

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

JAMES HONG, *Applicant*

vs.

**BARRETT BUSINESS SERVICES, INC.;
ACE AMERICAN INSURANCE COMPANY,
administered by CORVEL CORPORATION, *Defendants***

**Adjudication Number: ADJ11130675; ADJ11325280
Los Angeles District Office**

**OPINION AND ORDER
CORRECTING CLERICAL ERROR**

It has come to the Appeals Board's attention that its decision issued on June 5, 2025 contains a clerical error in that it omits Case No. ADJ11130675 in the caption. We will correct this clerical error by virtue of this order, without granting reconsideration as such errors may be corrected without further proceedings at any time. (*Toccalino v. Worker's Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145]; see also 2 Cal. Workers' Comp. Practice (Cont. Ed. Bar, March 2018 Update) Supplemental Proceedings, § 23.74, p. 23-76.)

Accordingly, we now issue this Order correcting this clerical error and substituting the correct case numbers in the caption as listed herein.

For the forgoing reasons,

IT IS ORDERED that the clerical error of omission of Case No. ADJ11130675 in the caption in the Opinion and Order Granting Petition For Reconsideration and Decision After Reconsideration issued on June 5, 2025, is **CORRECTED** to include Case No. ADJ11130675 in the caption.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 23, 2025

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

**JAMES HONG
LAW OFFICES OF SOLOV & TEITELL
LAW OFFICES OF FRIEDMAN & BARTOUMIAN**

AS/mc

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

**WORKERS' COMPENSATION APPEALS BOARD
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ACE AMERICAN INSURANCE COMPANY
administered by CORVEL CORPORATION, *Defendants***

Adjudication Number; ADJ11325280

Los Angeles District Office

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Joint Findings and Award and Order (F&A) issued on November 18, 2022, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant sustained two industrial injuries, which jointly caused applicant to become permanently totally disabled, without apportionment.

Defendant argues that the WCJ erred because substantial medical evidence does not support the finding of permanent total disability, in part, because applicant is not yet permanent and stationary. Defendant further argues that the WCJ incorrectly applied Labor Code section 4662(a)(4) because applicant's injury does not meet the standard of 'permanent mental incapacity'.

We have received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will rescind the WCJ's November 18, 2022 F&A and return this matter to the trial level for further proceedings consistent with this decision.

FACTS

Applicant worked for defendant as a truck driver when he sustained an admitted industrial injury on September 26, 2017, to his cervical spine, head, bilateral shoulders, vestibular system, and in the form of headaches. (Minutes of Hearing and Summary of Evidence, August 29, 2022, p. 2, lines 10-13.)

Applicant sustained a second industrial injury on May 10, 2018, to his cervical spine, thoracic spine, lumbar spine, bilateral shoulders, and head. (*Id.* at p. 3, lines 8-11.)

A history of applicant's injuries was taken by the primary treater, Lawrence Miller, M.D., as follows:

Injury #1 - September 2017: He reports that working as a truck driver in September 2017, he sustained injuries in an accident. He reports that: another truck that was behind him and trying to pass struck the side of his truck. It was a hit and run accident. Mr. Hong followed the other driver and was able eventually to stop. When he got out of the truck, there was a misstep, and he slipped and fell striking his head. He received treatment including acupuncture, therapies, several epidural injections to the neck and back, and was off work for approximately six months. He returned to work sometime in March 2018, when he sustained a second injury.

Injury #2 - May 10, 2018: He reports that on May 10, 2018, he sustained injury in a second work-related accident. On that day, he states that he was asked by supervisor to open a large box. He felt that the requests were out of his work restrictions. He went on his way to file a [complaint]. On the way to the office, while using a walker, he fell down a flight of stairs. He reports that there was a transient period of unconsciousness. On regaining consciousness, he found himself to be in the emergency room at UCLA Harbor Hospital. He was kept overnight for observation and then discharged. He has been receiving treatment at HealthPointe Medical Group in Long Beach under the care of neurologist, Dr. Aaron Alan. He has been placed on hydrocodone. He has been placed doxepin for mood and anxiety. He was provided with Amitiza for constipation. For dizziness and orthostatic hypotension, he has been placed on midodrine and meclizine.

The patient continues to do poorly. He has severe balance issues, dizziness, and episodes of orthostatic hypotension. He has been confused and poor memory. He has had widespread pain, depression, and insomnia. He is limited in ability to complete any activities of daily living. He lives with his wife who has become

emotionally estranged. She provides minimal assistance with meals and shopping. In [general], he is left alone and is doing poorly.

(Applicant's Exhibit 11, Report of Lawrence Miller, M.D., August 16, 2019, pp. 2-3.)

Dr. Miller has yet to find applicant permanent and stationary. (Applicant's Exhibit 7, Report of Lawrence Miller, M.D., July 8, 2021, p. 2.)

Applicant was seen by orthopedic Qualified Medical Evaluator (QME) Charles Sadler, M.D., whose findings were not discussed in the WCJ's assignment of permanent total disability. (See Joint Exhibit 4, Report of Charles Sadler, M.D., July 31, 2019; Joint Exhibit 6, Deposition of Charles Sadler, M.D., December 6, 2019.) Dr. Sadler found multiple disabilities and apportioned them to their respective dates of injury. (See generally, *id.*) Applicant was not precluded from returning to his usual and customary employment on an orthopedic basis. (Joint Exhibit 4, *supra* at p. 29.)

Applicant was seen by neurological QME Natalia Ratiner, M.D., who provided the following opinion on impairment and causation:

For the headache problem, which is related to both direct injury of the head during the motor vehicle accident as well as to chronic cervical paraspinal muscle strain, the applicant is eligible for additional **3%** of total person impairment: Based upon the history, his headache problem started since the injury 09/26/2017, and therefore it is 100% related to that injury.

The applicant's impairment concerning his vestibular problem fits to class 4 on table 11-4 on page 253 of *AMA Guide 5th Edition*, and his impairment is **40%** impairment of the whole person. My opinion is based on the fact that, according to the applicant, he cannot perform activities of daily living without assistance except for self-care. According to the history given, the applicant did not have problem with vestibulopathy prior to the injury on 09/26/2017. Therefore, I can assume that his current problems regarding his vestibular instability are related to this particular accident on 09/26/2017. Therefore, no apportionment for the applicant's neurological issues described above exists.

(Joint Exhibit 3, Report of Natalia Ratiner, M.D., September 4, 2020, p. 77.)

In supplemental reporting, Dr. Ratiner assigned 20% non-industrial apportionment to applicant's vestibular problems due to non-industrial diabetes and related complications. (Joint Exhibit 2, Report of Natalia Ratiner, M.D., December 1, 2020, p. 77.)

Applicant took Dr. Ratiner's deposition and directly asked Dr. Ratiner about application of Labor Code section 4662, in pertinent part, as follows:

Q. . . . Can you state with reasonable medical probability based on your knowledge, training, and experience whether the applicant qualifies under Labor Code 4662 which indicates that the applicant is permanently totally disabled based on an injury causing mental incapacity?

A Well, I'm not a psychiatrist so I cannot comment on mental capacity. I'm just -- I can only comment on neurological impairment.

Q I understand. But there's a labor code section. It's Labor Code Section 4662 --

A Okay.

Q -- where it indicates that a neurologist can comment on whether someone is permanently totally disabled by making their opinion based on their examination and their clinical judgment. So is it your opinion that the applicant is permanently totally disabled and will never work again based on the neurological components of this case using Labor Code Section 4662 even though I understand you're not a psychiatrist?

A Yes.

MR. TEITELL: Okay. I don't have anything further.

(Joint Exhibit 5, Deposition of Natalia Ratiner, M.D., January 15, 2021, p. 77.)

DISCUSSION

I.

Only the Appeals Board is statutorily authorized to issue a decision on a petition for reconsideration. (Lab. Code, §§ 112, 115, 5301, 5901, 5908.5, 5950; see Cal. Code Regs., tit. 8, §§ 10320, 10330.)¹ The Appeals Board must conduct de novo review as to the merits of the

¹ The use of the term 'appeals board' throughout the Labor Code refers to the Appeals Board and not a DWC district office. (See e.g., Lab. Code, §§ 110, et. seq. (Specifically, § 110 (a) provides: "'Appeals board' means the Workers' Compensation Appeals Board. The title of a member of the board is 'commissioner.'").) Section 111 clearly spells out that the Appeals Board and DWC are two different entities.

petition and review the entire proceedings in the case. (Lab. Code, §§ 5906, 5908; see Lab. Code, §§ 5301, 5315, 5701, 5911.) Once a final decision by the Appeals Board on the merits of the petition issues, the parties may seek review under Labor Code section 5950, but appellate review is limited to review of the record certified by the Appeals Board. (Lab. Code, §§ 5901, 5951.)

Former Labor Code section 5909 provided that a petition was denied by operation of law if the Appeals Board did not “act on” the petition within 60 days of the petition’s filing with the ‘appeals board’ and not within 60 days of its filing at a DWC district office. A petition for reconsideration is initially filed at a DWC district office so that the WCJ may review the petition in the first instance and determine whether their decision is legally correct and based on substantial evidence. Then the WCJ determines whether to timely rescind their decision, or to prepare a report on the petition and transmit the case to the Appeals Board to act on the petition. (Cal. Code Regs., tit. 8, §§ 10961, 10962.)² Once the Appeals Board receives the case file, it also receives the petition in the case file, and the Appeals Board can then “act” on the petition.

If the case file is never sent to the Appeals Board, the Appeals Board does not receive the petition contained in the case file. On rare occasions, due to an administrative error by the district office, a case is not sent to the Appeals Board before the lapse of the 60-day period. On other rare occasions, the case file may be transmitted, but may not be received and processed by the Appeals Board within the 60-day period, due to an administrative error or other similar occurrence. When the Appeals Board does not review the petition within 60 days due to irregularities outside the petitioner’s control, and the 60-day period lapses through no fault of the petitioner, the Appeals Board must then consider whether circumstances exist to allow an equitable remedy, such as equitable tolling.

It is well-settled that the Appeals Board has broad equitable powers. (*Kaiser Foundation Hospitals v. Workers’ Compensation Appeals Board* (1978) 83 Cal.App.3d 413, 418 [43

² Petitions for reconsideration are required to be filed at the district office and are not directly filed with the Appeals Board. (Cal. Code Regs., tit. 8, § 10995(b); see Cal. Code Regs., tit. 8, § 10205(l [defining a “district office” as a “trial level workers’ compensation court.”].) Although the Appeals Board and the DWC district office are separate entities, they do not maintain separate case files; instead, there is only one case file, and it is maintained at the trial level by DWC. (Cal. Code Regs., tit. 8, § 10205.4.)

When a petition for reconsideration is filed, the petition is automatically routed electronically through the Electronic Adjudication Management System (EAMS) to the WCJ to review the petition. Thereafter, the entire case file, *including the petition for reconsideration*, is then electronically transmitted, i.e., sent, from the DWC district office to the Appeals Board for review.

Cal.Comp.Cases 785] citing *Bankers Indem. Ins. Co. v. Indus. Acc. Com.* (1935) 4 Cal.2d 89, 94-98 [47 P.2d 719]; see *Truck Ins. Exchange v. Workers' Comp. Appeals Bd. (Kwok)* (2016) 2 Cal.App.5th 394, 401 [81 Cal.Comp.Cases 685]; *State Farm General Ins. Co. v. Workers' Comp. Appeals Bd. (Lutz)* (2013) 218 Cal.App.4th 258, 268 [78 Cal.Comp.Cases 758]; *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [59 Cal.Comp.Cases 96].) It is an issue of fact whether an equitable doctrine such as laches applies. (*Kwok, supra* 2 Cal.App.5th at p. 402.) The doctrine of equitable tolling applies to workers' compensation cases, and the analysis turns on the factual determination of whether an opposing party received notice and will suffer prejudice if equitable tolling is permitted. (*Elkins v. Derby* (1974) 12 Cal.3d 410, 412 [39 Cal.Comp.Cases 624].) As explained above, only the Appeals Board is empowered to make this factual determination.³

In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493], the Appeals Board denied 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, especially in light of the fact that the Appeals Board had repeatedly assured the petitioner that it would rule on the merits of the petition. (*Id.*, at p. 1108.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Ibid.*) The touchstone of the workers' compensation system is our constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.) "Substantial justice" is not a euphemism for inadequate justice. Instead, it is an exhortation that the workers' compensation system must focus on the *substance* of justice, rather than on the arcana or minutiae of its administration. (See Lab. Code, § 4709 ["No informality in any proceeding . . . shall invalidate any order, decision, award, or rule made and filed as specified in this division."].)

³ Labor Code section 5952 sets forth the scope of appellate review, and states that: "Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence." (Lab. Code, § 5952; see Lab. Code, § 5953.)

With that goal in mind, all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) If a timely filed petition is never considered by the Appeals Board because it is "deemed denied" due to an administrative irregularity not within the control of the parties, the petitioning party is deprived of their right to a decision on the merits of the petition. (Lab. Code, §5908.5; see *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350]; *LeVesque, supra* 1 Cal.3d 627, 635.) Just as significantly, the parties' ability to seek meaningful appellate review is compromised, raising issues of due process. (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra*, 68 Cal.2d 753.)

Substantial justice is not compatible with such a result. A litigant should not be deprived of their due process rights based upon the administrative errors of a third party, for which they bear no blame and over whom they have no control. This is doubly true when the Appeals Board's action in granting a petition for reconsideration has indicated to the parties that we will exercise jurisdiction and issue a final decision on the merits of the petition, and when, as a result of that representation, the petitioner has forgone any attempt to seek judicial review of the "deemed denial." Having induced a petitioner not to seek review by granting the petition, it would be the height of injustice to then leave the petitioner with no remedy.

In this case, the WCJ issued the Findings and Award on November 18, 2022, and applicant filed a timely petition on December 12, 2022. According to EAMS, the case file was first transmitted to the Appeals Board on February 22, 2023, which was beyond 60 days from the petition for reconsideration being filed. Accordingly, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties. The Appeals Board granted the petition on March 7, 2023, within 60 days of the petition being transmitted to the Appeals Board. In so doing so, we sent a clear signal to the parties of our intention to exercise jurisdiction and issue a final decision after reconsideration. Neither party expressed any opposition to this course of action, and it appears clear from the fact that neither party sought judicial review of our grant of reconsideration that both parties have acted in reliance on our grant.

Under the circumstances, the requirements for equitable tolling have been satisfied in this case. Accordingly, our time to act on defendant's petition was equitably tolled until 60 days after

February 22, 2023. Because we granted the petition on March 7, 2023, our grant of reconsideration was timely, and we may issue a decision after reconsideration addressing the merits of the petition.

II.

To constitute substantial evidence an expert's opinion must not be speculative. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 621 (Appeals Board en banc).) It must be based on pertinent facts and on an adequate examination and history and it must set forth reasoning in support of its conclusions. (*Ibid.*) "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal. 2d 122, 139, 70 Cal. Rptr. 193, 443 P.2d 777.)

Here, the WCJ found that applicant qualified for the presumption of section 4662(a) because he sustained a permanent mental incapacity. Section 4662(a) creates a conclusive presumption of total (100%) disability in four situations:

- (1) Loss of both eyes or the sight thereof.
- (2) Loss of both hands or the use thereof.
- (3) An injury resulting in a practically total paralysis.
- (4) An injury to the brain resulting in permanent mental incapacity.

In all other cases, total disability is determined in accordance with the fact. (Lab. Code §4662(b).)

Section 4662(a) originally provided for a conclusive presumption in cases of "An injury to the brain resulting in incurable imbecility or insanity." (Former Lab. Code, § 4662(d) (enacted 1937) amended by (Stats. 2007, ch. 31, § 2), further amended by (Stats. 2014, ch. 144, § 46).) The section was amended in 2007 to change the phrase "imbecility or insanity" to "incurable mental incapacity or insanity" and then further amended in 2014 to the term "permanent mental incapacity"; however, the Legislature was clear that the change in language was not a substantive change, but a technical change to remove outdated and insensitive language from the statute. (Stats. 2007, ch. 31, § 5 ["It is the intent of the Legislature, in enacting this act, not to adversely affect decisional case law that has previously interpreted, or used, the term 'idiot,' 'imbecility,' or 'lunatic,' or any variation thereof."]; see also 2014 CAL. AB 1847 [Noting a plethora of "technical changes" throughout California law referring to persons who suffer from a mental health disorder or otherwise lack legal capacity to make decisions.].) Thus, as used in section 4662(a)(4), the term

“permanent mental incapacity” is synonymous with the previously used outdated terms of imbecility or insanity.

A traumatic injury may lead to permanent mental incapacity in severe cases; **however, a traumatic brain injury is not synonymous with having permanent mental incapacity.** “Incapacity” is “the quality or state of being **incapable**; *especially* lack of physical or intellectual power or of natural or legal qualifications.” (“Incapacity”, Merriam-Webster Dictionary, online ed., <https://www.merriam-webster.com/dictionary/incapacity>, last reviewed September 17, 2024 (emphasis added).) Here, no evidence exists to find that applicant is permanently mentally incapacitated. Applicant was able to coherently testify to the events of his case. The WCJ found applicant’s testimony credible.⁴

As the record lacks any evidence establishing that applicant is permanently mentally incapacitated, the WCJ’s decision was in error and must be rescinded.

Accordingly, as our Decision After Reconsideration we will rescind the WCJ’s November 18, 2022 F&A and return this matter to the trial level for further proceedings consistent with this decision.

⁴ It would appear that if applicant were permanently mentally incapacitated, then applicant may have lacked the ability to make legal decisions about his case and thus, the parties should have considered whether to appoint a guardian ad litem or other form of conservatorship prior to proceeding with trial. (See Cal. Prob. §§ 810-813.)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings and Award and Order issued on November 18, 2022 is **RESCINDED**.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

s/ JOSÉ H. RAZO, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 5, 2025

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

**JAMES HONG
LAW OFFICES OF SOLOV & TEITELL
LAW OFFICES OF FRIEDMAN & BARTOUMIAN**

EDL/mc

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