WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHADRICK HALL, *Applicant*

vs.

DHL EXPRESS;
AIU INSURANCE COMPANY, administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ16212301

Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

On December 2, 2022, we issued our Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (Decision), which rescinded the Findings and Order (F&O) issued on September 13, 2022, by the workers' compensation administrative law judge (WCJ), and substituted a new finding that applicant sustained industrial injury to his ankle and returned the matter to the trial level for further proceedings.

On December 22, 2022, defendant filed a petition for reconsideration of our December 2, 2022 Decision. Defendant contends that the credibility determinations of the WCJ should be afforded great deference, that certain medical records should have been admitted into evidence as they were unavailable prior to the mandatory settlement conference, and that the reports of the qualified medical evaluator are not substantial evidence.

We received an Answer from applicant.

Upon review of the file, we have spotted a clerical error that requires correction. Our December 2, 2022 Decision After Reconsideration substituted a Finding of Fact, which listed Sedgwick as the insurance carrier in this matter. The correct carrier is AIU Insurance Company. We will grant reconsideration to correct for this clerical error.

As to the merits of defendant's petition for reconsideration, we have considered the allegations of the Petition for Reconsideration and the Answer. Based on our review of the record, for the reasons stated in our December 2, 2022 Decision, which we adopt and incorporate, and for the reasons discussed below, we will deny the Petition for Reconsideration.

We would first note that by regulation "Petitions for reconsideration of decisions after reconsideration of the Appeals Board shall be filed **with the office of the Appeals Board**." (Cal. Code Regs., tit. 8, § 10940(a) (emphasis added).) Defendant did not file its petition with the Appeals Board, but instead filed its petition in the Electronic Adjudication Management System (EAMS), that is, with the DWC District Office. By filing with the DWC District Office, defendant effectively precluded the Appeals Board from reviewing its petition in a timely manner. The Appeals Board would politely admonish defendant that any such future petitions must be filed directly with the Appeals Board.

There are multiple common misconceptions that must be dispelled.

The first misconception is that the DWC District Office is part of the Appeals Board. **It is not.**

> The Workers' Compensation Appeals Board, consisting of seven members, shall exercise all judicial powers vested in it under this code. In all other respects, the Division of Workers' Compensation is under the control of the administrative director and, except as to those duties, powers, jurisdiction, responsibilities, and purposes as are specifically vested in the appeals board, the administrative director shall exercise the powers of the head of a department within the meaning of Article 1 (commencing with Section 11150) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code with respect to the Division of Workers' Compensation which shall include supervision of, and responsibility for, personnel, and the coordination of the work of the division, except personnel of the appeals board.

(Lab. Code[1], § 111 (emphasis added).)

In short, the WCJ is employed under the Division of Workers' Compensation, which is a separate division of government than the Workers' Compensation Appeals Board. The DWC and WCJ correctly use the term "Workers' Compensation Appeals Board" on their forms and pleadings as they are acting under the *delegated judicial authority* of the Appeals Board. (§§ 5309, 5310.)

[1] Future references are to the Labor Code unless noted.)

The Appeals Board delegates its judicial authority to the WCJ to decide cases in the first instance, including *recommendations* on petitions for reconsideration. (*Ibid*.; see also, Cal. Code Regs., tit. 8, §§ 10330, 10961, 10962.) However, that delegation does not include the power to *decide* petitions for reconsideration, which is prohibited by statute. (§ 5908.5.)

The next common misconception is that a petition for reconsideration from *a decision after reconsideration* is automatically received by the Appeals Board when it is filed in EAMS. **It is not.**

This misconception flows from the *general rule* that filing a document in EAMS constitutes filing with the Workers' Compensation Appeals Board: "(a) All documents required or permitted to be filed under the rules of the Workers' Compensation Appeals Board shall be filed in EAMS or with the district office having venue, **except as otherwise provided by these rules** or ordered or allowed by the Workers' Compensation Appeals Board." (Cal. Code Regs, tit. 8, § 10615(a) (emphasis added).) Given the statutory time restraint upon petitions for reconsideration and the host of errors that can occur when filing for reconsideration of an Appeals Board decision, the Appeals Board has expressly required that petitions for reconsideration *from the decisions of the Appeals Board* be directly filed with the Appeals Board. (Cal. Code Regs., tit. 8, § 10940(a).)

The Appeals Board does not share an electronic file with the DWC District Office. There is one electronic adjudication file, which is ordinarily maintained by the DWC. "'Electronic Adjudication Management System' or 'EAMS' means the computerized case management system **used by the Division of Workers' Compensation** to electronically store and maintain adjudication files and to perform other case management functions." (Cal. Code Regs., tit. 8, § 10305(j) (emphasis added).)

When a petition for reconsideration is filed from an order, award, or decision of a WCJ, the WCJ completes a report on the petition and then transfers the petition and report along with the DWC's adjudication file to the Appeals Board. (Cal. Code Regs., tit. 8, §§ 10961, 10962.) Only then is an electronic file in the Appeals Board's possession.

Before EAMS, the adjudication file was transferred physically by mail. Today, the file is transferred electronically at the click of a button. The change in the manner of file transfer in no way altered DWC's ownership and maintenance of the file. Once reconsideration is decided, the adjudication file is immediately returned to the DWC District Office upon service of the decision. At that point, the file is no longer with the Appeals Board.

When reconsideration is sought from an order or decision of the Appeals Board, while jurisdictionally the petition is considered timely filed when it is filed in EAMS, the EAMS adjudication file is at the DWC District Office and the EAMS system lacks a way to direct the petition to the Appeals Board. Consequently, while it may be timely filed, it is not received by the Appeals Board. This is why WCAB Rule 10940 requires petitions for reconsideration *from the decisions of the Appeals Board* be filed directly with the Appeals Board.

This is not the first time this error has occurred. Generally, the DWC District Office simply transfers the filed petition to the Appeals Board as a courtesy. However, this requires the DWC District Office to discover the petition, and parties should not rely on the DWC District Office to timely bring the petition to the attention of the Appeals Board. Here, it appears that the DWC District Office failed to recognize that defendant filed a petition for reconsideration in response to our Decision, which caused the petition to remain in limbo at the DWC District Office. Defendant followed up with multiple letters asking for a status update on its petition for reconsideration. Yet, defendant again filed these documents solely with the DWC District Office, and not the Appeals Board. The DWC District Office did not forward these letters to the Appeals Board, and thus we only recently became aware of them as part of our overall review of the record while considering the petition for reconsideration.

We are now faced with the situation that defendant's petition for reconsideration was not acted upon with 60 days of filing. Former section 5909 deems petitions for reconsideration denied if the Appeals Board does not act upon them within 60 days of filing. (Former § 5909, Stats 1992, ch. 1226, § 5.) However, we must examine whether to apply equitable tolling in this matter to review the petition for reconsideration on the merits. There is an apparent conflict of opinion in the District Courts of Appeal on this issue.

For over 30 years, the courts of this state followed the Fourth District's decision in *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107, ("*Shipley"*) holding that because section 5909 is premised upon the Appeals Board having possession of a petition for reconsideration, equitable tolling may apply to extend the 60-day deadline to act in cases where the Appeals Board does not have the petition.

Recently, in *Zurich v. Workers' Comp. Appeals Bd*. (2023) 97 Cal.App.5th 1213 ("*Zurich"*), the Second District expressed doubt as to part of *Shipley*'s reasoning, while still acknowledging that the section 5909 deadline is not jurisdictional in the fundamental sense.

Zurich therefore still allowed the application of equitable tolling in theory, but found that it did not apply based on the particular facts of the case. (See generally, *id*.)

In *Mayor v. Workers' Compensation Appeals Bd.* (2024) 104 Cal.App.5th 713 [2024 Cal.App. LEXIS 531] ("*Mayor*"), the First District rejected the Fourth District's analysis in *Shipley*, appearing to hold that the section 5909 deadline is jurisdictional in the fundamental sense, so that equitable tolling is entirely unavailable to extend the deadline as a matter of law, regardless of the circumstances. However, following our analysis of the holding in *Mayor*, we believe that it should be limited to its facts as its holding directly contradicts its analysis.[2]

The holding in *Mayor* was that the Appeals Board exceeded its jurisdiction. Use of the term "excess of jurisdiction" indicates that the *Mayor* court found section 5909 to be nonjurisdictional because "exceeding jurisdiction" necessarily means that the Appeals Board had fundamental jurisdiction to act but that the actions taken were in error.

> A lack of fundamental jurisdiction is an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. [Citations.] Because a lack of fundamental jurisdiction implicates the basic power of a court to act, courts must enforce jurisdictional limitations even if considerations of waiver, estoppel, consent, or forfeiture might otherwise excuse a party's failure to comply with them. [Citations.] In other words, when a party fails to comply with a jurisdictional time bar, the court has no choice but to dismiss the case for lack of jurisdiction, even if equitable concerns would support reaching the merits.
>
> Because of those harsh consequences, we apply a presumption that statutes do not limit the courts' fundamental jurisdiction absent a clear indication of legislative intent to do so. [Citations.] This approach reflects a preference for the resolution of litigation and the underlying conflicts on their merits by the judiciary. [Citations.]

(*Law Finance Group, LLC v. Key (2023) 14 Cal.5th 932* at pp. 949-950.)

Orders exceeding jurisdiction are ***not*** *void ab initio,* but *merely voidable*.

> When a statute authorizes a prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction. [Citation.] When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. [Citations.] **That is, its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside by**

[2] The *Mayor* decision is presently on appeal to the Supreme Court.

> **principles of estoppel, disfavor of collateral attack or res judicata**. [Citation.]

(*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660-661.)

Both *Mayor* and *Zurich* found that the actions of the Appeals Board, beyond 60 days[,] was in excess of jurisdiction. This finding necessarily means that the Appeals Board has fundamental jurisdiction to act. Once a court has fundamental jurisdiction, the next question to analyze is whether the statute is subject to equitable tolling. Neither *Mayor* nor *Zurich* can control on this issue because they contain no legal analysis on whether the statute is subject to equitable tolling.

Section 5909 sets a 60-day time period for deciding reconsideration. "Yet lurking in the backdrop for most limitations periods is equitable tolling: a judicially created doctrine allowing courts to toll the statute of limitations when justice so requires." (*Saint Francis Memorial Hospital v. State Dept. of Public Health* (2020) 9 Cal.5th 710, 716-717.)

> Equitable tolling is a "judicially created[,] non statutory doctrine" that "'suspend[s] or extend[s] a statute of limitations as necessary to ensure fundamental practicality and fairness.'" [Citation.] The doctrine applies "occasionally and in special situations" to "soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court." [Citation.] Courts draw authority to toll a filing deadline from their inherent equitable powers—not from what the Legislature has declared in any particular statute. [Citation.] For that reason, we presume that statutory deadlines are subject to equitable tolling.

(*Id*. at pp. 719-720.)

The presumption that a statutory limitations period is subject to equitable tolling is rebuttable. (*Law Finance Group, LLC, supra,* 14 Cal.5th at pp. 952-953.) Whether the presumption is rebutted requires an examination of the explicit statutory language or the manifest policy underlying a statute. (*Ibid*.)

Given that the Appeals Board is constitutionally bound to achieve substantial justice, the manifest policy underlying every workers' compensation statute would appear to favor a hearing on the merits and that it is appropriate to err on the side of the due process rights of the litigants.[3]

[3] Section 3202 states that Division Four, which exclusively governs the workers' compensation system "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." This statutory mandate also appears to contemplate a system where equitable considerations are foremost.

The *Mayor* decision relies heavily upon the analysis in *Zurich*, which in turn, is based upon the Supreme Court's analysis in *J.M. v. Huntington Beach Union High School Dist*. (2017) 2 Cal.5th 648. (*Zurich, supra,* 97 Cal.App.5th at pp. 1229-1230.) That case dealt with application of a deemed denied provision in the Government Claims Act. The Supreme Court held that: "The doctrine of equitable tolling may also apply to the limitation periods imposed by the claims statutes." (*J.M., supra,* 2 Cal.5th at p. 657.) That is, even where the Government Claims Act deemed an application denied, the Supreme Court found that equitable tolling can apply.

The Supreme Court has provided examples of statutory language that it has found to indicate that a statue is not subject to tolling:

> If the Legislature had intended to preclude equitable tolling or equitable estoppel, it could have done so expressly. (See, e.g., Code Civ. Proc., § 366.2, subd. (b) [providing a one-year statute of limitations for a surviving action against a deceased person and stating that the period "shall not be tolled or extended for any reason" except as specified in the statute]; Atwater Elementary School Dist. v. California Dept. of General Services, supra, 41 Cal.4th at p. 233 ["'The Legislature could have easily stated it intended to abrogate long-established equitable principles [such as equitable estoppel]. It did not do so.'"].)

(*Law Finance Group, LLC, supra,* 14 Cal.5th at p. 953.)

Similar to the statutes at issue in *Law Finance Group, LLC,* and *J.M., supra*, former section 5909 contains no express limitations on the application of tolling, and thus, following the reasoning of those decisions, section 5909 is subject to equitable tolling.

Given that the holding in *Mayor* contradicts its analysis, the decision is confusing and does not present clear guidance as to whether section 5909 is jurisdictional, and if not, whether it is subject to equitable tolling. For these reasons, we believe that the decision in *Mayor* should be limited to its facts.

For the reasons expressed in the Significant Panel Decision of *Ja'Chim Scheuing (Sandra) v. Lawrence Livermore National Laboratory*, (2024) 89 Cal. Comp. Cases 325,[4] the Appeals Board

[4] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal. App. 4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and the Appeals Board may consider these decisions to the extent that their reasoning is found persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].) Here, we refer to *Scheuing, supra,* because it considered a similar issue. A significant panel decision is one that is identified

continues to follow the holding in *Shipley*. Section 5909 is not a jurisdictional statute. It is subject to equitable tolling where the facts warrant it.

The reason that the Appeals Board failed to timely act upon the petition for reconsideration in this case is because it languished in the DWC District Office. Accordingly, and per former section 5909, the Appeals Board denied defendant's petition for reconsideration without ever looking at it. This violates the parties' fundamental right to due process. "The one who decides must hear." (*Morgan v. United States* (1936) 298 U.S. 468, 481.) The Appeals Board is required "to achieve a substantial understanding of the record[.]" (*Allied Compensation Ins. Co. v. Industrial Acc. Com*. (1961) 57 Cal.2d 115, 120.) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (Cal. Const., art. XIV, § 4 ["[T]he administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character(.)]; *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403.)

We note that the issue of equitable tolling in this case is close. The reason the file was lost is because defendant misfiled it at the DWC District Office in violation of our regulation. However, we recognize that there are significant misconceptions in the community as to what transpires after a petition is filed in EAMS. Traditionally, the DWC District Office has transmitted "lost" petitions to the Appeals Board, which unfortunately has further fueled the misapprehension that filing with the DWC District Office is acceptable. Filing with the DWC District Office may satisfy the timeliness requirement for a petition for reconsideration of an Appeals Board decision, but it does not guarantee that the petition will be timely received and reviewed by the Appeals Board.

For the reasons stated above, we find that equitable tolling applies in this case. Thus, we will decide defendant's petition for reconsideration on the merits.

For the reasons stated in our December 2, 2022 Decision, which we adopt and incorporate, we continue to find that applicant's injury is industrial. Accordingly, we will deny defendant's petition for reconsideration on the merits.

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for dissemination by the WCAB in order to address new or recurring issues of importance to the workers' compensation community. Significant Panel Decisions have been reviewed by each of the commissioners, who agree that the decision merits general dissemination. (Cal. Code Regs., tit. 8, § 10325(b).)

In reviewing the file anew, we have spotted an error in our December 2, 2022 Decision in the Findings of Fact, which incorrectly lists Sedgwick as the insurance carrier, when in fact they are a third-party administrator. We will grant reconsideration to reissue the Findings of Fact to correct this clerical error. Otherwise, we deny reconsideration on the merits.

For the foregoing reasons,

IT IS ORDERED that defendant's December 22, 2022 petition for reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration issued on December 2, 2022, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Appeals Board that the Findings of Fact and Order issued within the December 2, 2022 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration is **RESCINDED** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. CHADRICK HALL born on _____ while employed on July 23, 2021 as a delivery driver in California, by DHL EXPRESS, DHL EXPRESS, INC., whose workers' compensation insurance carrier was AIU INSURANCE COMPANY, sustained injury arising out of and occurring in the course of employment to the right ankle.

2. The issue of what other parts of the body were injured is deferred.

3. The issue of whether applicant is entitled to further medical treatment to cure or relieve the effects of injury is deferred.

ORDER

IT IS ORDERED that the records from Novato Community Hospital, exhibit E, be not admitted in evidence.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 29, 2024

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

CHADRICK HALL
BOXER & GERSON
ALBERT & MACKENZI

EDL/mc

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

OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O) issued on September 13, 2022, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed by defendant as a delivery driver on July 23, 2021, applicant did not sustain injury arising out of and occurring in the course of employment (AOE/COE) to his ankle (malleolus); and (2) applicant is not entitled to further medical treatment to cure or relieve him of the effects of his injury. The WCJ ordered that records from Novato Community Hospital not be admitted in evidence and that applicant take nothing on his claim.

Applicant contends that the WCJ erroneously failed to find that he sustained injury AOE/COE to the right ankle.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will grant reconsideration, and, as our Decision After Reconsideration, we will affirm the F&O, except that we will amend to find that that applicant sustained injury AOE/COE to the right ankle, defer the issue of what other parts of the body were injured, defer the issue of whether applicant is entitled to further medical treatment to cure or relieve the effects of injury, and rescind the order that applicant take nothing on his claim;[1] and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On August 1, 2022, the matter proceeded to trial as to the following relevant issues:

1. Injury arising out of and in the course of employment.
2. Parts of body injured: right Achilles and right ankle.

(Minutes of Hearing and Summary of Evidence, August 1, 2022, p. 2:11-15.)

[1] We will leave the WCJ's order that that the records from Novato Community Hospital, exhibit E, be not admitted in evidence undisturbed as the parties have not sought reconsideration thereon.

The WCJ admitted the QME reports of David Guzman, D.P.M., dated December 1, 2021 and April 19, 2022, into evidence. (*Id*. p. 3:13-14.) Both reports diagnose applicant's injury as a "[h]igh-grade probable complete tear of the Achilles tendon, right," and attribute "100% of Mr. Hall's disability . . . to industrial cause and 0% to preexisting cause or condition." (Ex. 101, QME Report of David Guzman, DPM, December 1, 2021, p. 5; Ex. 102, QME Report of David Guzman, DPM, April 19, 2022, pp. 5-6.) Both reports state as to the issue of causation: "When Mr. Hall stepped out of his delivery truck on 7/23/21, he felt severe pain (like someone was hitting him) at the back of his right ankle. After this, the symptoms worsened." (*Id*.)

The April 19, 2022 QME Report of David Guzman, D.P.M.[,] states that he reviewed applicant's medical records, including:

> Kaiser Permanente 10/6/21; 9/22/21; 9/21/21; 8/26/21; 8/19/21; 8/12/21; 8/9/21; 7/31/21; 7/30/21; 7/29/21; **7/26/21 (Linda Jarvis); 7/25/21 (Jeffrey James, M.D.)**
> Concentra 7/27/21
> CMC 7/23/21
> **David L. Guzman, DPM 12/1/21**
> **(**Ex. 102, QME Report of David Guzman, DPM, April 19, 2022, p. 4 [Emphasis in original].)

The April 19, 2022 QME Report of David Guzman, D.P.M., also states with regard to causation:

> **Mr. Hall states that on 7/24/21 he was experiencing pain in his right ankle/foot all day (Saturday). On 7/25/21, his nephews asked him to play basketball and he took them down to the gym. However, he stated that by the time he got there, just walking to the gym was painful and he therefore did not play any basketball - nor did he do any running, jumping or additional walking at the gym whatsoever.**
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> **(**Ex. 102, QME Report of David Guzman, DPM, April 19, 2022, p. 4 [Emphasis in original].)

The WCJ also admitted a January 26, 2022 letter from defendant to Dr. Guzman into evidence. (Minutes of Hearing and Summary of Evidence, August 1, 2022, p. 3:7.) It includes the following:

> Thank you for evaluating Chadrick Hall on 12/1/21. After reviewing your report, it seems apparent the provided cover letter and medicals were not reviewed. In your report, it states that he reported the claim and was sent to Concentra but there were no openings, so he went to Kaiser. Based on Kaiser reports included

> with this letter this proves to be inaccurate because the claim was reported on 7/26/21. In your report, there is no mention of the Kaiser medical reports provided from 7/25/21 and 7/26/21.
> On 7/25/21, he contacted his Kaiser physician and stated he was at the emergency room and was told he may have a ruptured Achilles. There is a telephone visit with Kaiser dated 7/26/21 in which it is reported he went to the emergency room yesterday and thinks he ruptured Achilles playing basketball. The mechanism is reported that he planted really hard and heard something pop that felt life not able to walk and fell to walk.
>
> Please address the provided reports in a supplemental report to more adequately address and consider the subsequent events that led up to Mr. Hall reporting an injury on 7/26/21. (Ex. 4, Letter from Sedgwick to Dr. Guzman, January 26, 2022, p. 1.)

At trial, applicant testified that his duties as a delivery driver included unloading large trucks from the airport, loading delivery trucks for their assigned routes, and delivering and picking up packages. (*Id.*, p. 4:10-12.) On Friday, July 23, 2021, he loaded his truck and drove Santa Rosa, where at approximately 3:30 or 4:00 p.m., he jumped out of his truck, felt something pop in his right ankle area, and continued to work until the end of his shift at 8:00 p.m. (*Id.*, p. 4:23-25.)

His symptoms worsened over the weekend, and he reported his injury on Sunday, after going to the hospital emergency room for pain. At the emergency room, he was informed that he needed to go to his own doctor, and he initially went to Concentra, and, thereafter, Kaiser. (*Id*., p. 5:1-6.)

At the emergency room, he told the doctors that he injured himself and that he was coming from attempting to play basketball. He also told a nurse that the injury was not from playing basketball, but occurred at work. The nurse said that applicant should tell his doctor. (*Id*., p. 5:7 14.)

Dr. Choung at Kaiser informed him that the initial report stated that the injury happened while he was playing basketball, and he corrected Dr. Choung, who indicated he would correct this information in his report. He also told Dr. Ledean at Kaiser about how the injury occurred. After being evaluated by Dr. Choung and Dr. Ledean, defendant's adjuster informed him that their findings were disputed and he was seen by panel QME Dr. Guzman. (*Id*., p. 5:15-22.) During his April 2022 re-evaluation by Dr. Guzman, he explained that the initial reports indicated that he was hurt playing basketball because he told the original doctors that he was on his way to play basketball when he went to the emergency room. (*Id*., p. 6:1-5.) He did not play basketball on the day he went to the emergency room. (*Id.*, p. 6:17-19.)

In the Report, the WCJ writes:

> On Sunday July 25, 2022, he had his brother take him to the emergency room at Novato Community Hospital.
>
> He reported to Kaiser July 26, 2021, for a telephone visit. This note indicated, in relevant part[], that he called in with a right Achilles rupture for 1 day. Went to the ER the previous day. Thinks that he ruptured his Achilles playing basketball. He planted really hard, heard something pop and felt like he was not able to walk. (Defendants Exhibit A).
>
> He next reported to Kaiser, Dr. Jun Danny Choung, on July 30, 2021 (Defendants Exhibit B), where it was noted, in relevant part, that the applicant indicated that the rupture happened on Sunday while he was playing basketball, but he did already feel some pain to the Achilles the Friday before while doing some strenuous work activities.
>
> The applicant was evaluated by a Panel QME, Dr. David Guzman. The undersigned did not find the reporting of Dr. David Guzman to be substantial medical evidence, as Dr. Guzman issue his reports without the benefit of all the medical records and a complete history. His reports are marked as Joint Exhibits 101 and 102. Dr. Guzman does find industrial causation.
>
> Applicant's exhibit 3 is the report of Dr. Timothy Ledean. Dr. Ledean indicates a mechanism of injury wherein the applicant was jumping in and out of his work truck and that is how he injured his ankle/Achilles. This report is dated August 12, 2021.
>
> Lastly, there is a medical report from Concentra dated July 27, 2021. This report also indicates a mechanism of injury of jumping from his work truck.

> The undersigned, having reviewed the medical reports and listened to the testimony of the applicant, found the applicant's testimony regarding his mechanism of injury to not be credible and Ordered that he take nothing.
> (Report, p. 2.)

DISCUSSION

We observe that California has a no-fault workers' compensation system. With few exceptions, all California employers are liable for the compensation provided by the system to employees injured or disabled in the course of and arising out of their employment, "irrespective of the fault of either party." (Cal. Const., art. XIV, § 4.) The protective goal of California's no-fault workers' compensation legislation is manifested "by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.'" (Labor Code §§ 3351, 5705(a);[2] *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354 [54 Cal.Comp.Cases 80].)

Notwithstanding the above, section 3600 imposes liability on an employer for workers' compensation benefits only if its employee sustains an injury "arising out of and in the course of employment." An employer is liable for workers' compensation benefits, where, at the time of the injury, an employee is "performing service growing out of and incidental to his or her employment and is acting within the course of employment." (§ 3600(a)(2).) The determination of whether an injury arises out of and in the course of employment requires a two-prong analysis. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].)

First, the injury must occur "in the course of employment," which ordinarily "refers to the time, place, and circumstances under which the injury occurs." (*LaTourette v. Workers' Comp. Appeals Bd.*, *supra*, 63 Cal.Comp.Cases at page 256.) An employee is acting within "the course of employment" when "he does those reasonable things which his contract with his employment expressly or impliedly permits him to do." (*Id*.) In other words, if the employment places an applicant in a location and he or she was doing an activity reasonably attributable to employment or incidental thereto, an applicant will be in the course of employment and the injury may be industrially related. (*Western Greyhound Lines v. Ind. Acc. Com.* (*Brooks*) (1964) 225 Cal.App.2d 517 [29 Cal.Comp.Cases 43].)

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

Second, the injury must "arise out of" the employment, "that is, occur by reason of a condition or incident of employment." (*Employers Mutual Liability Ins. Co. of Wisconsin v. I.A.C.* (*Gideon*) *(*1953) 41 Cal.2d 676 [18 Cal.Comp.Cases 286, 288].) "[T]he employment and the injury must be linked in some causal fashion," but such connection need not be the sole cause, it is sufficient if it is a "contributory cause." (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729 [48 Cal.Comp.Cases 326, 329].)

The burden of proof rests on the party holding the affirmative of the issue, which must be met by a preponderance of the evidence. (§§ 5705, 3202.5.) Applicant therefore has the affirmative burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment.

In the present case, the WCJ found that applicant did not meet his burden because the reporting of QME Dr. David Guzman did not constitute substantial medical evidence and applicant's testimony regarding the mechanism of injury was not credible. (Report, p. 2.)

But on January 26, 2022, defendant requested that Dr. Guzman review applicant's July 25, 2021 and July 26 2021 Kaiser records; and on April 13, 2022 Dr. Guzman reported that he had reviewed the records and was made aware of the July 26, 2021 record indicating that applicant believed his injury occurred while playing basketball. (Ex. 102, QME Report of David Guzman, DPM, April 19, 2022, p. 4; Report, p. 2; Ex. 4, Letter from Sedgwick to Dr. Guzman, January 26, 2022, p. 1.) Nevertheless, Dr. Guzman remained of the opinion that applicant's injury occurred when he "stepped out of his delivery truck on 7/23/21 [and] he felt severe pain (like someone was hitting him) at the back of his right ankle," stating that applicant told him he "was experiencing pain in his right ankle/foot all day (Saturday) . . . . [and] did not play any basketball" before going to the emergency room. (Ex. 102, QME Report of David Guzman, DPM, April 19, 2022, pp. 4- 6.)

On this record, it is clear that as of April 13, 2022, Dr. Guzman's reporting was informed by adequate medical history and otherwise based on pertinent facts and an adequate medical examination; and, as such, was sufficient to constitute substantial medical evidence. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Bd. en banc).) Therefore, we conclude that the WCJ erroneously failed to consider Dr. Guzman's reporting when she found that applicant did not sustain injury AOE/COE to the right ankle.

However, the WCJ based her finding not only on her assessment of Dr. Guzman's reporting, but also her assessment of applicant's credibility as to the mechanism of injury. (Report, p. 2.) The WCJ's assessment of applicant's credibility is entitled to great weight and should not be rejected without contrary evidence of considerable substantiality. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *McAllister v. Workers' Comp. Appeals B*d. (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660].)

However, in addition to Dr. Guzman's medical reporting—reporting which describes with specificity the progression of applicant's pain symptomatology after he stepped out of his work truck—the medical records of Dr. Choung, Dr. Ledean, and Concentra all trace applicant's pain progression back to strenuous work activity or otherwise indicate that applicant injured himself while jumping from his work truck. (Ex. 102, QME Report of David Guzman, DPM, April 19, 2022, p. 4; Report, p. 2.) We deem this evidence that applicant sustained injury at work to be of considerable substantiality that outweighs the inconsistent and rather limited evidence that applicant sustained injury off work. Accordingly, we conclude that the WCJ erroneously found that applicant did not sustain injury AOE/COE to the right ankle based upon her assessment of applicant's credibility.

Accordingly, we will grant reconsideration, and, as our Decision After Reconsideration, we will affirm the F&O, except that we will amend to find that that applicant sustained injury AOE/COE to the right ankle, defer the issue of what other parts of the body were injured, defer the issue of whether applicant is entitled to further medical treatment to cure or relieve the effects of injury, and rescind the order that applicant take nothing on his claim; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration the Findings and Order issued on September 13, 2022 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued on September 13, 2022 is **AFFIRMED,** except that it is **AMENDED** as follows:

FINDINGS OF FACT

3. CHADRICK HALL born on _____ while employed on July 23, 2021 as a delivery driver in California, by DHL EXPRESS, DHL EXPRESS, INC., whose workers' compensation insurance carrier was SEDGWICK PLEASANTON, SEDGWICK ROSEVILLE, sustained injury arising out of and occurring in the course of employment to the right ankle.

4. The issue of what other parts of the body were injured is deferred.

5. The issue of whether applicant is entitled to further medical treatment to cure or relieve the effects of injury is deferred.

ORDER

IT IS ORDERED that the records from Novato Community Hospital, exhibit E, be not admitted in evidence.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 2, 2022

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

CHADRICK HALL
BOXER & GERSON
ALBERT & MACKENZIE

SRO/ara/cs

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