

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

ROBERTO MACIAS, *Applicant*

vs.

E&J GALLO, permissibly self-insured and administered by BROADSPIRE; *Defendant*

**Adjudication Number: ADJ12180050
Santa Rosa District Office**

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

Applicant seeks reconsideration of the Findings & Award (“F&A”) issued on April 2, 2024, wherein the workers’ compensation administrative law judge (“WCJ”) granted applicant’s Petition to Reopen but awarded applicant the same 29% permanent disability (“PD”) as had been previously awarded. Applicant asserts that the WCJ erred, and that he should have been awarded 34% PD instead, because defendant failed to file a counterpetition and therefore the WCJ lacked jurisdiction to diminish the award of disability for applicant’s right shoulder in order to offset the increase to disability to applicant’s left shoulder.

We did not receive an Answer. We did receive a Report and Recommendation on Petition for Reconsideration from the WCJ, recommending that reconsideration be denied.

We have reviewed the Petition and the Report, as well as the record. For the reasons discussed below, we will grant reconsideration and amend the F&A to award applicant 34% PD, but defer the issue of the award, including attorney’s fees, for the WCJ to issue a new decision consistent with this opinion.

FACTUAL BACKGROUND

Applicant Roberto Macias filed an Application for Adjudication, alleging a specific injury to his bilateral shoulders on December 20, 2018 while employed by defendant as a laborer. The matter was settled via Stipulations with Request for Award for a total of 29% PD, based upon medical reporting showing applicant sustained an 8% whole person impairment (“WPI”) to each

shoulder, translating to 16% PD to each shoulder, and resulting in a combined PD rating of 29%. (Stipulations with Request for Award, at p. 7.)

Applicant filed a Petition to Reopen on January 17, 2023, noting that he had undergone surgery on his left shoulder,¹ and seeking a “probable increase” in PD.² (Petition to Reopen, at p. 1.) Defendant neither filed its own petition, nor filed a counterpetition to applicant’s petition.

Accordingly, on September 20, 2023, Applicant underwent a second examination with Patrick McGahan, M.D., the same Qualified Medical Examiner (“QME”) who had examined him previously, in order to assess his shoulders post-surgery. (J. Ex. 3, at p. 5.) Dr. McGahan concluded that although applicant’s left shoulder had increased to a 11% WPI rating, applicant’s right shoulder had *decreased* to only a 5% WPI rating. (*Id.* at pp. 15–16).

The matter went to trial on February 13, 2024, with the issues listed as: (1) permanent disability; (2) attorney’s fees; (3) new and further disability pursuant to Labor Code section 5410. (Minutes of Hearing / Summary of Evidence (MOH/SOE), 2/13/2024, at p. 2.) Exhibits were admitted without objection, and the matter was taken under submission. (*Id.* at pp. 1, 3–4.)

Both parties filed post-trial briefing. Applicant argued that because defendant had not filed either a petition of its own or a counterpetition, the WCJ was precluded from considering the diminishment in disability to applicant’s right shoulder. (Applicant’s Post Trial Brief, at p. 1–2.) Accordingly, applicant contended that he was due an award of 34% PD, calculated by combining the 16% PD rating for his right shoulder from the original examination with the 21% PD rating for his left shoulder derived from the September 2023 re-examination. (*Id.* at p. 2.)

Defendant, by contrast, argued that the PD award should remain fixed at 29%, the PD that would be owed based upon the September 2023 QME Report’s findings as to both shoulders. (Defendant’s Post Trial Brief, at pp. 1–2.) In defendant’s view, its failure to file a petition or counterpetition was not fatal, because it was not seeking a *reduction* to applicant’s PD, but merely a finding that applicant’s PD had not *increased*. (*Ibid.*)

On April 2, 2024, the WCJ issued her F&A, finding in relevant part that applicant’s PD remained at 29%, and accordingly finding no attorney’s fees due. (F&A, at p. 1, ¶ 4, 7.) The Opinion on Decision makes clear that the WCJ’s finding was based upon a belief that a petition to reopen “is, in effect, a completely new award” and “has the effect of throwing open the entire case

¹ In fact, applicant underwent surgery on both shoulders: on the right shoulder in 2021 and the left shoulder in 2022.

² Applicant also sought temporary total disability; this issue is not before us and is therefore not referenced further.

for reconsideration,” meaning that “the WCJ must address all facts and issues raised by the parties.” (Opinion on Decision, at pp. 3–4.) The WCJ therefore opined that even though defendant had failed to file its own petition or counterpetition, she was “required to review all evidence and issue a completely new Award based on substantial medical evidence.” (*Id.* at p. 4.)

The instant Petition for Reconsideration followed.

DISCUSSION

A final order, decision, or award may be rescinded, altered, or amended either upon a petition to reopen filed within five years of the employee's date of injury or upon a counterpetition filed by an adverse party within 30 days of a timely original petition to reopen. (Lab. Code, §§ 5803, 5804.) However, except in rare circumstances not present here (e.g., extrinsic fraud/mistake or an insidious disease process), these time limits are jurisdictional. (*Selden v. Workers' Comp. Appeals Bd.* (1986) 176 Cal.App.3d 877, 882 [51 Cal.Comp.Cases 28]; *Smith v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d 1160, 1169–1170 [50 Cal.Comp.Cases 311].)

Moreover, where one party files a petition seeking to reopen the case to either increase or decrease compensation, but the other party files neither its own petition nor a counterpetition, the WCAB's jurisdiction is limited to the possibility of modifying the award only in the manner sought by the filing party. (*Selden, supra*, 176 Cal.App.3d at 882.) In other words, when an applicant files a petition to reopen to *increase* compensation, and defendant does not file its own petition or a counter-petition, the WCAB is limited to considering whether to *increase* the award, and is jurisdictionally prohibited from taking any action to *decrease* it.

This situation – albeit in the converse, with the defendant being the only party to file a petition – was aptly illustrated in the seminal case of *Selden, supra*, 176 Cal.App.3d 877. In that case, defendant filed a timely Petition to Reopen to reduce a prior award of 96.75% permanent disability just days before the expiration of the five-year period to amend or alter the award. Applicant did not file any counterpetition seeking other relief, such as a potential increase in permanent disability, within 30 days of the petition pursuant to Labor Code section 5804, although he did timely object to defendant's Petition to Reopen on the substantive ground there was no good cause to do so. Applicant was subsequently re-examined by defendant's QME, who found that applicant's condition had in fact worsened as compared to his prior examination. This report prompted applicant to request the award be reopened so as to increase the level of permanent

disability, but by then the five years had run. After a trial and pursuant to applicant's request, the WCJ issued an award which increased the permanent disability to 100% based on the reporting of defendant's QME. The Court of Appeal affirmed the WCAB's decision to rescind the new award, noting "[a]bsent a timely petition or section 5804 counterpetition by applicant seeking increased permanent disability, the WCJ erroneously expanded jurisdiction to increase permanent disability, as the Board majority correctly concluded." (*Id.* at p. 883.)

The holding in *Selden* was cited and followed by the Appeals Board in the case of *A.C. Transit District v. Workers' Comp. Appeals Bd. (Stewart)* (1992) 57 Cal. Comp. Cases 114 (writ den.). The Court of Appeal summary in *Stewart* notes that "[t]he WCAB denied the Petition for Reconsideration, holding the *Selden* case applicable and noting that the five-year limitation of Labor Code section 5804 is jurisdictional *and cannot be waived*." (*Id.* at p. 115, emphasis added.)

Initially, we disagree with the WCJ's conclusion that the filing of a petition to reopen "has the effect of throwing open the entire case for reconsideration". (Opinion on Decision, at p. 4.) As noted in *Selden*, the WCAB's jurisdiction to amend an award based upon a petition to reopen is limited based upon the petition itself. To the extent that the WCJ's view would support decreasing an award in the absence of a petition from defendant seeking such a decrease, such reasoning clearly conflicts with *Selden* and cannot be sustained.

Nor does the WCJ's citation to *University of California, Berkeley v. Workers' Comp. Appeals Bd. (Sedlack)* (2020) 85 Cal.Comp.Cases 311 (writ denied) appear to support the WCJ's position. In *Sedlack*, like the case before us, the defendant failed to file its own petition, and was therefore precluded from arguing that the award should be *decreased* based on medical evidence obtained in connection with the applicant's petition to reopen to *increase* the award. (*Sedlack, supra*, 85 Cal.Comp.Cases at 314–15.)

We are not unsympathetic to the WCJ's reluctance to issue a new award that ignores the decrease to disability found by the QME in the 2023 examination. However, the law is clear that in the absence of a petition or counterpetition filed by the defendant, the WCAB lacks jurisdiction to reduce an award, no matter what the medical evidence may show.

Defendant did not file an Answer, but did file a post-trial brief. In that brief, defendant does not appear to contest that its failure to file its own petition or counterpetition precludes the WCAB from considering a reduction to PD. (See Defendant's Post Trial Brief, at pp. 1–2.) Instead, defendant argues that because the impairment ratings for both shoulders found in the 2023 QME

Report result in *the same* PD rating as previously found, reliance on those findings would not impermissibly *decrease* the PD award.

Although defendant's argument is admittedly creative, we do not think that it can be squared with *Selden* or the statutory scheme. No matter what words are used to characterize it, the WCJ's new award was based upon the finding in the 2023 QME Report that applicant's right shoulder impairment had *decreased* from an 8% WPI to a 5% WPI. The fact that the increase to applicant's left shoulder happened to perfectly offset the decrease to the right does not mean that the WCJ did not decrease the award with respect to applicant's right shoulder as part of the new award.

To illustrate the point, if the QME had found only a decrease to 5% WPI with regard to the right shoulder, without a corresponding increase in WPI to the left, decreasing applicant's award would clearly be impermissible according to the holding of *Selden*, given defendant's failure to file its own petition or counterpetition. This being the case, we cannot see any reason why it would be any more permissible to use the finding of decreased disability in the right shoulder to "offset" an increase to disability in applicant's left shoulder. In either case, applicant's award for the right shoulder is being decreased, despite the WCAB's jurisdiction being limited to consideration of an increase.

Therefore, we agree with applicant that the WCJ should not have considered the decrease in WPI to his right shoulder when issuing the new award. As a result, the award should have been based upon the original 8% WPI for applicant's right shoulder and the new 11% WPI for applicant's left shoulder, resulting in PD ratings of 16% and 21% respectively, and therefore in a new combined PD award of 34%.

Accordingly, we will amend the F&A to award 34% PD. As a result, applicant's attorney may be due an attorney's fee. Because this issue should be determined by the WCJ in the first instance, we will defer both the issue of attorney's fees and the issuance of an award, and return the matter to the WCJ for consideration and issuance of a new decision and award consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the April 2, 2024 Findings & Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 15, 2024 Findings & Award is **AMENDED** as follows:

FINDINGS OF FACT

4. The applicant is entitled to a permanent disability award of 34%. Defendants are entitled to credit for permanent disability paid under the prior Award.

7. The issue of attorney's fees is deferred.

AWARD

AWARD IS MADE in favor of **ROBERTO MACIAS** against **E&J Winery, E&J Gallo** of:

a. All further medical treatment reasonably required to cure or relieve the effects of the injury.

b. All other issues pertaining to the award of benefits, including but not necessarily limited to permanent disability, reasonable attorney's fees, and credit, are deferred.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings and a new decision by the workers' compensation administrative law judge consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 13, 2024

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

**ROBERT MACIAS
FOWLER BALL UKIAH
MULLEN FILIPPI SAN FRANCISCO**

AW/pm

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