

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

**ERIKA SOTO PALOS, *Applicant***

**vs.**

**AMAZON; AMERICAN ZURICH INSURANCE COMPANY  
and LIBERTY MUTUAL, administered by SEDGWICK, *Defendants***

**Adjudication Numbers: ADJ16798052, ADJ16798517  
San Bernardino 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.

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/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER**



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

**March 4, 2024**

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

**ERIKA SOTO PALOS  
HINDEN & BRESLAVSKY, APC  
EMPLOYER DEFENSE GROUP**

**JMR/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**

**I.  
INTRODUCTION**

1. Identity of Petitioner: Applicant, ERIKA SOTO PALOS
2. Timeliness: The petition was timely filed on January 5, 2024
3. Verification: The petition was verified.
4. Petitioner's Contentions: Petitioner contends the WCJ erred by: (1) acting in excess of his authority; and (2) the evidence does not justify the Decision.

The Applicant has filed a verified, timely Petition for Reconsideration of this Court's Joint Findings and Award/Order of December 18, 2023. The Applicant is contending that because of her unrebutted testimony that an interpreter was not present during the evaluation by the Panel Qualified Medical Examiner, the Court should not have relied upon the Panel Qualified Medical Examiner's reporting as the basis for the Joint Findings and Award/Order. This Court recommends the Petition for Reconsideration be denied by the Appeals Board because applicant's testimony could not be relied upon due to lack of credibility and the Panel Qualified Medical Examiner report constituted substantial medical evidence upon which to base the decision.

**II.  
FACTS**

This court issued a Findings and Award regarding the December 2, 2021 injury (ADJ16798052), where as a warehouse associate, Applicant slipped off and fell from a three-rung step-ladder and sustained injury arising out of and in the course of employment (AOE/COE) to the lumbar spine, upper right arm, and pelvis/gluteal, however not to the right shoulder. Applicant was unable to meet her burden of proving injury to the right shoulder due to lack of medical evidence. This Court awarded applicant 0% Permanent Disability as well as the need for future medical treatment pursuant to Panel Qualified Medical Examiner (PQME) Dr. Jason Chiu's March 15, 2023 report (Defendant's Exhibit A, pages 24 – 25, & 26).

This court also issued a Findings and Order regarding Applicant's alleged continuous trauma injury from November 19, 2021 through September 3, 2022 (ADJ16798517), where injury AOE/COE was not found as Applicant did not meet her burden of proof pursuant to Labor Code §3202.5 with her offered testimony and the medical evidence. This finding was also based on PQME Dr. Chiu's March 15, 2023 report, which specifically found no continuous trauma injury (Defendant's Exhibit A, pages 23 – 24).

At Trial, the Applicant was found not credible, and thus her testimony alleging that an interpreter was not present during the PQME evaluation but only afterwards, could not have been relied upon (Opinion on Decision, page 4, 2nd paragraph). Additionally, PQME Dr. Chiu's March 15, 2023 report was found to be credible, reliable, persuasive, and constituted substantial medical evidence (Opinion on Decision, page 4, 6th paragraph). Further, Dr. Chiu specifically stated that an interpreter, Nubia Castaneda CMI 106647, was present throughout the evaluation which increased the time and complexity of the evaluation, in accordance and compliance with Title 8 Cal. Code of Regulations §9795(d). (Defendant's Exhibit A, page 1).

Moreover, the Applicant never made an objection nor raised any issue contending that an interpreter was not present during the entire examination and evaluation process with PQME Dr. Chiu. PQME Dr. Chiu's March 15, 2023 report was admitted into evidence without any objection by Applicant.

### III.

#### DISCUSSION

##### A. Reconsideration or Removal

Is Applicant's appeal filed on January 5, 2024, a Petition for Reconsideration or a Petition for Removal? Removal is an extraordinary remedy that may be requested to challenge interim and non-final orders issued by a workers' compensation judge (*Cortez v. Workers' Compensation Appeals Board* (2006) 136 Cal. App. 4th 596, 600 fn 5, [71 Cal. Comp. Cases 155, 157, fn 5]; *Kleman v. Workers' Compensation Appeals Board* (2005) 127 Cal. App. 4th 274, 281, fn 2 [70 Cal. Comp. Cases 133, 136, fn 2]). The petitioning party must demonstrate that substantial prejudice or irreparable harm will result if removal is not granted (Title 8 Cal. Code Regulations, Section 10955(a) and that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues.

A Petition for Reconsideration on the other hand is the appropriate mechanism to challenge a final order, decision, or award. Labor Code Section 5900. An order that resolves or disposes of the substantive rights and liabilities of those involved in a case is a final order. See *Maranian v. Workers' Compensation Appeals Board* (2000) 81 Cal. App. 4th 1068 [65 Cal. Comp. Cases 650]; *Safeway Stores, Inc. v. Workers' Compensation Appeals Board (Pointer)* (1980) 104 Cal. App. 3d 528 [45 Cal. Comp Cases 410]. The instant case involves the Applicant's and Defendant's respective substantive rights and liabilities and therefore, Reconsideration is the proper mechanism for the Applicant to challenge this Court's Findings and Award.

##### B. Applicant's Allegation an Interpreter was Not Present During the PQME Evaluation Cannot Be Relied Upon as Credible Testimony.

A WCJ's determination of the credibility of witnesses is to be given great weight because the WCJ had the opportunity to observe the demeanor of the witnesses, when it is supported by ample, credible evidence, and can only be rejected if substantial evidence supports a contrary finding

(*Garza v. WCAB (1970) 35 CCC 500*). In this instance, Applicant was determined to be a less than credible witness.

During cross-examination, Applicant testified that her prior motor vehicle accident of September 10, 2019 only involved a neck injury (MOH/SOE, page 7, lines 19 – 20). In addition, Applicant further testified that she treated for this accident with Inland Chiropractic, however such did not include the lumbar spine or elbows (MOH/SOE, page 7, lines 19 – 23, and page 8, lines 2 – 5). Also, the Applicant advised PQME Dr. Chiu that her prior September 10, 2019 injury only involved the neck (Defendant's Exhibit A, page 4).

In rebuttal, Defendant offered records from Inland Chiropractic, dated September 11, 2019, September 12, 2019, March 11, 2020, and March 18, 2020, documenting Applicant's complaints, diagnosis, and treatment concerning the lumbar spine, thoracic spine and bilateral elbows (Defendant's Exhibit B). The Applicant did not object to the records, and thus, the designated pages were admitted into evidence. Note, Applicant's alleged continuous trauma injuries included the back and elbows, but not the neck. Based on the above, this Court found Applicant's testimony not credible.

Additionally, at Trial the Applicant testified that immediately prior to her employment with Defendant, which started November 19, 2021, she had no health issues nor any injured body parts (MOH/SOE, page 5, line 9 and lines 19 – 20). This appears contrary to the above discussed records from Inland Chiropractic, which include diagnosis of cervical disc displacement, intervertebral lumbar disc displacement, cervicobrachial syndrome, cervical spine facet syndrome, pain in unspecified elbow, and segmental and somatic dysfunction of the cervical, thoracic, and lumbar region. Further, the records indicate that the MRI reports revealed structural damage and disc injuries (Defendant's Exhibit B).

Although Applicant could argue that her prior health issues and injuries were not documented right up to the immediate date prior her employment with Defendant, it is unlikely that Applicant would have fully recovered such that she could credible state she had no health issues or injured body parts prior to her employment with Defendant. This also supported this Court's finding that Applicant was not credible.

At Trial, the Applicant testified that no interpreter was present during Dr. Chiu's examination, which she later confirmed on cross-examination (MOH/SOE, page 6, lines 14 – 15 and 21 - 23). Applicant claims that this is unrebutted testimony. However, as direct rebuttal evidence to Applicant's testimony, PQME Dr. Chiu specifically stated in his March 15, 2023 report that an interpreter was present throughout the evaluation (Defendant's Exhibit A, page 1).

Furthermore, during the cross-examination, Applicant recalled that part of her examination, was reporting her job duties. The Applicant also remembered the doctor examining her knees and back, and performing a grip test for her hands (MOH/SOE, page 6, lines 24 – 25 and page 7, lines 1 - 2). According to the Applicant, the doctor only spoke English, which she did not (MOH/SOE, page 6, lines 13 – 14).

It is highly questionable how Dr. Chiu, allegedly without the aid of an interpreter, could have acquired all the detailed information concerning job duties which Applicant testified that she provided during the evaluation. It is further very questionable how Dr. Chiu could have conducted the extensive physical examination, taking numerous measurements involving the Applicant's active participation, without the aid of an interpreter (Defendant's Exhibit A, pages 3, & 6 – 15).

Thus, based on the foregoing, this Court found Applicant not to be a credible witness, and Applicant's testimony that an interpreter was not present during the PQME evaluation, could not be relied upon. Therefore, since Applicant's allegation concerning the interpreter is the only basis of Applicant's argument against relying on PQME Dr. Chiu's March 15, 2023 report, the doctor's report could be relied upon as credible evidence.

**C. Liberal Construction Clause Is Not Relevant to the Determination that Applicant was Not Found to be Credible Witness.**

Applicant's argument is that the Liberal Construction Clause of Labor Code §3202 requires applicant's claim that no interpreter was present during the PQME evaluation, should not be ignored. This is not relevant to the finding by this Court that Applicant was not a credible witness. The Applicant's testimony was not ignored, but rather it was merely discounted due to her lack of credibility.

**IV.  
RECOMMENDATION**

Therefore, based on the above, it is respectfully recommended that the Applicant's Petition for Reconsideration be DENIED.

Dated 01/19/2024 at San Bernardino, California:

**Johann L. Van Kolken**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE