WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE DE JESUS ORTIZ, *Applicant*

vs.

3 AMIGOS MARKET; AMGUARD INSURANCE COMPANY; ZENITH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11713524
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) issued on August 23, 2022, wherein the workers' compensation administrative law judge's (WCJ) found that (1) while employed during the period of July 1, 1994 through October 19, 2018, applicant claims to have sustained injury to the hand, back, shoulders, legs, feet, elbows, wrists, hips, feet, heels, musculoskeletal system, and in the form of grip loss and headaches; (2) Labor Code section 5402 does not apply to this claim; (3) Dr. Opoku's reports are not substantial evidence; (4) pursuant to Labor Code sections 5412 and 5500.5, the legal date of industrial cumulative trauma injury for the purpose of affixing liability in this case is the period of December 2, 2019 through November 2, 2020, making All-Time Maintenance the only liable employer in this case; and (5) all other issues are made moot.

The WCJ ordered that applicant take nothing on his claim against defendant.

Applicant contends that the WCJ erroneously found that the legal date of applicant's cumulative injury is the period of December 2, 2019 through November 2, 2020.

We received an Answer from defendant.

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[1] Commissioner Palugyai, who previously served as a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons stated below, we will rescind the F&O, and substitute findings that applicant's Labor Code section 5412 date of injury is December 2, 2020, and that the issue of whether applicant sustained separate cumulative injuries during his employment with defendant and his subsequent employment with All-Time Maintenance is deferred. We make no changes to Findings 1, 2 and 3. We will return the matter for further proceedings consistent with this decision.

FACTUAL BACKGROUND

Applicant, while employed during the period of July 1, 1994 to October 19, 2018, as a stocker cashier,by 3 Amigos Market, insured by AmGuard Insurance Company, claimed injury arising out of and in the course of employment to his hand, back, shoulders, legs, feet, headaches, elbows, wrists, hips, feet, heels, grip loss, and musculoskeletal.

On November 3, 2020, applicant was examined by qualified medical evaluator (QME) Purab Viswanath, M.D., and he issued a report on December 2, 2020. He stated that:

> The applicant began work for 3 Amigos Market on 7/1/1994. He worked as a cashier/general laborer, and stopped working there 10/19/2018. His job duties included a cleaning, operating a cash register and stocking. He worked five days a week generally from 7 AM to 3 PM. He also needed to occasionally operate a dolly. In an eight hour work day he reported standing for one hour a day continuously, and sitting for the remainder. The heaviest object you would have to lift was about 40 pounds, and this was occasionally. However, he continuously needed to looked up to 20 pounds. He continuously needed to be reaching at or above shoulder height and tilting the head over down. He does mention being exposed to the noise and dust at the workplace.
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> The applicant reports cumulative injury over the course of his employment over 24 years at Los 3 Amigos market. He notes pain and dysfunction in the bilateral shoulders, bilateral hands, lower back bilateral legs and bilateral feet. He's undergone nonoperative therapies including physical therapy extensively. He denies any radiating symptoms. He also does not have significant issue with the left-hand. Upon examination regarding his leg pain is stemming from his hips.
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> . . .
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> (Ex. X, PQME Report of Dr. Viswanath, December 2, 2020, pp. 12, 19-21.)

Dr. Viswanath issued a further report on December 6, 2021. Based on his review of records and applicant's deposition transcript, he stated:

> Given the high level of physical of demand at Alltime, and the lack of injury reporting while working at Los 3Amigos Market, I would apportion 75% of the permanent disability of the applicant's claim to employment under Los 3 Amigos Market, and apportion 25% of the disability to employment under Alltime. His employment with Alltime appears physically strenuous, however, the duration is significantly shorter here when compared with that with Los 3 Amigos Market.

(Ex. Z, PQME Report of Dr. Viswanath, December 6, 2021, p. 5.)

On June 16, 2022, the matter proceeded to trial on the issue of AOE/COE. Applicant raised the issue of presumption of injury pursuant to Labor Code Section 5402. Defendant contended that "they have no liability under Labor Code Section 5412 and 5500.5 based upon the opinion of the QME that the injurious CT exposure occurred through 11/3/2020 at the subsequent employer Alltime Maintenance." Defendant further contended "the medical reports of Dr. Opoku are deficient or are not substantial evidence to support a finding of injury AOE/COE" and that "that the case is barred by the post-termination provisions of Labor Code Section 3600(a)(10)." (Minutes of Hearing and Summary of Evidence, June 18, 2022, (MOH) p. 2:14-22.)

Applicant testified in relevant part as follows:

He worked at 3 Amigos Market until October 19, 2018, when he was terminated. Prior to his termination, he stated that he worked his usual and customary duties, and he did not seek treatment prior to his termination. He believes he started working for All-time Maintenance in November of 2018. He still works for All-time Maintenance, and it will be four years in November renovating apartments continuously. (MOH, pp. 4-7.)

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.)[2] The Appeals Board must conduct de novo review as to the merits of the petition and review the entire proceedings in the case. (Lab. Code, §§ 5906, 5908; see Lab. Code,

[2] 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.

§§ 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.)[3] 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 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

[3] 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.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.[4]

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."].)

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

[4] 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.)

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 of Fact and Order issued on August 23, 2022, and applicant filed a timely petition on September 12, 2022. According to EAMS, the case file was transmitted to the Appeals Board on September 23, 2022. However, for reasons that are not entirely clear from the record, the Appeals Board did not actually receive notice of and review the petition until April 11, 2023. 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 June 12, 2023. 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 April 11, 2023. Because we granted the petition on June 12, 2023, our grant of reconsideration was timely, and we may issue a decision after reconsideration addressing the merits of the petition.

II.

Applicant contends that the WCJ erred by finding that the legal date of his claimed cumulative injury is the period of December 2, 2019 through November 2, 2020.

Labor Code section 5412 states:

> The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.
> (Lab. Code, § 5412.)

Labor Code section 5500.5 states in pertinent part that liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1981, shall be limited to those employers who employed the injured worker during a period of one year immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first. (Lab. Code, § 5500.5(a).)

Otherwise stated, Labor Code section 5500.5 is the statutory basis for determining the liability period, i.e., employer liability for cumulative injury, whereas Labor Code section 5412 is used for establishing the date of injury. "[T]he purpose of section 5412 was to prevent a premature commencement of the statute of limitations, so that it would not expire before the employee was reasonably aware of his or her injury." (*J. T. Thorp v. Workers' Comp. Appeals Bd*. (*Butler*) (1984) 153 Cal.App.3d 327, 340 - 341 [200 Cal. Rptr. 219, 49 Cal. Comp. Cases 224].)

Here, the issue at trial was whether applicant sustained cumulative injury while employed by defendant, and all other issues were deferred. (Minutes of Hearing and Summary of Evidence, June 18, 2022, p. 2:14-22.) To determine that issue, it was necessary to determine (1) when applicant sustained injury under Labor Code section 5412; and (2) whether defendant employed applicant on the earlier of either the year-long period immediately preceding applicant's Labor Code section 5412 date of injury or the date of applicant's last injurious exposure. (Lab. Code, § 5500.5(a).)

In this regard, applicant filed an application for adjudication on November 26, 2018, claiming cumulative injury during the period of July 1, 1994 through October 19, 2018. (Application for Adjudication, November 26, 2018.) However, the record fails to show that applicant knew he had a cumulative injury which had ripened into permanent disability for which he could recover workers' compensation benefits until December 2, 2020, the date on which

PQME Dr. Viswanath reported that he had sustained permanent disability to the hips. (Ex. X, PQME Report of Dr. Viswanath, December 2, 2020, pp. 2, 19-21; see *City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467 [50 Cal.Comp.Cases 53] (stating that for purposes of determining the date of a cumulative injury, it is not assumed that a worker has knowledge that the disability is job-related without medical confirmation, unless the nature of the disability and the worker's qualifications are such that he or she should have recognized the relationship); *Pacific Indemnity Company v. Industrial Accident Commission* (*Rotondo*) (1950) 34 Cal.2d 726, 729 [15 Cal.Comp.Cases 37, 39] (stating an injured worker's knowledge that he or she sustained symptoms does not constitute knowledge that the symptoms were work related).) It follows that applicant's Labor Code section 5412 date of cumulative injury is December 2, 2020.

The issue of how many cumulative injuries an employee sustained is a question of fact. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd*. (*Austin*) (1993) 16 Cal.App.4th 227, 234-235 [58 Cal.Comp.Cases 323]; *Aetna Casualty v. Workmen's Comp. Appeals. Bd.* (*Coltharp*) (1973) 35 Cal.App.3d 329 [38 Cal.Comp.Cases 720]. Under *Coltharp*, where there are two periods of injurious repetitive activities or stresses at work, interrupted by a period of disability or a need for medical treatment, there are two distinct and separate cumulative trauma injuries. (See also *American Bridge Co. v. Workers Compensation Appeals Bd*. (1995) 60 Cal. Comp. Cases 869 (holding that substantial medical evidence supported the WCJ's finding that the applicant suffered separate periods of cumulative trauma to his right knee when the demonstrated need for medical care without a period of temporary disability occurred in 1986, a subsequent demonstrated need for medical care without temporary disability occurred in 1988, and the ongoing trauma led to surgical need and disability in 1991).)

In his December 6, 2021 report, Dr. Viswanath opined that he "would apportion 75% of the permanent disability of the applicant's claim to employment under Los 3 Amigos Market, and apportion 25% of the disability to employment under Alltime." However, All-Time Maintenance has not been joined as a party defendant, and the record is undeveloped as to the issue of whether applicant's "high level of physical of demand at All-Time Maintenance" resulted in a cumulative injury separate and distinct from the cumulative injury he sustained while employed by defendant. (Ex. Z, PQME Report of Dr. Viswanath, December 6, 2021, p. 5.)

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d

274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, 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." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie*, *supra*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Id*.) If the existing physicians cannot cure the need for development of the record, the selection of an AME should be considered by the parties. If the parties cannot agree to an AME, the WCJ can appoint a physician to evaluate applicant pursuant to section 5701.

The issue then is whether applicant sustained one or two cumulative injuries. If applicant was employed in the same occupation, that is performing similar duties, by two different employers and had a continuous period of employment, then there may be one injury and section 5500.5 may apply. However, if applicant was employed in two different occupations, that is performing different duties, for two different employers, then applicant has two claimed injuries, and while apportionment may apply, section 5500.5 does not. Here, we are unable to determine

based on the record before us whether applicant was engaged in different occupations, that is performing different duties, thereby exposing him to different hazards, while employed by Los 3 Amigos Market and All-time. Thus, the record needs further development as to whether applicant sustained one or two cumulative injuries, and whether the injuries involved the same or different job requirements. Thus, any determination as to the liability period under Labor Code section 5500.5 is premature.

We note that while applicant was examined by Dr. Viswanath on November 3, 2020, Dr. Viswanath did not examine applicant again after he learned about applicant's subsequent employment, so that Dr. Viswanath's opinion as to the causation of injury while applicant was employed at All-time is not based on an adequate history.

Accordingly, we will rescind the F&O, and substitute findings that applicant's Labor Code section 5412 date of injury is December 2, 2020, and that the issue of whether applicant sustained separate cumulative injuries during his employment with defendant and his subsequent employment with All-Time Maintenance is deferred. We make no changes to Findings 1, 2 and 3. We will return the matter for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration, that the Findings of Fact and Order issued on August 23, 2023 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. JOSE DE JESUS ORTIZ, born _____, while employed during the period of 7/1/1994 through 10/19/2018, as a stocker cashier, at Los Angeles, California, by 3 Amigos Market, claims to have sustained injury arising out of and in the course of employment to the hand, back, shoulders, legs, feet, headaches, elbows, wrists, hips, feet, heels, grip loss, and musculoskeletal. At the time of injury, the employer's workers' compensation carriers were AmGuard Insurance Company and Zenith Insurance. No attorney fees have been paid and no attorney fee arrangements have been made.
2. Labor Code section 5402 does not apply to this claim.
3. Dr. Opoku's reports are not substantial evidence.
4. Applicant's Labor Code section 5412 date of injury is December 2, 2020.

5. The issue of whether applicant sustained separate cumulative injuries during his employment with defendant and his subsequent employment with All-Time Maintenance is deferred.

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

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

November 5, 2024

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

JOSE DE JESUS ORTIZ
GLASS LAW GROUP
CHERNOW AND LIEB
TOBIN LUCKS

SRO/*cs*

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