WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RENEE GIALLO, ***Applicant***

vs.

GUITAR CENTER;
ARROWOOD INDEMNITY COMPANY, ***Defendants***

Adjudication Number: ADJ2862836

Marina del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted both applicant, and defendant's Petitions for Reconsideration of the Findings of Fact and Award (F&A) issued on April 12, 2021, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

The WCJ found, in pertinent part, that defendant denied applicant medical treatment from April 28, 2017, through March 9, 2020, and awarded penalties of 15% of the reasonable value of treatment received by applicant from Karen Coscolluela, D.C., for the dates of service of April 4, 2017, through July 27, 2017. The WCJ deferred the exact amount of penalties to the parties to adjust.

Applicant contends, in pertinent part, that the WCJ erred because her award of penalties is for a time period that does not match the time period when defendant denied medical treatment.

Defendant contends, in pertinent part, that the WCJ erred because the prior stipulation by defendant to provide 36 sessions of chiropractic treatment per year was not a general agreement, but directed solely to a specific doctor selected; thus, defendant did not unreasonably deny medical treatment.

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[1] Commissioners Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board and a new panel member was appointed in her place.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we grant applicant's Petition for Reconsideration and amend Findings of Fact 2 and 3 to correct the period for which penalties are awarded, but deny defendant's Petition for Reconsideration

We have considered the allegations of the Petition for Reconsiderations and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, and for the reasons stated in the WCJ's Report, as our Decision After Reconsideration we will rescind the April 12, 2021 F&A and substitute a new F&A, which amends the period for which penalties are awarded.

Per the WCJ's Report:

> The Applicant, Renee Giallo . . . while employed on 10/11/2002 sustained injuries to his back and right elbow.
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> The Applicant filed an Application for Adjudication of Claim on or about 11/13/2002.
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> The Applicant was initially represented by counsel and the case resolved via Stipulations with Request for Award on 8/2/2006, when approved by former WCJ Pamela Foust. Prior counsel for Applicant was relieved as attorney of record by order dated 08/27/2012.
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> Applicant, unrepresented, appeared for the first time before this WCALJ on 01/07/2013. Thereafter, Applicant appeared before the undersigned WCALJ on five more occasions including trial on 07/23/2015. On the Minutes of Hearing dated 04/08/2013, the WCALJ documented an agreement between the parties. The defense counsel who appeared at the 04/08/2013 conference was a party to this agreement. The matter proceeded to trial on 07/23/2015 solely on the issue of the language contained on the 4/8/2013 Minutes of Hearing. A Findings and Award was served in this matter on 09/14/2015. The Findings of Fact found that Applicant was entitled to future medical treatment including but not limited to 36 chiropractic treatments per year with Dr. Jalili consistent with the parties stipulation on the Minutes dated 4/8/2013. Defendant filed a timely and verified Petition for Reconsideration on 10/05/2015. Applicant, who remains in pro per, did not file an Answer to Petition for Reconsideration. The Petition was denied by the WCAB on 12/4/2015.

> On 3/8/2016 the law firm of Gale & Sutow was substituted in to represent Defendant. Applicant has remained in propria persona. On 6/14/2019 Applicant filed a Petition for Penalties. On 8/20/2019 Defense counsel at the time, Gale & Sutow, filed a Response to Applicant's Petition for Penalties. On 10/25/2019, the Law Offices of Michael Sullivan was substituted in as counsel for Defendant.
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> On 1/16/2020, Applicant filed a Declaration of Readiness to Proceed raising the sole issue of "Penalties/Medical Denied". On 1/30/2020, Defendant through their current representative filed an Objection to the DOR. The matter was set for status conference on 2/13/2020. The parties appeared at various conferences and remained on calendar until 10/20/2020 when it was finally set for trial. The trial was continued to 12/23/2020 when trial commenced and trial testimony was concluded on 2/10/2021 when the matter was submitted. Applicant was the only witness to testify over the course of trial. Defendant was given the opportunity to cross-examine the Applicant and no other witnesses were called to testify. The limited issues submitted for decision were whether defendant has denied applicant medical treatment from 4/28/2017 to present and Penalties pursuant to Applicant's Petition dated 6/14/2019. The WCJ issued a Findings of Fact and Award on 4/9/2021. All parties of the official address record were served on 4/12/2021. Applicant filed a timely and verified Petition for Reconsideration dated 4/21/2021. Applicant contends that he is aggrieved as the evidence does not justify the findings of fact and the findings of fact do not support the order, decision or award. Defendant filed a timely and verified Petition for Reconsideration on 5/5/2021. Defendant contends that evidence does not support a finding of denial of medical care or unreasonable delay, that Applicant must treat within the MPN, that this treatment is subject to UR and that the 4/8/2013 stipulation between the parties is void. To date, neither party has filed an Answer to the Petition for Reconsideration of the other. The WCJ contends that her decision was based on the entire record presented at trial and for the following reasons both Petitions for Reconsideration should be denied for lack of good cause.

(WCJ's Report, pp. 2-4.)

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, §§ 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

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[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.

[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.

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 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.)

[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.)

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 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 and Award on April 9, 2021, and applicant filed a petition for reconsideration on April 23, 2021. Defendant filed a petition for reconsideration on May 5, 2021. According to EAMS, the WCJ generated a report and transmitted the petitions to the Appeals Board on June 1, 2021. Accordingly, the Appeals Board failed to act on applicant's

petition within 60 days, through no fault of the parties. The Appeals Board timely granted defendant's petition.

A grant of reconsideration 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 [19 Cal.Comp.Cases 98].) Accordingly, the Appeals Board may address all issues raised.

Furthermore, no party sought writ of review of our June 29, 2021 order granting reconsideration for study, and thus, the order has become the law of this case.

II.

The WCJ recommended amending the Findings of Fact per applicant's Petition for Reconsideration as follows:

> Applicant objects to the fact that the award of penalties pursuant to Labor Code Section 5814 does not contain a sum specific and does not include the entire period Applicant was denied medical treatment which he contends was through 3/9/2020.
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> Regarding the lack of a specific sum for the Labor Code Section 5814 penalties awarded, no evidence was presented at trial as to the reasonable value or cost of the medical treatment Applicant was denied. Applicant does not dispute the percentage of the penalty at 15% in his Petition.
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> The finding of a penalty pursuant to Labor Code Section 5814 is based on the amount of the payment unreasonably delayed or refused. As there was no evidence presented at trial regarding the amount of the payment, the WCJ could only award a percentage not a specific dollar amount. In the event that this decision is upheld, then the parties have been ordered to adjust the amount based on a discussion and if a dispute remains, the WCJ has reserved jurisdiction.
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> 1. Applicant's second major point out is well taken. The WCJ determined in her Findings of Fact that Defendant denied the Applicant medical treatment from 4/28/2017 to 3/9/2020. Applicant contends that the penalties awarded pursuant to Labor Code Section 5814 should reflect the same period as the finding of denial of medical treatment. After additional consideration the WCJ agrees. Therefore it is recommended that Applicant's Petition for Reconsideration be granted in part and the Findings of Fact be amended as follows:

> 2. Defendant has denied the Applicant medical treatment from **4/4/2017** to 3/9/2020.
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> 3. Applicant is entitled to penalties pursuant to Labor Code Section 5814 of 15% based on the reasonable value of the medical treatment of Dr. Karen A. Coscolluela, D.C., for dates of service from 4/4/2017 to 7/27/2017 **and any other denied medical treatment through 3/9/2020**.
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> The significance of 4/4/2017 as the starting date is based on the letter to Applicant from Dr. Coscolluela dated 7/27/2017 indicating this was the first date she was not paid for her services. (See Exhibit 1). The significance of 3/9/2020 as the ending date is based on Defendant's letter to Dr. Shery authorizing him to be Applicant's treating physician based on Applicant's election. (See Exhibit G)

(WCJ's Report, pp. 4-6.)

For the reasons stated by the WCJ, we agree that the Findings of Fact should be amended.

Turning to defendant's Petition, stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. (*County of Sacramento v. Workers' Comp. Appeals Bd.* (*Weatherall*) (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1] (*Weatherall*).) As defined in *Weatherall*, "A stipulation is 'An agreement between opposing counsel . . . ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,' (Ballentine, Law Dict. (1930) p. 1235, col. 2) and serves 'to obviate need for proof or to narrow range of litigable issues' (Black's Law Dict. (6th ed. 1990) p. 1415, col. 1) in a legal proceeding." (*Weatherall*, supra, 77 Cal.App.4th at p. 1119.)

Section 5702 states:

> The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. The appeals board may thereupon make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.

(§ 5702.)

Here the parties stipulated in 2013 and the WCJ previously found that: "Applicant is entitled to future medical treatment including but not limited to 36 chiropractic treatments per year with Dr. Jalili." Sometime after this stipulation, Dr. Jalili became unavailable. Defendant argues that it is no longer required to provide 36 chiropractic treatments per year because the stipulation was to a specific doctor. Defendant's argument on this point borders on skeletal and is not persuasive.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Cal. Civ. Code, § 1636.) Here the parties stipulated that applicant was to receive 36 chiropractic treatments per year and that defendant would authorize Dr. Jalili to provide them. Defendant makes no legal arguments in its Petition, and thus, it is impossible to determine under what legal theory defendant argues that it has been relieved of the stipulation. The stipulation itself does not limit treatment to Dr. Jalili. Had defendant sought such a limitation, it could have used appropriate restrictive language (e.g., "*only* Dr. Jalili"). Such language does not exist in the present stipulation.

Defendant stipulated to provide 36 chiropractic treatments per year and has not abided by that stipulation. Accordingly, we agree with the WCJ that defendant unreasonably delayed treatment by denying applicant further chiropractic visits.

Accordingly, as our Decision After Reconsideration we will rescind the April 12, 2021 F&A and substitute a new F&A, which amends the period for which penalties are awarded, but make no other substantive changes.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued on April 12, 2021, is **RESCINDED** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Both Exhibits 3 and K are admitted into evidence.

2. Defendant has denied the Applicant medical treatment from 4/4/2017 to 3/9/2020.

3. Applicant is entitled to penalties pursuant to Labor Code Section 5814 of 15% based on the reasonable value of the medical treatment of Dr. Karen A. Coscolluela, D.C, for dates of service from 4/4/2017 to 7/27/2017 and any other denied medical treatment through 3/9/2020, subject to proof.

4. All other issues are deferred.

AWARD

AWARD IS MADE in favor of Rene Giallo, against Royal Sun Alliance Insurance, as follows:

(a) Penalties as provided in Finding number 3.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSÉ H. RAZO, COMMISSIONER
PARTICIPATING, NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 4, 2024

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

RENEE GIALLO, IN PRO PER
PEARLMAN, BROWN & WAX, LLP, CURRENT DEFENSE COUNSEL

EDL/mc

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