WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL KREZA (DECEASED),
SHANNA KREZA (GUARDIAN AD LITEM), ***Applicant***

vs.

CITY OF COSTA MESA FIRE DEPARTMENT. ***Defendant***

Adjudication Numbers: ADJ12674446

Anaheim District Office

OPINION AND DECISION
AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the "Findings and Order" (F&O) issued on September 9, 2021, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that decedent applicant did not sustain industrial injury on November 5, 2018, when he was struck and killed while riding a bicycle.

Applicant argues, in pertinent part, that the WCJ erred because decedent applicant had an objectively reasonable, subjective belief that exercise was a reasonable expectation of his employment.

We have received an answer from defendant.[2] The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record, as our Decision After

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[1] Commissioner Lowe was on the panel that issued the order granting reconsideration. Commissioner Lowe no longer serves on the Appeals Board. A new panel member has been substituted in her place.

[2] Defendant also filed a document tilted "Opposition to Opinion & Order Granting Petition for Reconsideration." Defendant's supplemental petition does not comply with WCAB Rule 10964, and thus, the supplemental petition is not accepted for filing. (Cal. Code Regs., tit. 8, § 10964.) However, and for the reasons stated in Section 1 of our Discussion, *infra*, we would otherwise reject the arguments raised by defendant in the supplemental petition.

Reconsideration we will rescind the WCJ's September 9, 2021 F&O and substitute a new Findings of Fact that applicant sustained industrial injury arising out of and occurring in the course of employment.

FACTS

Decedent applicant (hereinafter "applicant") worked as a firefighter for the City of Costa Mesa Fire Department for 24 years. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 18, 2021, p. 3, lines 6-8.)

On November 3, 2018, applicant was riding a bicycle when he was struck by a car resulting in multiple injuries, eventually leading to death on November 5, 2018. (Joint Exhibit 1, Report of QME M. Michael Mahdad, M.D., November 2, 2020, p. 1.) The sole issue for trial was injury arising out of and occurring in the course of employment. (MOH/SOE, *supra* at p. 2, lines 13-14.)

Applicant was not working on the date of the accident. (*Id*. at p. 7, lines 15-17.) He took his car to a mechanic, which was approximately 8 to 10 miles from applicant's home. (*Id*. at p. 6, lines 9-11.) Applicant took his bike with him so that he could get uphill ride training on the way home. (*Id*. at p. 6, lines 23-25.) Applicant would participate in triathlons and was training, in part, for an upcoming competition. (*Ibid*.)

Applicant would bring his bicycle to work. (*Id*. at p. 4, lines 6-8.) Bicycling was applicant's primary method of fitness. (*Ibid*.) Applicant preferred exercising off-duty so that it did not interrupt his work. (*Id*. at p. 4, line 16.)

Defendant requires applicant to participate in a fitness program, which is administered through a college fitness class. (Joint Exhibit 2, MOU for the City of Costa Mesa, p. 17.) Defendant's MOU states:

> The company officers, or a member designated by Fire Administration, shall track the progress of each member of his/her crew. Battalion Chiefs, or a member designated by Fire Administration, shall document the progress of each Captain under their command. Information regarding performance should be noted in annual performance reviews.

(*Ibid*.)

Defendant's fitness program requires employees to perform 91 hours of exercise throughout the year. (MOH/SOE, *supra* at p. 4, lines 9-15.) Employees may exercise off duty. (*Id*. at p. 8, line 22.) The requirements for completing the 91 hours of fitness are broad and

participants may run, swim, bike, or do weight training. (*Id*. at p. 4, lines 1-2; p. 9, lines 15-17.) .Maintaining fitness helps firefighters do their job well. (*Id*. at p. 10, lines 15-18.)

"Fitness requirements were an essential part of the ability to do the job." (*Id*. at p. 3, lines 18-19.) Firefighting is a physically demanding job. (*Id*. at p. 3, line 12.) If you failed to complete the fitness requirements, you would be put on a six-month supervised fitness program. (*Id*. at p. 3, line 15-18.) If you failed again after six months, you would be put on another six-month supervised program. (*Ibid*.) Failure to maintain fitness for a third time would result in you being sent to a doctor for a fitness for duty evaluation. (*Ibid*.)

DISCUSSION

I.

Recently the Appeals Board issued a Significant Panel Decision in *Ja'Chim Scheuing (Sandra) v. Lawrence Livermore National Laboratory*, (2024) 89 Cal. Comp. Cases 325.[3] This decision clearly explained the jurisdiction of the Appeals Board to act where a petition for reconsideration is received by a District Office, but is then untimely transmitted to the Appeals Board. We have extensively cited this decision below without block quotes for ease of reading.

Labor Code section 5900[4] states that:

> (a) Any person aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board or a workers' compensation judge under any provision contained in this division, may petition the appeals board for reconsideration in respect to any matters determined or covered by the final order, decision, or award, and specified in the petition for reconsideration. The petition shall be made *within the time* and in the manner *specified in this chapter*.

[3] 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 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).)

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

> (b) At any time within 60 days after the filing of an order, decision, or award by a workers' compensation judge and the accompanying report, the appeals board may, on its own motion, grant reconsideration.

(Lab. Code, § 5900, italics added.)

As set forth in section 5901, a final decision may issue either after an aggrieved person has filed a timely petition for reconsideration or after action by the Appeals Board on its own motion. In either instance, a party may seek timely appellate review of that final decision under section 5950.

There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10507(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10508.) To be timely, however, a petition for reconsideration must be filed (i.e., received) within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10845(a), 10392(a).) As explained further below, petitions for reconsideration are required to be filed at the district office, and not directly at the Appeals Board. (Cal. Code Regs., tit. 8, § 10940(a)); see Cal. Code Regs., tit. 8, § 10205(l) [defining a "district office" as a "trial level workers' compensation court."].)

This time limit is jurisdictional and therefore, the Appeals Board has no authority to act upon or consider an *untimely* petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal. App. 4th 1068, 1076 [97 Cal. Rptr. 2d 418, 65 Cal. Comp. Cases 650, 656]; *Rymer v. Hagler* (1989) 211 Cal. App. 3d 1171, 1182, 260 Cal. Rptr. 76; *Scott v Workers' Comp. Appeals Bd.* (1981) 122 Cal. App. 3d 979, 984 [176 Cal. Rptr. 267, 46 Cal. Comp. Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com.* (*Hinojoza*) (1962) 201 Cal. App. 2d 545, 549 [27 Cal. Comp. Cases 73, 75–76].)

In contrast, here, applicant's Petition for Reconsideration was ***timely*** filed September 29, 2021, twenty days after the WCJ's decision of September 9, 2021. Thus, as explained below, the Appeals Board has the authority to act upon the Petition and to consider it.

The jurisdiction conferred on the Appeals Board when a petition is timely filed under section 5900, subdivision (a), means that in order to act, the Appeals Board does not have to issue an order removing the proceedings to itself under section 5301, nor does it have to provide notice and an opportunity to be heard as required under section 5803 before issuing a new decision. Moreover, when reconsideration is granted under section 5900 or section 58113, it has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]), and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal. App. 2d 201, 203 [270 P.2d 55, 19 Cal. Comp. Cases 98].)

Section 5909 provides that a petition is denied by operation of law if the Appeals Board does not act on the petition within 60 days after it is filed.[5] However, unlike the Court of Appeal, which has the right to summarily deny petitions for writ of review and mandate, the Appeals Board does not deny petitions for reconsideration by operation of law pursuant to section 5909. This is based on the Supreme Court's holdings that summary denial of reconsideration is no longer sufficient after the enactment of section 5908.5. (*Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal. 2d 753, 754–755 [33 Cal. Comp. Cases 350]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal. 3d 627, 635 [83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal. Comp. Cases 16] ["We hold that if the appeals board denies a petition for reconsideration its order may incorporate and include within it the report of the referee, provided that the referee's report states the evidence relied upon and specifies in detail the reasons for the decision."]; *Moyer v. Workmen's Comp. Appeals Bd*. (1972) 24 Cal. App. 3d 650, 655 [100 Cal. Rptr. 540, 37 Cal. Comp. Cases 219]; *Hodges v. Workers' Comp. Appeals Bd*. (1978) 82 Cal. App. 3d 894, 906 [147 Cal. Rptr. 546, 43 Cal. Comp. Cases 870; *Painter v. Workers' Comp. Appeals Bd*. (1985) 166 Cal. App. 3d 264, 268, 212 Cal. Rptr. 354.)

[5] We observe that section 5301 provides for "full power, authority and jurisdiction" by the Appeals Board over all proceedings, and section 5803 provides for "continuing jurisdiction" by the Appeals Board over all of its "orders, decisions, and awards." (Lab. Code, §§ 5301, 5803.) Thus, the Appeals Board's failure to act within 60 days on a timely petition is not a true issue of jurisdiction because the Appeals Board always has jurisdiction over all proceedings and all orders, decisions, and awards.

Timely petitions for reconsideration filed and received by the Appeals Board are acted upon within 60 days from the date of filing pursuant to section 5909, by either granting, dismissing, or denying the petition. Thereafter, once a decision on the merits of the petition issues, the parties can then determine whether to seek review under section 5950. (See, § 5901.)

An exception occurs when a petition is not received by the Appeals Board within 60 days due to irregularities outside the petitioner's control. In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal. App. 4th 1104, 1108 [9 Cal. Rptr. 2d 345, 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 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. (*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*.) Pursuant to the holding in *Shipley* allowing tolling of the 60-day time period in section 5909, the Appeals Board acts to grant, dismiss, or deny such petitions for reconsideration within 60 days of receipt of the petition, and thereafter issues a decision on the merits.

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 [97 Cal. Rptr. 2d 852, 65 Cal. Comp. Cases 805].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd*. (2005) 127 Cal. App. 4th 625, 635, fn. 22 [25 Cal. Rptr. 3d 828, 70 Cal. Comp. Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal. App. 3d 1449, 1452–1454 [285 Cal. Rptr. 222, 56 Cal. Comp. Cases 537].)

If a timely filed petition is never acted upon and considered by the Appeals Board because it is "deemed denied" due to an administrative irregularity and not through the fault of the parties, the petitioning party is deprived of their right to a decision on the merits of the petition. (§5908.5; see *Evans*, *supra*, 68 Cal. 2d at pp. 754–755; *LeVesque*, *supra*, 1 Cal. 3d at p. 635.) Just as significantly, the parties' ability to seek meaningful appellate review is compromised, raising issues of due process. (§§ 5901, 5950, 5952; see *Evans*, *supra*, 68 Cal. 2d 753; see also *Rea*, *supra*, 127 Cal. App. 4th at p. 643.) *Rea* and other California appellate courts have consistently followed

the *Shipley* court's lead when weighing the statutory mandate of 60 days against the parties' constitutional due process right to a true and complete judicial review by the Appeals Board.

As the California Supreme Court stated in *Elkins v. Derby* (1974) 12 Cal. 3d 410, 420 [115 Cal. Rptr. 641, 525 P.2d 81, 39 Cal. Comp. Cases 624]:

> ***Procedural rules should engender smooth and functional adjudication***. A procedural practice is neither sacred nor immutable. It must be able to withstand the charge that it is inequitable, burdensome or dysfunctional. We think duplicative filing succumbs to all three charges. We also believe that ***respect for our legal system—a respect which is absolutely essential to its effective functioning—is hardly enhanced by an incongruent procedural structure*** which causes an injured party simultaneously to allege before different tribunals propositions which are mutually inconsistent. Absent a tolling rule, this is precisely the strategy to which a party unsure of his remedy must resort in order to protect his right to recovery.

(*Elkins*, *supra*, 12 Cal. 3d at p. 420 (emphasis added).)

"[I]t is a fundamental principle of due process that a party may not be deprived of a substantial right without notice… ." (*Shipley*, *supra*, 7 Cal. App. 4th at p. 1108.) The California Constitution mandates that the WCAB "accomplish substantial justice in all cases… ." (Cal. Const., art XIV, § 4; § 3201.) ***In keeping with the WCAB's constitutional and statutory mandate, all litigants before the WCAB must be able to rely on precedential authority, and all litigants must have the expectation that they will be treated equitably on issues of procedure and be accorded same or similar access to the WCAB***.[6] The Appeals Board has relied on the *Shipley* precedent for over thirty years, by continuing to consider all timely filed petitions for reconsideration on the merits, consistent with due process. Treating all petitions for reconsideration in the same or similar way procedurally promotes judicial stability, consistency,

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[6] The workers' compensation system "was intended to afford a *simple* and *nontechnical path* to relief." (*Elkins*, *supra*, 12 Cal. 3d at p. 419, citing 1 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1973) § 4.01[1], pp. 4-2 to 4-3. Cf. Cal. Const., art. XX, § 21 [italics added]; § 3201.) In order to further the goal of expeditious adjudication of disputes, informal rules of pleading apply to workers' compensation proceedings. (See Cal. Code Regs., tit. 8, § 10617; *Rivera v. Workers' Comp. Appeals Bd*. (1987) 190 Cal. App. 3d 1452, 1456 [236 Cal. Rptr. 28, 52 Cal. Comp. Cases 141]; see also *Claxton v. Waters* (2004) 34 Cal. 4th 367, 373 [69 Cal. Comp. Cases 895]; *Sumner v. Workers' Comp. Appeals Bd*. (1983) 33 Cal. 3d 965, 972, 973 [191 Cal. Rptr. 811, 663 P.2d 534, 48 Cal. Comp. Cases 369].) Moreover, as part of advancing the underlying public policy, workers may be unrepresented or represented by individuals other than attorneys. (See Lab. Code, § 5501 [providing for filing of application for adjudication by non-attorney representative or unrepresented worker].) "The system affords means by which an employee may learn about his rights informally and without an attorney." (*Elkins*, *supra*, 12 Cal. 3d 410 at p. 419 referring to 1 Hanna, supra, at § 4.02[1–5], pp. 4-4 to 4-6.)

and predictability and safeguards due process for all litigants. We also observe that a decision on the merits of the petition protects every litigant's right to seek meaningful appellate review after receiving a final decision from the Appeals Board.

In this case, the WCJ issued the Findings & Order on September 9, 2021, and applicant filed a timely Petition for Reconsideration on September 29, 2021 at the Anaheim district office. The petition was filed electronically into the Electronic Adjudication Management System (EAMS). The petition along with the WCJ's Report was transmitted to the Appeals Board on October 6, 2021.

The Appeals Board must admit error in this matter as we misplaced the file and failed to act on the Petition within 60 days, through no fault of the parties. The Appeals Board discovered the misplaced file on December 3, 2021. Therefore, considering that applicant filed a timely Petition for Reconsideration and that the Appeals Board's failure to act on that Petition was a result of administrative error, we conclude that our time to act on applicant's Petition was equitably tolled until 60 days after December 3, 2021.

II.

Turning to the merits of the petition, section 3600(a)(9) states, in pertinent part, that compensation does not exist where an injury arises ". . . out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment." (§ 3600(a)(9).)

In determining whether off-duty physical fitness activities constitute an industrial injury, the Appeals Board must determine whether the exercise is a reasonable expectancy of employment, which consists of two elements: (1) whether the employee subjectively believes that exercise is expected by the employer, and (2) whether that subjective belief is objectively reasonable. (*Ezzy v. Workers' Comp. Appeals Bd.*, (1983) 146 Cal.App.3d 252, 260 [48 Cal.Comp.Cases 611].)

Here, defendant first argues that applicant did not have a subjective belief that exercise is expected by the employer. The evidence clearly shows that defendant mandated physical fitness as a condition of employment. Firefighters were required to log 91 hours of fitness each year. Objectively, exercise was required by the employer. Accordingly, applicant met the burden of proving a subjective reasonable belief that exercise was required.

Applicant's subjective belief was objectively reasonable as the employer expressly allowed off-duty exercise and did not limit the methods of the exercise. According to the terms of the MOU agreement, the exercise program was administered through a local college and not by defendant. "[P]roving express or implied pressure upon the employee serves to establish the objective reasonableness of that employee's belief that he or she was required to participate in the off-duty activity." (*Wilson v. Workers' Comp. Appeals Bd*., (1987) 196 Cal. App. 3d 902, 906, (quoting *Aetna Casualty & Surety Co. v. Workers' Comp. Appeals Bd*. (1986) 187 Cal.App.3d 922, 931.)

Defendant argues that applicant was training for a triathlon, and thus the exercise did not have a substantial nexus to the employment. Applicant's personal goal of training for a triathlon does not preclude a finding of industrial injury. The sole questions are whether the employee subjectively believes that exercise is expected by the employer and whether that belief is objectively reasonable. Many areas of the employment relationship encompass mixed motives. For example, a business trip may also entail some personal comfort and leisure activity. The fact that applicant's motive to exercise was both personal and professional does not preclude a finding of industrial injury. Where the exercise meets the conditions of *Ezzy*, the exercise is industrial notwithstanding applicant's personal motives.

The WCJ relied, in part, upon *Hermann v. Workers Compensation Appeals Bd*., (2000) 65 Cal. Comp. Cases 197 (writ den.). *Hermann* is distinguishable as the employer in *Hermann* mandated that applicant run 40 minutes per day. However, applicant far exceeded this mandate by running up to 50 to 60 hours per week. Contrary to *Hermann*, here, no evidence was presented that applicant exceeded the employer's mandate. If the 91-hour mandate was exceeded, no evidence was presented as to what extent. Accordingly, the holding in *Hermann* is not persuasive.

Defendant relies upon *Davis v. Workers Comp. Appeals Bd*., (1997) 62 Cal. Comp. Cases 182 (writ den.). *Davis* is easily distinguished as the WCJ in *Davis* "found no evidence that Applicant's activity was expressly or impliedly required by Applicant's employment." (*Id*. at 183.) Contrary to *Davis*, here the employer required applicant to complete 91 hours of exercise per year.

Defendant suggests that we find the injury non-industrial because defendant "has not endorsed, prompted, nor promoted the Applicant's participation in the Ironman contests[.]" (Defendant's Answer, p. 5, lines 27-28.) However, applicant was not participating in an Ironman contest at the time of injury. Applicant was bicycling home from the mechanic. Defendant

mandates an exercise program, which permits bicycling. Defendant's Ironman argument is a straw man argument.

Accordingly, as our Decision After Reconsideration we will rescind the WCJ's September 9, 2021 F&O and substitute a new Findings of Fact that applicant sustained industrial injury arising out of and occurring in the course of employment.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the September 9, 2021 Findings and Order is **RESCINDED**, with the following **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Michael Kreza, deceased, while employed on November 3, 2018 as a firefighter, occupational group number 490 at Costa Mesa, California by the City of Costa Mesa, sustained injury arising out of and in the course of employment to his head, which resulted in his death on November 5, 2018.

2. Defendant mandated that applicant exercise 91 hours per year and thus, applicant subjectively believed that exercise was expected.

3. Applicant's subjective belief that exercise was expected by the employer was objectively reasonable.

4. At the time of injury, the employer was self-insured and administered by Adminsure.

5. Shanna Kreza is the Guardian Ad Litem for the minors and total dependents, Kayla Kreza, Layla Kreza and Audrey Kreza.

6. All other issues are deferred to the parties to adjust, with jurisdiction reserved to the trial level in the event of a dispute.

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

August 16, 2024

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

SHANNA KREZA
ADAMS FERRONE AND FERRONE
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP
KARLIN HIURA & LA SOTA

EDL/mc

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