

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

MARTA HENRIQUEZ, *Applicant*

vs.

**SERVICON SYSTEMS, INC.;
NORTH RIVER INSURANCE COMPANY,
administered by CRUM & FORSTER, *Defendants***

**Adjudication Numbers: ADJ13428207, ADJ11777154
Los Angeles District Office**

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

Applicant seeks reconsideration of the Findings and Order (F&O) of June 25, 2024, wherein the worker's compensation arbitrator¹ (WCA) found that applicant's petition to reopen based on new and further disability was untimely and ordered the case off calendar. Applicant contends that her petition to reopen was timely.

We have received an Answer from defendant. The WCA prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration, rescind the F&O, and return this matter to the arbitrator for further proceedings consistent with this opinion.

¹ Applicant participated in alternate dispute resolution due to an agreement between her union and her employer. (Cal Lab Code, §§ 3201.5; 3201.7.)

FACTS

Applicant filed two claims for workers' compensation benefits; a specific injury of August 16, 2018 and a continuous injury from April 30, 2016 through December 1, 2018. Defendant filed a Petition for Dismissal of Applications for Adjudication of Claim on the basis that applicant's union and employer had entered into an Alternative Dispute Resolution/ Carve Out Agreement. Both Applications were dismissed on June 29, 2021, pursuant to Labor Code² section 3201.7.

Applicant's prior attorney prepared a Petition to Reopen, alleging new and further disability, dated December 1, 2023, with a proof of service by mail stating that the attached Petition to Reopen was served on December 1, 2023. The Los Angeles district office of the WCAB, defendant's attorneys, defendant's administrator, the Ombudsperson, the WCA, and applicant are all listed on the proof of service.

The matter proceeded to a *four (4) minute* hearing on June 21, 2024 on the sole issue of the timeliness of the petition to reopen. The only evidence submitted was applicant's petition to reopen (Exhibit A). No witness testimony was taken. The WCA then stated:

And let the minutes reflect that defendant has given me a copy of the Petition to Reopen, apparently a faxed copy, with a date stamp of "Received December 1st, 2023." However, it's impossible to tell who this was received by.

Anyhow, the matter is hereby submitted for decision on this sole issue.

On June 25, 2024, the WCA issued the F&O, and found that the petition to reopen was untimely and ordered the matter off calendar.

DISCUSSION

I.

Former 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, 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.

² All further statutory references are to the Labor Code unless otherwise noted.

(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.

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.) 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, §§ 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 section 5950, but appellate review is limited to review of the record certified by the Appeals Board. (Lab. Code, §§ 5901, 5951.)

A petition for reconsideration of an arbitrator's decision or award made pursuant to a collective bargaining agreement per the provisions of sections 3201.5 and 3201.7 shall be subject to review by the appeals board in the same manner as provided for reconsideration of a final order, decision or award made and filed by a workers' compensation administrative law judge. (Lab. Code §§ 3201.5(a)(1) and 3201.7(a)(3)(A).)

Under 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. Once the Appeals Board receives the petition and the arbitration file pursuant to WCAB Rule 10990 (Cal. Code Regs., tit. 8, §10990), the Appeals Board can then "act" on the petition. 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 19, 2024, and 60 days from the date of transmission is November 18, 2024. This decision is issued by or on November 18, 2024, so that we have timely acted on the petition as required by section 5909(a).

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. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, there is no proof of service for the Report and Recommendation by the WCA, and the case was transmitted to the Appeals Board on September 19, 2024. No other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with accurate notice of transmission as required by section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on September 19, 2024.

II.

The relevant statute of limitations for filing a workers' compensation claim is one year from the date of injury. (Lab. Code, § 5405(a).) Pursuant to section 5410, an injured worker who has previously received workers' compensation benefits either voluntarily paid by the employer or pursuant to an award is entitled to claim benefits for "new and further disability" within five years of the date of injury. (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 925 [72 Cal.Comp.Cases 778].) If a petition to reopen is filed within the five-year period, the Board has jurisdiction to decide the matter beyond the five-year period. (*Id.*)

California case law has applied section 5410 to cases involving new and further disability to the original body part (*Sarabi v. Workers' Comp. Appeals Bd.*, *supra*, 151 Cal.App.4th at pp. 922–923, 926–927) or injury to a new body part which is alleged as a compensable consequence of the original injury. (*Southern California Rapid Transit Dist., Inc. v. Workers' Comp. Appeals Bd. (Weitzman)* (1979) 23 Cal.3d 158, 165-166 [44 Cal.Comp.Cases 107]; *Liberty Mutual Ins. Co. v. Industrial Accident Com. (Walden)* (1964) 231 Cal.App.2d 501, 504-505 [29 Cal.Comp.Cases 293].) However, irrespective of whether the Appeals Board's continuing jurisdiction is invoked because of new and further injury to an original body part or injury to a new body part as a compensable consequence of the original injury, the new and further disability must be a result or an effect of the prior compensable injury. (*Applied Materials v. Workers' Comp. Appeals Bd.* (2021) 64 Cal.App.5th 1042, 1080 [86 Cal.Comp.Cases 331]; *Sarabi*, *supra*, 151 Cal.App.4th at p. 926; *Weitzman*, *supra*, 23 Cal.3d at pp. 164-166.)

Unfortunately, not only does the record lack a copy of the original findings and award of October 15, 2021 that is discussed by the WCA's Report, it contains no finding of the date of injury, which is necessary as part of the overall determination in this matter. Based on the sparse record here, we cannot even determine which case applicant seeks to reopen. In fact, the four-minute record created here is devoid of any evidence other than the petition to reopen.

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].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id.* at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).)

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56

Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924] [“The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims.”]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

The Appeals Board also 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].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

We note that with respect to the date of injury, it may be necessary to also make a finding as to the section 5412 date of injury. (See *Palmer v. Workers' Comp. Appeals Bd.* (1987) 192 Cal.App.3d 1241, 1242 [52 Cal.Comp.Cases 298] [case reversed and remanded for a hearing to determine the date of injury pursuant to section 5412 and then to determine if the Petition to Reopen was timely filed.])

Upon return to the WCA, the original findings and award(s) should be provided and as appropriate, medical evidence that supports the dates of injury for applicant’s two claimed injuries, including the section 5412 date of applicant’s cumulative injury. Just as important, the WCA has a duty to prepare stipulations and issues, which at a minimum, should include an allegation as to applicant’s claimed new and further disability.

With respect to the finding that applicant’s claim is barred by the five-year statute of limitations under section 5410, we note that the defense of statute of limitations is an affirmative one. Defendant bears the burden of proving same. (Lab. Code, § 5409; *Kaiser Found. Hosps. Permanente Medical Group v. Workers' Comp. Appeals Bd.* (1985) 39 Cal.3d 57, 67, fn. 8 [50 Cal.Comp.Cases 411] [“The running of the statute of limitations is an affirmative defense (§ 5409), and the burden of proving it has run, therefore, is on the party opposing the claim.”].) On this existing record, it appears that the defendant has failed to prove that the filing of the petition to reopen is untimely.

The proof of service indicates that the petition was served on the Los Angeles district office of the WCAB, defendant’s attorneys, defendant’s administrator, the Ombudsperson, the WCA, and applicant. The petition is stamped “received” by an unknown party on December 1, 2023.

Yet, defendant submitted no evidence, and no testimony was offered as to whether the defendant “received” such petition in an untimely manner. It is not the applicant’s burden to prove that the petition to reopen was received on time. Based upon the existing record, it appears the defendant has failed in their burden of proof as to the untimeliness of applicant’s petition to reopen, but since we are rescinding the decision in its entirety and returning the matter for further supplementation of the record, we make no findings on this issue at this time.

Therefore, we grant applicant’s Petition for Reconsideration, rescind the F&O and return the matter to the WCA for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the June 25, 2024 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the June 25, 2024 Findings and Order is **RESCINDED** and 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/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 18, 2024

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

**MARTA HENRIQUEZ
SOLOV TEITELL
SCHOCHET SOLOMON, LLP
HOWARD GOODMAN, ARBITRATOR**

JMR/AS/mc

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