

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

CLYDE WINBUSH, *Applicant*

vs.

**COUNTY OF LOS ANGELES DEPARTMENT OF MENTAL HEALTH,
*Permissibly Self-Insured, Defendant***

**Adjudication Numbers: ADJ16748561; ADJ18251026;
ADJ5506215; ADJ7449430; ADJ7449546
Van Nuys 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 of Fact and Orders of August 22, 2024 in case ADJ16748561, wherein it was found applicant did not sustain industrial cumulative injury during a cumulative period ending October 2008 to his back, neck, shoulders, elbows, wrists, hands, fingers, hips, knees, heart, gastrointestinal system, head, or in the forms of varicose veins or sexual dysfunction. The WCJ thus issued an order that applicant take nothing by way of his workers' compensation claim.

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

As explained below, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level for further development of the record, proceedings and decision.

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 September 16, 2024, and 60 days from the date of transmission is Friday, November 15, 2024. This decision is issued by or on Friday, November 15, 2024, 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 September 16, 2024, and the case was transmitted to the Appeals Board on September 16, 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 September 16, 2024.

Applicant worked for the employer until October 8, 2008, when he sustained a specific injury to his back. Applicant claimed specific industrial injuries to the low back occurring on

August 21, 1995 (ADJ5506215) and October 8, 2008 (ADJ7449546) and orthopedist Jeffrey A. Berman, M.D. was selected as agreed medical evaluator with regard to those injuries. Dr. Berman found applicant to be permanent and stationary in a November 8, 2012 report, found applicant to require further medical treatment, and apportioned 90 percent of applicant's permanent impairment to his 2008 injury and 10 percent to the 1995 injury. On October 28, 2014, stipulated awards were issued finding 38% permanent disability in case ADJ7449546 and 4% permanent disability in case ADJ5506215 and finding of a need for medical treatment to the low back.

Applicant apparently continued to experience lower back symptoms and underwent lumbar surgery in 2018. It is unclear if this surgery was provided on an industrial basis pursuant to the stipulated awards. Applicant then complained of gastrointestinal symptoms which he attributed to being prescribed narcotic analgesics and anti-inflammatory medication following the 2018 lumbar surgery. (April 7, 2023 report of qualified medical evaluator internist James H. Sherman, MD. at p. 3) On September 28, 2022, applicant filed an Application for Adjudication of claim alleging cumulative injury to various body parts.

In the instant proceedings, the only expert medical opinion procured was the April 7, 2023 medical report and the September 19, 2023 deposition testimony of qualified medical evaluator internist James H. Sherman, MD. Dr. Sherman found that applicant had sustained injury as a consequence of taking nonsteroidal anti-inflammatory medications to relieve his back symptoms. (April 7, 2023 report at pp. 9-10, 12-13; September 19, 2023 deposition at p. 8, 27.) Dr. Sherman testified that applicant's gastrointestinal issues "are compensable to his orthopedic issues. There's no independent [injury] other than that." (September 19, 2023 deposition at p. 26.)

Since any gastrointestinal cumulative trauma injury would be derivative of an orthopedic cumulative trauma injury, and no evidence of an orthopedic cumulative trauma injury was introduced into evidentiary record, the WCJ correctly determined on the current record that applicant has not carried his burden of proving industrial cumulative injury. However, we believe that the record must be developed so that an agreed medical evaluator or qualified medical evaluator may determine whether applicant sustained orthopedic cumulative injury which at least partially caused the need for nonsteroidal anti-inflammatory medications. While Dr. Berman's reports were properly admitted into evidence, applicant is entitled to an evaluation of his current claim by a new reporting physician (see generally *Navarro v. City of Montebello* (2014) 79 Cal.Comp.Cases 418 [Appeals Bd. en banc]). We note that Dr. Berman was never selected as

agreed medical evaluator in the current case and appears to have retired. (September 19, 2023 deposition at p. 8.) The parties should also be allowed discovery regarding any other claims of direct or consequential cumulative injury. After the factual record is developed, defendant may reassert its legal defenses.

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]) medical 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, rescind the WCJ's decision, and return this matter to the trial level for further proceedings and decision on the issue of industrial causation and all other outstanding issues. We take no position on the ultimate resolution of any outstanding issue in this matter.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings of Fact and Orders of August 22, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Orders of August 22, 2024 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

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

NOVEMBER 15, 2024

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

**CLYDE WINBUSH
GLASS LAW GROUP
HANNA, BROPHY, MacLEAN, McALEER & JENSEN**

DW/cs

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