

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

JAMES HARVELL, *Applicant*

vs.

SCHNEIDER ELECTRIC; AIG, administered by BROADSPIRE, *Defendants*

**Adjudication Numbers: ADJ13081250, ADJ13081258, ADJ12718390,
ADJ13081274, ADJ13081277**

Van Nuys District Office

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND DECISION
AFTER RECONSIDERATION**

Applicant seeks reconsideration of the February 14, 2024 Findings and Award (“F&A”), wherein the workers’ compensation administrative law judge (WCJ) found applicant sustained a work-related injury to his back on March 13, 2017, but that applicant sustained no permanent disability as a result of the injury, that he did not require any further medical treatment, and that applicant was therefore due no further compensation. (F&A, at pp. 1–2.)¹ Applicant asserts that the WCJ erred in basing her conclusions on the reporting of Panel Qualified Medical Examiner (“QME”) Ronald Wolfson, M.D. because the reports are not substantial medical evidence.

We received an Answer. We also received a Report and Recommendation on Petition for Reconsideration (Report), recommending that reconsideration be denied. We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and for the reasons described below, we will grant the Petition for Reconsideration, rescind the F&A, and return the matter to the WCJ for a decision in the first instance as to the substantiality of Dr. Wolfson’s QME Report.

¹ Commissioner Dodd was on the panel assigned to the first petition in this matter, but was unavailable to participate on the second petition, resulting in Deputy Commissioner Sussman taking her place as a substitute panel member. Commissioner Dodd has now rejoined the panel.

PROCEDURAL BACKGROUND

In Case No. ADJ13081250,² applicant alleged a specific injury to his back sustained on March 13, 2017 while employed by defendant as a field service engineer.

On April 22, 2021, Applicant was examined by Panel Qualified Medical Examiner (“QME”) Ronald Wolfson, M.D., in connection with the above-claimed injury. (See J. Ex. KK, at p. 2.) Dr. Wolfson noted that applicant described being injured on March 13, 2017 while lifting and moving a 250-pound piece of machinery; he initially thought it was a back sprain but it got progressively worse over two days, with severe back pain and pain radiating down his left leg. (*Ibid.*) Applicant also reported a later diagnosis of metastatic cancer in his left hip. (*Id.* at p. 3.) Applicant thought the March 13, 2017 injury claim was “reopened” or “reactivated when it became apparent that he had a lesion in his left hip. He tells me that the magnetic lines of flux can be a carcinogenic.” (*Ibid.*) Applicant reported being unable to put weight on his hip, that he uses a walker, and that his left leg “feels dead.” (*Ibid.*) He has pain radiating all the way down to his foot, and lots of joint pain. (*Ibid.*)

Dr. Wolfson concluded that applicant had sustained a back sprain on March 13, 2017, but that “in all medical probability,” the injury “resolved, and there is no evidence at this time that his problems are caused by anything other than his metastatic cancer.” (*Id.* at p. 19.) On the question of the cancer, and whether it could have been caused by applicant’s employment, Dr. Wolfson clearly stated that he was “not an expert about magnetic electrical fields and I cannot opine on that question.”³ (*Ibid.*) Dr. Wolfson accordingly found no permanent impairment. (*Id.* at p. 20.)

The matter originally came on for trial on March 16, 2023; after various delays, the matter came on again for trial on September 13, 2023. The issues listed for trial in Case No. ADJ13081250 were: (1) injury arising out of and in the course of employment (“AOE/COE”); (2) permanent disability (“PD”); (3) apportionment; (4) need for further medical treatment; (5) liability for self-procured medical treatment (bifurcated and deferred); (6) liens (bifurcated and deferred); and (7) attorney fees. Minutes of Hearing / Summary of Evidence (MOH/SOE), 9/13/23, at pp. 3–4.) Defendant additionally argued that the matter was barred by a settlement in a

² This procedural background omits references to cases other than Case No. ADJ13081250, because, as described below, it is clear that the Petition for Reconsideration is actually directed only at that case number, and not toward any others.

³ We note that the case number does not include any claim for a work-related cancer injury.

prior case number, and that the claim was barred by the statute of limitations and/or the post-termination defense; applicant argued that the issues should be limited to PD and future medical treatment, per the Declaration of Readiness (“DOR”). (*Id.* at p. 4.) Evidence was admitted, and the matter taken under submission without taking testimony or hearing argument. (*Id.* at pp. 6–8.)

On November 8, 2023, the WCJ issued a Findings and Order finding that Case No. ADJ13081250 was barred by a prior Compromise and Release (“C&R”). Applicant filed a Petition for Reconsideration; we concluded that the claim was not barred by the prior C&R, and accordingly rescinded the finding and returned the matter to the WCJ for further proceedings.

On February 14, 2024, without reconvening the parties or otherwise providing them an opportunity to be heard, the WCJ issued the instant F&A, finding based upon the medical reporting of Dr. Wolfson that applicant sustained a work-related injury, but with no permanent disability or ongoing need for medical treatment. (F&A, at pp. 1–2.)

The instant Petition for Reconsideration followed. The Petition alleges that Dr. Wolfson’s QME Report is not substantial evidence because (1) it does not provide the underlying basis for his conclusion, in that the Report does not explain what methods the doctor utilized when examining applicant’s back; (2) it does not allow the WCAB to determine if the QME followed the AMA guides; (3) Dr. Wolfson, as an orthopedic surgeon, lacks the medical expertise to determine whether applicant’s cancer did or did not impact his back; and (4) the report does not explain why the back injury is not a contributory factor to applicant’s ongoing hip pain. (Petition for Reconsideration, at pp. 3–5.)

DISCUSSION

Initially, we consider the timeliness of the Petition. Both defendant and the WCJ contend that the Petition should be dismissed as untimely because the caption states that it is seeking review of the wrong case number, Case No. ADJ13081258, when in fact applicant’s contentions relate to Case No. ADJ13081250.

We do not believe this argument correctly states the law. What governs the timeliness of a Petition for Reconsideration is its date of filing, not the case number listed on the caption. Here, it is undisputed that the Petition for Reconsideration was filed within the time limits provided by Labor Code⁴ section 5903; that it happened to contain the wrong case number in the case caption,

⁴ Further references are to the Labor Code, unless otherwise specified.

while not ideal, is of no more material relevance than any other typo. There is no allegation that either the WCJ or defendant was prejudiced by this essentially clerical error, and the body of the Petition references the correct case number. Accordingly, the Petition was timely filed.

Turning to the merits of applicant's argument, the WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (Hamilton) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton, supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] ... For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id.* at p. 476 (citing *Evans, supra*. 68 Cal. 2d at p. 755.)

Here, the WCJ's Report does not directly address applicant's claim that Dr. Wolfson's Report is not substantial evidence, instead including a long list of reasons why the issue was waived. We consider each reason in sequence.

First, the WCJ asserts that the issue is waived because applicant did not submit evidence that he had made efforts to obtain additional information or clarifications from the QME regarding the alleged deficiencies of the report. Although we sympathize with the WCJ here over applicant's apparent inaction, any such failure does not waive a claim that the QME Report does not constitute substantial evidence. Medical evidence either is or is not substantial, and a party's lack of effort to introduce other evidence does not convert otherwise insubstantial evidence into substantial evidence.

Second, the WCJ notes that applicant did not list the substantiality of the QME Report, the necessity of development of the record, or a request for a replacement QME as issues on the Pre-Trial Conference Statement. Although this appears to also be true, applicant did list PD as an issue; to the extent that his claim is that there is a lack of substantial evidence to support the WCJ's findings as to PD, the listing of PD as an issue was sufficient to preserve this argument.

Third, the WCJ notes that despite having made multiple motions at trial, applicant's attorney did not raise any issue relating to the QME Report, and that the QME Report was listed as a joint exhibit. Although we are sympathetic to the WCJ's frustrations here, the same considerations as above apply – PD was listed as an issue at trial, and the fact that the QME Report was listed as a joint exhibit does not mean that applicant conceded it to be substantial evidence, it merely means that applicant consented for it to be considered.

Finally, the WCJ points to applicant's failure to carry "his burden of proof to submit medical evidence at trial to establish that [he] sustained permanent impairment and/or need for future medical treatment on an industrial basis," and that, with discovery closed as of October 11, 2023, any such opportunity has passed. This again dodges the issue – applicant's contention is that Dr. Wolfson's QME Report – upon which the WCJ's conclusion was based – is not substantial evidence. To the extent that applicant failed to submit contrary evidence, that is a different issue, and does not result in waiver of the argument that the QME report is not substantial.

Moreover, we note that the WCJ did not provide the parties an opportunity to reappear to argue any of these issues after we concluded the claim was not barred by a prior settlement and returned the matter to the WCJ for further proceedings, instead opting to issue the instant F&A without further proceedings. Without having been given the chance to articulate the issue to the WCJ post-remand, we do not think it would be fair to rule that applicant has waived the ability to challenge the substantiality of the QME Report based on his prior course of conduct.

Accordingly, we conclude that the issue was not waived, and therefore that the WCJ should have addressed the merits of applicant's contention in the Report. Because the Report does not do so, it fails to comply with *Hamilton* and section 5313, and we will return the matter to the WCJ in order to consider applicant's contentions and issue a decision explaining the WCJ's reasoning. Our action should not be construed as making any comment on the merits, which we leave to the

WCJ in the first instance.⁵ If the WCJ determines that the QME Report is substantial evidence, the WCJ may issue a F&A in accordance with that finding, and any aggrieved party may timely seek reconsideration thereof.

Should the WCJ conclude that the QME Report is not substantial evidence, we note that the WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal. App. 4th 1117, 1121–1122 [63 Cal. Comp. Cases 261].) The Appeals Board has a constitutional mandate to “ensure substantial justice in all cases.” (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal. App. 4th 396, 403 [65 Cal. Comp. Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

⁵ Although we are sympathetic to the WCJ’s evident desire to speedily adjudicate the matter, we would suggest that the WCJ allow the parties the opportunity to appear and present argument on the question, in order to create a full record upon which any judgement as to the substantiality of the QME Report can be based.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the February 14, 2024 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, that the February 14, 2024 Findings and Award is **RESCINDED**, and that the matter is **RETURNED** for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 7, 2024

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

**JAMES HARVELL
SHATFORD LAW
LAW OFFICES OF HOLMES & HOLMES**

AW/pm

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