The petition was timely filed on 05/08/2023
<u>Verification:</u>	The petition was verified
<u>Date of Award and Order:</u>	April 25, 2023
<u>Petitioner's Contentions:</u>	Petitioner contends the WCJ erred by: A. The evidence does not justify the findings of fact;

Petitioner, Applicant, who represents herself, has filed a timely verified Petition for Reconsideration on May 8, 2023, challenging the Findings and Award dated April 25, 2023.

Defendant, the Respondent, has not filed an Answer.

In its Petition for Reconsideration, Petitioner argues that the evidence does not justify the Findings of Fact.

It is recommended that reconsideration be denied.

**II
FACTS AND PROCEDURAL HISTORY**

Applicant, the Petitioner, filed an application for adjudication of claim, that while she was working as a correctional officer for California Department of Corrections And Rehabilitation, legally uninsured, sustained injury arising out of and in the course of her employment to her brain/neurological system/cognitive, psyche, vestibular/ear/vertigo and speech and sleep. She also claimed additional body parts consisting of neck, thoracic spine, lumbar spine, shoulders, elbow, hands, hips, knees, feet, immune disease.

This case proceeded to trial on January 21, 2023 and was submitted on February 6, 2023 after submission of trial briefs. At the time of trial applicant was represented by counsel. The court issued the decision on April 25, 2023, and found applicant has a compensable claim which resulted in 62 percent permanent disability to the her brain/neurological system/cognitive, psyche, vestibular/ear/vertigo and speech and sleep based on the opinions of PQME Dr. Jacobo

Chodakiewitz, M.D., PQME Dr. Stanley Goodman and the report of Ariel Shandling, M.S. However, applicant did not sustain injury arising out of and in the course of employment to the neck, thoracic spine, lumbar spine, shoulders, elbows, hands, hips, knees, or feet. The court relied on the opinions of Lee Silver, M.D., the orthopedic PQME, who opined applicant did not have an injury involving the neck, thoracic spine, lumbar spine, shoulders, elbows, hands, hips, knees, or feet. (Ortho PQME reports by Lee Silver, M.D., dated 5/24/2019 and September 4, 2019, Exhibits II and HH.)

The Findings and Award and Opinion on decision were served by the Riverside District Office on applicant's attorney as applicant was represented for the trial, applicant and defense counsel on April 26, 2023.

Subsequent to the issuance of the Findings and Award and Opinion on Decision, the applicant dismissed her attorney for case ADJ8439665.

On May 8, 2023, applicant filed a two page handwritten Petition for Reconsideration with a star next to number 3: The evidence does not justify the findings of fact. Petitioner also handwritten on page 2 the following statements:

- A. Exhibits filed with court;
- B. Attorney Refused? ;
- C. Decision on 4/26/23 received;
- D. Reg 4/27/23 Nasty gram w/ no date and trial "exhibits" not included in link with case files;
- E. Trial Brief.

III **DISCUSSION**

THE EVIDENCE NOT JUSTIFY THE FINDINGS OF FACT

Petitioner did not raise any substantive argument or provide additional evidence. The court reviewed the complete record during submission.

The trial judge's credibility determination should be given great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) There was also no evidence of considerable substantiality that should warrant rejecting the WCJ's credibility determination.

The court does not fully grasp Petitioner's arguments but will address them as well as possible in order of listing, but it appears Petitioner wants to re-litigate the case based on evidence which had already been reviewed by the court.

A. Exhibits filed with court

It is unclear what this contention means, but if the petitioner is attempting to argue that exhibits were not filed there were multiple joint exhibits ZZ through FF consisting of PQME reports and

depositions of QME physicians jointly filed by the parties. All joint Exhibits offered were admitted into evidence. Applicant's 1 through 4 and Defendant's Exhibit A were also offered and admitted into evidence. The court reviewed all exhibits entered into evidence and considered these reports in issuing its Findings and Award and Opinion on Decision.

B. Attorney Refused?

The court does not understand what this statement means. Applicant was represented by competent counsel at time of trial, exhibits were offered and admitted into evidence and the applicant's testimony was heard and witness testimony was heard, see Minutes of Hearing Summary of Evidence pages 1-14 served January 1, 2023. No corrections were requested by any party subsequent to service of this document.

C. Decision on 4/26/23 received

It does not appear that this is actually an issue but only a statement of when the Findings and Award and Opinion on Decision were received by the applicant in this matter.

D. Reg 4/27/23 Nasty gram with no date and trial "Exhibits" not included in link with case files.

Once again the court does not understand this alleged contention. As noted above the case proceeded to trial with all offered exhibits being entered into evidence and considered by the court. The court assumes that the petitioner is referring to the discussion of the actual date of injury and medical records, which were in conflict with the testimony of the applicant for the specific date of injury of February 17, 2012. How this is perceived by the applicant appears to be at issue. The court does not relist admitted exhibits in its Opinion and Decision but does discuss reports and Exhibits relied upon. The court is not clear what is meant by "in link with case files", the court considered all evidence admitted in this matter and spent considerable time reviewing the evidence presented and admitted in this matter. There were no additional exhibits offered by the parties that were not entered into evidence.

E. Trial Brief.

It is unclear what is meant by this contention. Both applicant's attorney and defendant's attorney submitted trial briefs in this matter, these were reviewed and considered as well as all medical evidence and testimony at time of trial. The court made its determinations based on the entirety of the record.

The court provided the basis for making its decision, and based on the totality of the evidence presented, including testimony from the applicant, the court determined applicant's claim was compensable but limited to the brain/neurological system/cognitive, psyche, vestibular/ear/vertigo, speech and sleep.

IV
RECOMMENDATION

It is respectfully recommended that Applicant's Petition for reconsideration be denied.

Respectfully submitted,

Sharon Renzi
Workers' Compensation
Administrative Law Judge

Date: 05/22/2023