

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

KEVIN SCHIFF, *Applicant*

vs.

**EPSILON SYSTEMS SOLUTIONS, INC.; TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA, *Defendants***

**Adjudication Number: ADJ9673310
San Diego District Office**

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

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of October 17, 2024, wherein it was found that while employed on January 18, 2013 as an Engineering Tech IV applicant sustained industrial injury to the left hand, left wrist, hernia and psyche, causing permanent disability of 33%.

Applicant contends that the WCJ erred in not finding industrial injury to the right elbow. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will grant reconsideration and amend the WCJ's decision to defer the issues of injury to the right elbow and permanent disability pending further clarification of the medical record.

Preliminarily, we note that former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b)

(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on November 15, 2024, and 60 days from the date of transmission is January 14, 2025. This decision is issued by or on January 14, 2025, so we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on November 15, 2024, and the case was transmitted to the Appeals Board on November 15, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 15, 2024.

Turning to the merits, in his initial March 30, 2015 report, agreed medical evaluator orthopedist Jeffrey P. Bernicker, M.D. wrote:

With respect to the right upper extremity, while I believe the patient to have developed mild right elbow epicondylitis as a compensable consequence of the left upper extremity injury due to long-term favoring and overuse, I do not believe the right elbow symptoms will ultimately prove to be of any consequence and should not require any medical treatment other than conservative measures such as medications and corticosteroid injection. No permanent disability or impairment is anticipated for this aspect of the claim at this time. Once the patient's left upper extremity function is improved following the stellate ganglion block/ spinal cord stimulation, it is my hope that the right elbow symptoms will dissipate as well.

(March 30, 2015 report at p. 25.)

In the "Causation" section of his report, Dr. Bernicker wrote, "I believe the patient became mildly symptomatic with respect to his RIGHT ELBOW as a compensable consequence of the left upper extremity injury secondary to long-term overuse." (March 30, 2015 report at p. 26.)

In his September 1, 2015 report, Dr. Bernicker repeated in the "Causation" section that applicant had sustained right elbow injury as a compensable consequence of the left upper extremity injury. (September 1, 2015 report at p. 10.) In the September 1, 2015 report, Dr. Bernicker opined that applicant's injury had caused 45% whole person impairment based on complex regional pain syndrome in his non-dominant left upper extremity. Dr. Bernicker did not ascribe any additional impairment with regard to the right upper extremity. (September 1, 2015 report at pp. 9-11.) In the causation section of an April 5, 2016 report, Dr. Bernicker again opined that applicant sustained a right elbow compensable consequence injury. (April 5, 2016 report at p. 15.)

Subsequently, Dr. Bernicker reviewed surveillance tapes which according to Dr. Bernicker showed that, contrary to the history given at the prior examinations, applicant was able to move his left upper extremity without restrictions. At a November 10, 2016 deposition, Dr. Bernicker now opined that applicant's injury caused only 6% whole person impairment, all ascribed to the left hand and wrist. (Transcript of November 10, 2016 deposition at pp. 6-7.) In the "Causation" section of an August 7, 2018 report, Dr. Bernicker now wrote that applicant sustained a left upper extremity injury, with no mention of the right elbow. Similarly, in his final January 23, 2023 report, Dr. Bernicker listed only the left upper extremity injury in the "Causation" section (January 23, 2023 report at p. 48) and wrote, "I have not been presented any evidence that might cause me to rethink my stance regarding the scope of injury arising out of this claim which I believe is limited exclusively to the left hand and wrist" (January 23, 2023 report at p. 46.) However,

under “Impressions,” Dr. Bernicker wrote that applicant had sustained “mild right elbow lateral epicondylitis as a compensable consequence” of his left upper extremity injury. (January 23, 2023 report at p. 46.)

Accordingly, since there is some contradictory information in the January 23, 2023 report, we will grant reconsideration and amend the WCJ’s decision to defer the issue of industrial injury to the right elbow. Although Dr. Bernicker previously opined that any right elbow injury did not cause any permanent impairment, we defer the issue pending further development of the record and a clear statement from Dr. Bernicker.

The WCAB has a duty to further develop the record when there is a complete absence of (*Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) evidence on an issue. The WCAB 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].) In accordance with that mandate, we will grant reconsideration and amend the WCJ’s decision to defer the issues industrial injury to the right elbow, permanent disability, and attorneys’ fees so that the medical record may be clarified on those issues.

For the foregoing reasons,

IT IS ORDERED that Applicant’s Petition for Reconsideration of the Findings and Award of October 17, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the Findings and Award of October 17, 2024 is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, Kevin Schiff, age 53 on the date of injury, while employed on January 18, 2013, as an Engineering Tech IV, Occupational Group No. 470, at San Diego, California, by Epsilon Systems Solutions, Inc., sustained injury arising out of and in the course of employment to his left hand, left wrist, hernia and psyche.

2. The issue of industrial injury to the right elbow is deferred, with jurisdiction reserved.

3. Applicant has not sustained injury arising out of and in the course of employment to his neck, back, left shoulder, left elbow, left knee or left thumb.

4. Applicant has failed to meet his burden of proof as it pertains to the diagnosis of complex regional pain syndrome.

5. The issue of permanent disability is deferred, with jurisdiction reserved.

6. The issue of attorneys' fees is deferred, with jurisdiction reserved.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALWESKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 14, 2025

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

**KEVIN SCHIFF
ERIC GRITZ
AZIZ AND ASSOCIATES**

DW/oo

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