

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

**PARISS KELLY, *Applicant***

**vs.**

**CARPET MASTER CHEM-DRY;  
LIBERTY MUTUAL INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ7026552  
Oakland District Office**

**OPINION AND ORDERS  
DISMISSING PETITION FOR  
RECONSIDERATION;  
GRANTING PETITION FOR  
RECONSIDERATION;  
AND DECISION AFTER  
RECONSIDERATION**

Applicant, in pro per, and defendant have each filed Petitions for Reconsideration of the Findings and Award dated November 19, 2020 and issued on November 23, 2020 by the workers' compensation administrative law judge (WCJ). On December 14, 2020, lien claimant, applicant's former attorney James Latimer, filed a Petition for Order Awarding Payment of Applicant Attorney fees that we will treat as a Petition for Reconsideration. We have considered the allegations of the Petitions for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated below, we take the following actions. As to lien claimant's petition, we will grant reconsideration and return this matter to the WCJ for consideration of the request for attorney fees in the first instance. As to defendant's petition, we will affirm the WCJ's finding of permanent total disability with no apportionment for the reasons stated below and for the reasons stated in the WCJ's report, which we adopt and incorporate, except as noted below. We will dismiss applicant's petition as skeletal.

Preliminarily, we note that a petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "it is a fundamental principle of due process that a party may not be

deprived of a substantial right without notice ....” (*Shipley v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied the 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. (*Shipley, supra*, 7 Cal.App.4th 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].” (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the WCJ issued the Findings and Award on November 23, 2020 and applicant, lien claimant, and defendant each filed timely petitions on December 9, 2020, December 14, 2020, and December 16, 2020, respectively. Thereafter, the Appeals Board failed to act on those petitions within 60 days, through no fault of the parties. Therefore, considering that the Appeals Board’s failure to act on those petitions was in error, we find that our time to act was tolled.

We now turn to applicant’s Petition for Reconsideration. We do not adopt or incorporate the WCJ’s recommendation that we deny applicant’s Petition for Reconsideration. Rather, we will dismiss applicant’s petition as skeletal.

The Labor Code requires that:

The petition for reconsideration shall set forth specifically and in full detail the grounds upon which the petitioner considers the final order, decision or award made and filed by the appeals board or a workers' compensation judge to be unjust or unlawful, and every issue to be considered by the appeals board. The petition shall be verified upon oath in the manner required for verified pleadings in courts of record and shall contain a general statement of any evidence or other matters upon which the applicant relies in support thereof.  
(Lab. Code, § 5902, emphasis added.)

Moreover, the Appeals Board Rules provide in relevant part: (1) that “[e]very petition for reconsideration ... shall fairly state all the material evidence relative to the point or points at issue [and] [e]ach contention contained in a petition for reconsideration ... shall be separately stated and clearly set forth” (Cal. Code Regs., tit. 8, former § 10842, now § 10945 (eff. Jan. 1, 2020) and (2) that “a petition for reconsideration ... may be denied or dismissed if it is unsupported by specific references to the record and to the principles of law involved” (Cal. Code Regs., tit. 8, former § 10846, now § 10972 (eff. Jan. 1, 2020).)

In accordance with section 5902 and WCAB Rules 10945 and 10972, the Appeals Board may dismiss or deny a petition for reconsideration if it is skeletal (e.g., *Cal. Indemnity Ins. Co. v. Workers' Comp. Appeals Bd. (Tardiff)* (2004) 69 Cal.Comp.Cases 104 (writ den.); *Hall v. Workers' Comp. Appeals Bd.* (1984) 49 Cal.Comp.Cases 253 (writ den.); *Green v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 564 (writ den.)); if it fails to fairly state all of the material evidence, including that not favorable to it (e.g., *Addecco Employment Services v. Workers' Comp. Appeals Bd. (Rios)* (2005) 70 Cal.Comp.Cases 1331 (writ den.); *City of Torrance v. Workers' Comp. Appeals Bd. (Moore)* (2002) 67 Cal.Comp.Cases 948 (writ den.); or if it fails to specifically discuss the particular portion(s) of the record that support the petitioner's contentions (e.g., *Moore, supra*, 67 Cal.Comp.Cases at p. 948; *Shelton v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 70 (writ den.)) Applicant's Petition for Reconsideration fails to state grounds upon which reconsideration is sought or to cite with specificity to the record. Therefore it is subject to dismissal.

We turn next to defendant's petition. By a June 26, 2017 Findings and Award, applicant was previously found to have sustained industrial injury to her bilateral knees, lumbar spine, cervical spine, bilateral ankles, and psyche, while employed on May 19, 2009. Therefore, psychiatric injury arising out of and occurring in the course of employment (AOE/COE) is not at issue. Moreover, defendant does not dispute that applicant is totally disabled from the work force. (Dr. Piciuccio's 5/15/19 report, at. p. 61, defendant's exhibit K.) The only issue defendant raises on reconsideration is the assertion that the WCJ erred in failing to find apportionment.

Labor Code<sup>1</sup> section 4663(a) provides that "[a]pportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) Section 4664(a) states that "[t]he employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Lab. Code, § 4664(a).) The defendant has the burden of proof on the issue of apportionment. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].)

We agree with the WCJ that there is no substantial medical evidence supporting a finding of apportionment. (*Heggin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621

---

<sup>1</sup> All further statutory references are to the Labor Code, unless otherwise noted.

(Appeals Board en banc) [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].) In order to consist of substantial medical evidence on the issue of apportionment, a medical opinion

[M]ust 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.

For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability.

And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.

(*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621-622 (Appeals Board en banc).)

In this case, while the psychology panel qualified medical examiner (PQME) Luigi Piciuccio, M.D., attempted to apportion psychiatric disability to non-industrial causes, his opinion on apportionment is not well-reasoned and it fails to explain the "how and why" he determined the percentages that he did. (See Dr. Piciuccio's 5/15/19 report, at pp. 4-6, 11-12, defendant's Exhibit K.) In addition, during his August 28, 2019 deposition, Dr. Piciuccio essentially testified that, while pre-existing personality traits may have predisposed applicant to developing a delusional disorder, it is the delusional disorder that is causing his inability to work and not the pre-existing personality traits. (Dr. Piciuccio's deposition, 8/28/19, at pp. 16-17, defendant's exhibit L.)

Defendant's reliance on the holding in *City of Petaluma v. Workers' Comp. Appeals Bd. (Lindh)* (2018) 29 Cal.App.5th 1175 [83 Cal.Comp.Cases 1869] is misplaced. In *Lindh*, the court held that apportionment to an asymptomatic underlying condition or risk factor is required, even if the condition or risk factor alone might never cause disability, provided there "is substantial medical evidence that establishes that the asymptomatic condition or pathology was a contributing

cause of the disability.” (*Lindh, supra*, 83 Cal.Comp.Cases at 1882.) However, the holding in *Lindh* does not alter the necessity that all such determinations must be based upon medical evidence that establishes how and why a non-industrial factor caused some portion of the resulting disability. As discussed above, Dr. Piciucco’s opinion is not substantial on the issue of apportionment.

Finally, we note that the lien of applicant’s former attorney was not adjudicated at the September 24, 2020 trial and that applicant’s former attorney timely sought reconsideration of the November 23, 2020 Findings and Award. Therefore, we will grant reconsideration, rescind the November 23, 2020 Findings and Award, substitute it with new Findings of Fact that defer the issue of attorney fees and otherwise restate the WCJ’s findings. The WCJ should issue an award following further proceedings as she determines necessary to adjudicate former applicant’s attorney’s lien.

For the foregoing reasons,

**IT IS ORDERED** that applicant’s Petition for Reconsideration of the November 23, 2020 Findings and Award is **DISMISSED**.

**IT IS FURTHER ORDERED** that defendant’s and lien claimant’s Petitions for Reconsideration of the November 23, 2020 Findings and Award are **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the November 23, 2020 Findings and Award is **RESCINDED** and **SUBSTITUTED** with new Findings of Fact, as provided below:

**FINDINGS OF FACT**

1. Applicant, Pariss Kelly, is totally permanently disabled as a result of the industrial injury he sustained on May 19, 2009.
2. Mr. Kelly is entitled to reasonable and necessary medical care as it pertains to the industrially injured body parts: bilateral knees, lumbar and cervical spine, bilateral ankles and psyche.
3. The applicant's former attorney's lien for fees is deferred.
4. Defendant is entitled to take credit for permanent disability advances made to date.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**APRIL 30, 2021**

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

**PARISS KELLY  
MULLIN & FILIPPI**

**PAG/pc**

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

## **REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION**

Both defendant and applicant filed timely, verified, petitions for reconsideration from my finding that applicant is totally permanently disabled. I will address both petitions in this report and recommendation.

### **INTRODUCTION**

Applicant, Pariss Kelly, was employed by Carpet Master Chem-Dry, as a carpet cleaner when on May 19, 2009, while he was carrying a heavy buffer down a flight of stairs, his right knee buckled and he went fell to the ground. Mr. Kelly has not worked since the day of his injury.

Applicant has been evaluated by a number of physicians in this case; panel qualified medical examiners, Dr. Smolins as well as Dr. Piciuccio; Dr. Herrick as a neurological consult, Drs Waldman, Kabayan, Cheng, Bokarius and Krinsky. A Functional Capacity evaluation was also performed at the Feinberg medical group.

Mr. Kelly was found to have reached permanent and stationary status by most of the evaluating physicians in 2014. Ratable reports issued addressing all injured body parts before 2015. Because the parties could not resolve this case, this matter proceeded to trial before me.

I have reviewed the record in its entirety. Initially I was unable make a decision on applicant's level of permanent disability because the medical record was stale. My first decision in this case required the parties to return to the evaluating physicians for updated medical opinions.

Although the applicant was initially evaluated by a significant number of physicians, all commenting on applicant's level of disability, re-evaluations only took place with Dr. Smolins as well as Dr. Piciuccio.

I did not feel it necessary to have applicant evaluated by any other physicians. As it was, it was quite difficult to get applicant to attend the evaluations with Dr. Smolins and with Dr. Piciuccio.

Initially I planned on issuing formal rating instructions in this case. Then I read Dr. Piciuccio's report and noted that Dr. Piciuccio determined that from a psychiatric perspective applicant was unemployable in the open labor market.

I had already determined causation for injury to the psyche in my last decision. That was never appealed. All I had left to address was whether any portion of the psychiatric injury can or should be apportioned to non-industrial causes.

Review of the record convinced me that applicant was permanently totally disabled as a result of his industrial injury with this employer.

Defendant's petition for reconsideration does not question applicant's inability to compete in the open labor market. Defendant's petition for reconsideration simply addresses the question of apportionment and argues that a portion of applicant's disability should be apportioned to non-industrial factors.

## **DISCUSSION**

Dr. Piciucco's deposition, defense Exhibit L, is the crucial exhibit in this case. Although Dr. Piciucco issues several reports, having evaluated applicant on 5 separate occasions, it is in the deposition transcript that he makes it clear that not only is applicant unemployable in the open labor market because of his psychiatric disability, but that the industrial injury is responsible for his inability to compete in the open labor market.

Page 10 of his deposition testimony states that Mr. Kelly has a personality trait that made him vulnerable to a delusional disorder (lines 6-9). Dr. Piciucco then states that the stress Mr. Kelly experienced as a result of his work related injury, pushed him over the edge (lines 17-25). Because of the lack of treatment provided by the carrier, Mr. Kelly experienced lack of function which caused the stress that triggered his delusional disorder. Because of the delusional disorder, Mr. Kelly is unable to compete in the open labor market (page 15, lines 16-18, 25). Absent the onset of the clinical symptoms of the delusional disorder the other psychiatric disorders that applicant suffers from would not be disabling (page 17, lines 1-7).

When read as a whole, no other conclusion can be reached that but for the industrial injury, applicant would be employable in the open labor market.

The delusional disorder is caused by the industrial injury and it is this disorder that makes applicant unable to compete in the open labor market.

Applicant is therefore permanently totally disabled.

With respect to applicant's petition for reconsideration, his petition cannot be responded to because of its lack of clarity. Although Mr. Kelly does raise issues in his petition regarding penalties and back payment, those issues were not addressed at the time of trial and are best left for determination after there is a final determination regarding Mr. Kelly's overall disability.

**RECOMMENDATION**

I recommend that both Petitions for Reconsideration filed be ***DENIED***.

DATE: 02/16/2021

Lilla J Szelenyi

WORKERS' COMPENSATION

ADMINISTRATIVE LAW JUDGE