

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

**AURELIO RAMIREZ, *Applicant***

**vs.**

**PARKHOUSE TIRES, INC.; TRAVELERS PROPERTY CASUALTY OF AMERICA,  
*Defendants***

**Adjudication Numbers: ADJ10594852; ADJ10882589; ADJ10882630  
Bakersfield 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.<sup>1</sup>

Defendant seeks reconsideration of the Findings, Order and Award (F&A) issued on January 14, 2021, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a tire technician on May 20, 2015, applicant sustained injury to the right index finger and the back (ADJ10594852); (2) while employed as a tire technician on March 19, 2017, applicant sustained injury to the back (ADJ10882630); (3) while employed as a tire technician over the period from March 23, 2016 to March 23, 2017, applicant sustained injury by way of hernia (ADJ10882589); (4) at the time of all injuries, applicant's earnings were \$757.40 per week, warranting indemnity rates of \$466.67 per week for temporary disability, and \$290.00 per week for permanent disability; (5) for ADJ10594852, the employer paid temporary disability at \$466.67 per week for the period from May 21, 2015 to June 15, 2015; (6) for ADJ10882630, the employer paid temporary disability at \$623.19 per week for the period from March 30, 2017 to July 19, 2018; (7) for ADJ10882630, the employer paid permanent disability at \$290.00 per week for the period from July 19, 2018 to October 11, 2018; (8) applicant has been adequately compensated for all periods of temporary disability claimed through June 15, 2015; (9) defendant has furnished all medical treatment; (10) for ADJ10594852, the injury was permanent and stationary on September 22, 2016; (11) for ADJ1088630, the injury was permanent and stationary

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<sup>1</sup> Commissioner Sweeney and Commissioner Lowe no longer serve on the Appeals Board. Deputy Commissioner Sussman and Commissioner Capurro have been assigned in their place.

on June 9, 2018; (12) permanent disability in ADJ10594852 is apportioned one hundred percent (100%) to this injury; (13) for ADJ10594852 the injury caused permanent disability of forty-seven percent (47%) after adjustment for age, occupation and apportionment, equivalent to 259.00 weeks of indemnity at \$290.00 per week commencing on September 22, 2016, for a total of \$72,500.00; (14) defendant is entitled to credit of \$3,561.09 against its obligation to pay permanent disability indemnity in ADJ10594852; (15) applicant is in need of further medical treatment to cure or relieve the effects of the injuries; and (16) the reasonable value of applicant's attorney's services is \$8,700.00.

The WCJ ordered that defendant receive a credit of \$3,561.09 against its obligation to pay permanent disability indemnity in ADJ10594852.

The WCJ issued an award in applicant's favor of permanent disability indemnity of (1) \$290.00 per week commencing on September 22, 2016, for a total of \$72,500.00 in ADJ10594852, with defendant to receive a credit of \$3,561.09; (2) further medical treatment; and (3) attorney's fees of \$8,700.00, to be commuted from the far end of the award.

Defendant contends that the WCJ erroneously (1) found that QME Dr. Harris's September 22, 2016 reporting that applicant sustained 2% WPI to the MP joint of the middle finger and impairment in the form of grip loss constitutes substantial medical evidence; (2) awarded applicant permanent disability benefits based upon QME Dr. Harris's reporting instead of relying upon PTP Yung's December 7, 2015 reporting that applicant sustained no permanent disability; and (3) combined QME Dr. Harris's rating in ADJ10594852 with QME Fisher's rating in ADJ10882630.

We did not receive an Answer.

The WCJ filed a Report and Recommendation on the Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the Petition and the contents of the Report. Based on our review of the record, and for the reasons stated below, as our Decision After Reconsideration, we will rescind the F&A and substitute findings that (1) applicant sustained injury to the right index finger in ADJ10594852 resulting in permanent disability of 38%, payable in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of dispute; (2) applicant sustained injury to the back in ADJ10882630 resulting in permanent disability of 15%, payable in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of dispute; (3) defendant is not entitled to a credit for overpayment of temporary disability benefits in

ADJ10882630 to be applicable against permanent disability benefits in ADJ10594852; and (4) the issues of the amount of attorney's fees to which applicant is entitled in ADJ10594852 and ADJ10882630 are deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

### **BACKGROUND**

On January 22, 2020, the matter proceeded to trial on the following issues:

1. For Case ADJ10882589, injury arising out of and in course of employment.
2. For Case ADJ10882589, parts of the body injured.
3. Permanent disability for Case ADJ10594852.
4. Defendant's request for a TD overpayment or credit for TD overpayment in the amount of \$3,561.09 for the period 6-9-18 when the applicant was found permanent and stationary by the QME in that case, to 7-19-18, the date the report was received. Defendant requests overpayment of TD in Case ADJ10882630 to be applied against the PD in Case ADJ10594852.
5. Attorney fees.

(Minutes of Hearing and Summary of Evidence, January 22, 2020, p. 3:26-40.)

The parties stipulated as follows:

1. Aurelio Ramirez, . . . while employed on May 20, 2015 in ADJ10594852 and on March 19, 2017 in ADJ10882630 and over the period from March 23, 2016 through March 23, 2017 in ADJ10882589, in all cases as a tire technician, Occupational Group 460, at Bakersfield, California by Parkhouse Tire Services, Inc., sustained injury arising out of and in the course of employment in ADJ1059482 to the right index finger and sustained injury arising out of and in the course of employment to the back in ADJ10882630 and sustained injury arising out of and in the course of employment by way of hernia in ADJ10882589.

...

4. The employer has paid compensation as follows: In Case ADJ10594852, they paid temporary disability at \$466.67 for the period from 5-21-15 through 6-15-15, and in Case ADJ10882630, they paid temporary disability at \$623.19 per week for the period from 3-30-17 through 7-18-17 and 10-30-17 to 7-19-18 and paid permanent disability at \$290.00 per week for the period from 7-19-18 through 10-11-18. The employee has been adequately compensated for all periods of temporary disability claimed through 6-15-15.

...

6. The parties stipulate that the back percentage of permanent disability for Case ADJ10594852 based on the panel QME Dr. David Fisher is 15 percent. (*Id.*, p. 2:23-3:32.)

The WCJ admitted QME Dr. Harris's September 22, 2016 report into evidence. *Id.*, p. 4:5.)

It includes the following:

**SUBJECTIVE FACTORS OF DISABILITY**

Right Index Digit:

SUBJECTIVE FACTORS: Occasional slight discomfort.

RESTRICTIONS: No work restrictions required.

Right Middle Digit:

SUBJECTIVE FACTORS: Constant slight discomfort.

RESTRICTIONS: No work restrictions required.

**OBJECTIVE FACTORS OF DISABILITY:**

1. Soft tissue thickening with tenderness over the metacarpophalangeal joint of the left middle digit.

**FUTURE MEDICAL CARE:**

Future medical care for the right index and right middle digits may include but not be limited to intermittent courses of physical therapy, occupational therapy and chiropractic care; acupuncture, anti-inflammatory, analgesic and muscle relaxant medication; bracing; corticosteroid injections and evaluation by appropriate specialists with diagnostic studies as indicated.

If the patient's condition worsens and does not respond to the above measures, he may require surgical intervention.

**AMA IMPAIRMENT**

Right Index Digit:

The claimant has a 1% whole person impairment due to residual problems from scarring of right index digit (Table 8-2, page 178)

The claimant does have residual impairment as a result of the injury to the metacarpophalangeal joint.

In situations where impairment ratings are not provided, the GUIDES suggest that physicians use clinical judgment, comparing measurable impairment resulting from the unlisted condition to measurable impairment resulting from similar conditions with similar impairment or function in performing activities of daily living. The physician's judgment, based upon experience training, skills, thoroughness in clinical evaluation, and ability to apply the GUIDES criteria as intended, will enable an appropriate and reproducible assessment to be made of clinical impairment (page 11, section 1.5).

Based above, I do feel that the claimant will have 2% whole person impairment (Table 16-24, page 140).

The patient has residual 73% grip strength loss, resulting in 20% impairment of the upper extremity/12% whole person impairment (Table 16-34/Page 509).

UTILIZING COMBINED VALUES, THESE RESULTS IN A TOTAL WHOLE PERSON IMPAIRMENT OF 15%.

(Ex. M, Report of QME Dr. Harris, September 22, 2016, pp. 9-10.)

The WCJ also admitted the Transcript of the Deposition of Dr. Harris dated January 25, 2018 into evidence. (*Id.*, p. 4:15.)

The Transcript of the Deposition of Dr. Harris provides:

Q: On page 10 of your report, you did provide a rating for grip loss. On page 4 of the same report, you noted that the range of motion of the right middle digit was normal, and that there was normal sensation in the digit. I had a bit of confusion. In light of this, what is causing the grip loss?

A: I do not know.

Q: Now, in the same report -- we had the grip loss of -- on the right-hand side, which is his dominate side. And on the left, we have a 34, 34, 32. And the biceps and the forearms were the same size on the left and right. Is that normal?

A: I don't know if it's normal, but those were the findings in this case.

Q: Now, in your 4/14/2017 report that was done after your the evaluation, the grip on the right this time was 2, 2, 2. And then on the left, it was 20, 20, 18. How did this decrease in the grip strength on the right side occur in your professional opinion?

A: I do not know why it decreased, but it is not uncommon when examining patients that objective findings will change from time to time without apparent reason.

Q: And the grip strength is deemed to be an objective finding; is that correct?

A: Yes.

Q: Now, on April 14, 2017, the Applicant's right bicep and right forearm were both larger than on the left side despite the Applicant having almost no grip on the right and, you know, allegedly having grip loss for a sustained period of time. Wouldn't having a grip loss for a sustained period of time result in greater atrophy of the right arm and not left?

A: No.

Q: How come, Doctor?

A: The presence or absence of grip strength loss does not effect atrophy or result in atrophy. Atrophy results from lack of use of a muscle. So if a patient has decreased grip strength loss and is using his arm, no atrophy will result.

Q: And if he doesn't have a grip -- if he has in, this case the second time around, virtually no grip in his right hand, what kind of activities would he be able to do, then, to be able to have bigger biceps and forearms?

MR. BARSOUM: Objection. Calls for speculation.

THE WITNESS: I don't think that there are any particular activities that have resulted in the asymmetry of his upper extremities.

...

Q: So in your medical opinion, if the decrease in grip strength from two evaluations seven months apart and an increase in the forearm and biceps size over the same period, in your opinion would that suggest any kind of malingering with the tests conducted during the evaluations?

A: No.

Q: And why not, Doctor?

A: There was no evidence of any malingering or symptom exaggeration at the time of my examination that I documented.

...

Q: Now if – when I was looking at the report, it seems that the main issue was with the middle finger. As the other three fingers and thumb were unaffected, shouldn't they compensate for the middle finger during a grip?

A: No.

Q: No?

A: No.

Q: Why not?

A: Because one finger cannot compensate for another when performing grip strength.

(Ex. R, Transcript of the Deposition of Dr. Harris, January 25, 2018, pp. 7:18-10:6, 11:1-11.)

In the Opinion on Decision, the WCJ states:

Defendant claimed temporary disability overpayment for the period from June 9, 2018 to July 19, 2018 in the amount of \$3,561.09. They paid temporary disability during this period at \$623.19 per week. They paid this in ADJ10882630, but want credit for their permanent disability obligations in ADJ10594852.

...

Credit for benefits paid in one claim do not extend to another claim unless the period of benefits paid in the first case overlap the period of benefits owed in the other case.

In ADJ10594852, the Applicant was permanent and stationary on September

22, 2016. Permanent disability benefits would start on that date. Permanent disability of 47% is being awarded. That would be a period of benefits of 250.00 weeks, or 1,750 days, at \$290.00 per week. That period would end on July 8, 2021.

The period Defendant paid temporary disability in ADJ10882630 overlaps the period they owe permanent disability in ADJ10594852. They are entitled to credit for the benefits paid during this period, or \$3,561.09 against the benefits owed in ADJ10594852.

(Opinion on Decision, pp. 5-6.)

In the Report, the WCJ states:

For ADJ10594852, Applicant suffered an admitted injury on May 20, 2015 to the right index finger while working as a tire technician for Defendant.[fn]

For ADJ10882630, Applicant suffered an admitted injury on March 19, 2017 to the back while working as a tire technician for Defendant.[fn]

For ADJ10882589, injury by way of hernia over the period from March 23, 2016 to March 23, 2017 was both admitted to[fn] and put at issue at the January 22, 2020 trial.[fn] The Award found injury by way of hernia, but this finding is not complained of in the Petition. No rating for the hernia was given in the Award.

Applicant was examined by physicians including Dr. Arthur Harris, Dr. Alarick Yung, and Dr. David Fisher.

A Mandatory Settlement Conference was held on October 2, 2018. After several continuances, trial was held on January 22, 2020.

...

The matter was sent for formal rating on the finger injury in ADJ10594852, based on the September 22, 2016 report of Dr. Arthur Harris (Joint Exhibit M). The formal rating of June 2, 2020 used the age of 63.

The Defendant objected to the rating and a cross-examination of the rater was held on October 13, 2020. The error in the age to be used was admitted and a new rating based on the age of 60 was to be requested.

That rating issued on October 23, 2020, again for the index finger of the right hand and based on the September 22, 2016 report of Dr. Arthur Harris. That rating included finger scarring, grip loss, and residuals from the MP joint injury, and found 38% permanent disability. The age of 60 was used for the rating. Injury to the index finger was admitted to in ADJ10594852, and no finger injury was claimed in the other two cases. There was no objection to the rating.

The Award issued on January 14, 2021, finding permanent disability for ADJ10594852. It combined the 38% permanent disability to the finger with the 15% permanent disability for the back which had been stipulated to at the January 22, 2020 trial. This resulted in the forty-seven percent (47%) permanent disability for ADJ10594852 reflected in the Award.

...

In the September 22, 2016 report (Defendant Exhibit M) Dr. Harris reports on his examination of Applicant's fingers on the right hand.[fn]

He documents a scar on the right index finger, a negative Tinel's (sign) and no signs of infection. He documents no localized tenderness over the MP, PIP, and DIP joints.[fn] The joints had full range of motion. There was intact function and sensation in the finger.

For the right middle digit, he documents soft tissue thickening over the MP joint with diffuse tenderness to palpation over the MP joint, along with pain with stressing, but no instability. He documents the amount of motion in the MP, PIP, and DIP joints. He states there is intact function and normal sensation.

He documents examination of the right wrist and right hand. He documents biceps and forearm measurements and grip strength.

This documents an adequate examination.

Dr. Harris then lists the nine reports in his medical record review.[fn] This documents an adequate history.

Dr. Harris then gives his diagnosis, opinion on causation, apportionment, impairment, and future medical care. These paragraphs document a solid underlying basis for the opinion.

(Report, pp. 2-3.)

## **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.) 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.)

Former 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. However, the Appeals Board cannot “act on” the petition if it has not received it, and if it has not received the case file. Transmission of the case to the Appeals Board 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.” When the Appeals Board does not receive the case file and 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.<sup>2</sup>

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 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.) Pursuant to the holding in *Shipley* allowing equitable 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.

"[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.) 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].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp.*

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<sup>2</sup> 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.)

*Appeals Bd.* (2005) 127 Cal.App.4th 625, 635, fn. 22 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1454 [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. (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 v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) 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; see also *Rea, supra*, 127 Cal.App.4th at p. 643.)

On December 11, 2024, the California Supreme Court granted review in *Mayor v. Workers' Compensation Appeals Bd.* (2024) 104 Cal.App.5th 713 [2024 Cal.App. LEXIS 531] (“*Mayor*”). One issue granted for review is the same issue present in this case, i.e., whether section 5909 is subject to equitable tolling. The Supreme Court noted the conflict present in the published decisions of the Courts of Appeal, and in its order granting review of *Mayor*, stated as follows:

Pending review, the opinion of the Court of Appeal, which is currently published at 104 Cal.App.5th 1297, may be cited, not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, to choose between sides of any such conflict. (See *Standing Order Exercising Authority Under California Rules of Court, Rule 8.1115 (e)(3)*, *Upon Grant of Review or Transfer of a Matter with an Underlying Published Court of Appeal Opinion*, Administrative Order 2021-04-21; Cal. Rules of Court, rule 8.1115(e)(3) and corresponding Comment, par. 2.)

(Order Granting Petition for Review, S287261, December 11, 2024.)

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.) 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.”].) When a litigant is 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, substantial justice cannot be compatible with such a draconian result.

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. 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, 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.

Consequently, as discussed below, we apply the doctrine of equitable tolling pursuant to *Shipley* to this case. Here, the WCJ issued the F&A on January 14, 2021, and defendant filed a timely petition on February 3, 2021. However, according to EAMS, the district office did not transmit the case file to the Appeals Board until November 18, 2021. Accordingly, the Appeals Board was in no position to act on the petition within 60 days of its filing through no fault of the parties. The Appeals Board did grant the petition within 60 days of transmittal on January 10, 2022. 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 November 18, 2021. And because we granted the petition on January 10, 2022, our grant of reconsideration was timely, and we may issue a decision after reconsideration addressing the merits of the petition.

Accordingly, having timely granted reconsideration to further study the legal and factual issues presented herein, we now issue our Decision After Reconsideration.

## II.

Defendant contends that the WCJ erroneously found that QME Dr. Harris's September 22, 2016 reporting that applicant sustained 2% WPI to the MP joint of the middle finger and impairment in the form of grip loss constitutes substantial medical evidence. Specifically, defendant argues that Dr. Harris's reporting fails to describe applicant's finger impairment and fails to explain the mechanism of applicant's loss of grip strength or the limited atrophy of his right forearm and bicep following this loss of grip strength.

All decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [262 Cal. Rptr. 537, 54 Cal.Comp.Cases 349].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].) 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 [93 Cal. Rptr. 15, 480 P.2d 967, 36 Cal.Comp.Cases 93, 97].)

Here, as stated in the Report, QME Dr. Harris's reporting is based on pertinent facts, adequate examination and history, and sets forth reasoning in support of its conclusions. (Report, pp. 2-4.) Notably, Dr. Harris's reporting explains how he determined that applicant has 2% WPI impairment to the right MP joint: he found 1% whole person impairment resulting from "residual problems from scarring of right index digit" and then compared this impairment to the ratings provided by the Guides for similar impairments and concluded that applicant's clinical impairment amounted to 2% WPI. (Ex. M, Report of QME Dr. Harris, September 22, 2016, pp. 9-10.)

In addition, Dr. Harris's deposition testimony explains that his findings as to applicant's loss of grip strength are objective, that his clinical experience allows him to rely upon those findings without additional evidence as to the mechanism behind the grip strength loss, and that he would not expect applicant to suffer atrophy of the forearm and bicep as a result of the grip strength loss. (Ex. R, Transcript of the Deposition of Dr. Harris, January 25, 2018, pp. 7:18-10:6, 11:1-11.)

Accordingly, we are unable to discern merit to defendant's argument that the WCJ erroneously found that QME Dr. Harris's September 22, 2016 report constitutes substantial medical evidence.

Because we discern no error in the WCJ's reliance on Dr. Harris's reporting, we discern no merit to defendant's argument that the WCJ should have relied upon PTP Yung's December 7, 2015 reporting that applicant sustained no permanent disability.

We next address defendant's contention that the WCJ erroneously combined QME Dr. Harris's rating for the injury sustained on May 20, 2015 in ADJ10594852 with QME Dr. Fisher's rating for the injury sustained on March 29, 2017 in ADJ10882630.

Labor Code section 5702 provides:

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 [Emphasis added].)

Stipulations between counsel are a "substitute for proof" and binding on the parties "if within the authority of the attorneys," and on the court if "not contrary to law, court rule or policy." (*Greator v. Board of Administration* (1979) 91 Cal.App.3d 54, 58 [44 Cal.Comp.Cases 553].) Stipulations between counsel further "'the public policies of settling disputes and expediting trials...' (citation) 'and their use in workers' compensation cases should be encouraged.'" (*Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd. (Allen)* (2010) 181 Cal.App.4th 752, 764 [75 Cal.Comp.Cases 1]; see *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].)

Here, the parties stipulated that (1) applicant sustained injury to the back in ADJ10882630; (2) the injury to the back resulted in permanent disability of 15%; and (3) applicant sustained

injury to the right index finger in ADJ1059482. (Minutes of Hearing and Summary of Evidence, January 22, 2020, pp. 2:23-3:32.)

Although the parties cite “QME Dr. Fisher’s reporting in ADJ10594852” as the basis for stipulating to permanent disability for the back injury at 15%, the reference to ADJ10594852 appears to have been the result of scrivener's error because ADJ10882630 is applicant’s only case involving a back injury. (*Id.*, p. 3:32; Report, p. 2.)

Hence, because the record demonstrates that the parties stipulated that applicant sustained injury to the back in ADJ10882630 resulting in permanent disability of 15%, and further stipulated that applicant sustained injury to the right index finger in ADJ1059482, we conclude that the WCJ erroneously failed to issue findings in accordance with these stipulations.

Additionally, because the record shows that applicant’s injury to the right index finger in ADJ1059482 resulted in permanent disability of 38%, we conclude that the WCJ erroneously failed to find that the right finger injury in ADJ1059482 resulted in disability of 38%. (Report, p. 3.)

Accordingly, we will substitute findings that applicant sustained injury to the back in ADJ10882630 resulting in permanent disability of 15% , payable in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of dispute; and injury to the right index finger in ADJ1059482 resulting in permanent disability of 38%, payable in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of dispute.<sup>3</sup>

Temporary disability indemnity is a workers' compensation benefit which is paid during the time an injured worker is unable to work because of a work-related injury and is primarily intended to substitute for lost wages. (*Gonzales v. Workers' Comp. Appeals Bd.* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal. App. 3d 327, 333 [49 Cal.Comp.Cases 224].) The purpose of temporary disability indemnity is to provide a steady source of income during the time the injured worker is off work. (*Gonzales, supra*, at p. 1478.)

Generally, a defendant's liability for temporary disability payments ceases when the employee returns to work, is deemed medically able to return to work, or becomes permanent and

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<sup>3</sup> We note the parties’ stipulation that defendant paid applicant permanent disability benefits in ADJ10882630 at the rate \$290.00 per week for the period from July 19, 2018, through October 11, 2018. (Minutes of Hearing and Summary of Evidence, January 22, 2020, p. 3:12-13.)

stationary. (Lab. Code, §§ 4650–46571; *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798]; *Bethlehem Steel Co. v. I.A.C. (Lemons)* (1942) 54 Cal.App.2d 585, 586–587 [7 Cal.Comp.Cases 250]; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 236 [58 Cal.Comp.Cases 323].)

In general, equity favors allowance of a credit if the credit is small and does not cause a significant interruption of benefits, that the allowance of a credit of overpayment of one benefit against a second benefit can be disruptive and in some cases totally destructive of the purpose of the second benefit, and that the injured employee should not be prejudiced by defendant's actions when the employee received benefits in good faith with no wrong-doing on his part. (*Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827 [45 Cal.Comp.Cases 1106].) These equitable principles are particularly important where a defendant seeks credit in one case for benefits paid in a different case, and such claims for credit should be scrutinized closely. (*City of Santa Clara v. Workers' Comp. Appeals Bd. (Henry)* (2004) 69 Cal.Comp.Cases 386 [writ den.].)

Upon grant of reconsideration, the Appeals Board has the authority to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223 [2006 Cal. Wrk. Comp. LEXIS 35, 51-17] (Appeals Bd. en banc); see also *Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal.724, 729 [10 I.A.C. 322] (holding that grant of reconsideration has the effect of causing “the whole subject matter [to be] reopened for further consideration and determination”); *State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98] (finding that a grant of reconsideration has the effect of “[throwing] the entire record open for review”).)

In this case, the WCJ found defendant entitled to a credit for overpayment of temporary disability benefits in in ADJ10882630 during the period of June 9, 2018 to July 19, 2018, to be applicable against permanent disability benefits due in ADJ10594852, on the grounds that there was an overlap between the period in which defendant paid temporary disability benefits in ADJ10882630 and the period for which defendant became obligated to pay permanent disability benefits in ADJ10594852. (Opinion on Decision, pp. 5-6.)

But the June 9, 2018 date on which applicant was found to be permanent and stationary in ADJ10882630 does not correspond with the date of commencement of permanent disability benefits. (Minutes of Hearing and Summary of Evidence, January 22, 2020, p. 3:33-39.) On the

contrary, permanent disability benefits did not commence until notice of applicant's permanent and stationary status was received on July 19, 2018. (*Id.*) Consequently, applicant remained off-work and entitled to temporary disability benefits during this period.

Moreover, equity would not lie with allowing a credit in defendant's favor because it would tend to nullify the purpose of the temporary disability benefits: to substitute for wages applicant would have received had he not remained off-work due to his temporary disability. (See *Maples, supra*, at pp. 834, 836-837 (finding that credit may be awarded when the amount sought is small, would not cause significant interruption of benefits, and would not nullify the purpose of permanent disability indemnity); *Gonzales, supra*.)

Accordingly, we will substitute a finding that defendant is not entitled to a credit for overpayment of temporary disability benefits in ADJ10882630 to be applicable against permanent disability benefits in ADJ10594852.

Accordingly, we will rescind the F&A and substitute findings that (1) applicant sustained injury to the right index finger in ADJ10594852 resulting in permanent disability of 38%, payable in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of dispute; (2) applicant sustained injury to the back in ADJ10882630 resulting in permanent disability of 15%, payable in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of dispute; (3) defendant is not entitled to a credit for overpayment of temporary disability benefits in ADJ10882630 to be applicable against permanent disability benefits in ADJ10594852; and (4) the issues of the amount of attorney's fees to which applicant is entitled in ADJ10594852 and ADJ10882630 are deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.



For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Order and Award issued on January 14, 2021 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

### **FINDINGS OF FACT**

1. For ADJ10594852, Applicant Aurelio Ramirez, 63 years old at the time of injury, while employed on May 20, 2015 as a tire technician, Occupational Group 460, at Bakersfield, California, by Parkhouse Tire Service, sustained injury arising out of and in the course of employment to the right index finger.
2. For ADJ10882630, Applicant Aurelio Ramirez, 65 years old at the time of injury, while employed on March 19, 2017 as a tire technician, Occupational Group 460, at Bakersfield, California, by Parkhouse Tire Service, sustained injury arising out of and in the course of employment to the back.
3. For ADJ10882589, Applicant Aurelio Ramirez, 65 years old at the time of injury, while employed over the period from March 23, 2016 to March 23, 2017 as a tire technician, Occupational Group 460, at Bakersfield, California, by Parkhouse Tire Service, sustained injury arising out of and in the course of employment by way of hernia.
4. At the time of all injuries, Applicant's earnings were \$757.40 per week, warranting indemnity rates of \$466.67 per week for temporary disability, and \$290.00 per week for permanent disability.
5. For ADJ10594852, the employer paid temporary disability at \$466.67 per week for the period from May 21, 2015 to June 15, 2015.
6. For ADJ10882630, the employer paid temporary disability at \$623.19 per week for the period from March 30, 2017 to July 18, 2017, and for the period from October 30, 2017 to July 19, 2018.
7. Also for ADJ10882630, the employer paid permanent disability at \$290.00 per week for the period from July 19, 2018 to October 11, 2018.
8. The employee has been adequately compensated for all periods of temporary disability claimed through June 15, 2015.
9. The employer has furnished all medical treatment.
10. For ADJ10594852, the injury was permanent and stationary on September 22, 2016.
11. For ADJ1088630, the injury was permanent and stationary on June 9, 2018.

12. For ADJ10594852, applicant sustained injury to the right index finger resulting in permanent disability of 38%, payable in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of dispute.
13. For ADJ10882630, applicant sustained injury to the back resulting in permanent disability of 15%, payable in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of dispute.
14. Defendant is not entitled to a credit for overpayment of temporary disability benefits in ADJ10882630 to be applicable against permanent disability benefits owed in ADJ10594852.
15. Applicant requires further medical treatment to cure or relieve the effects of these injuries.
16. The issues of the amount of attorney's fees to which applicant is entitled in ADJ10594852 and ADJ10882630 are deferred.

### **AWARD**

Award is made in favor of Aurelio Ramirez and against Parkhouse Tire Service, Inc., insured by Travelers Property Casualty of America, of permanent disability indemnity in ADJ10594852 commencing on September 23, 2016, in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ, pursuant to findings 10 and 12 above; permanent disability indemnity in ADJ1088630 commencing on June 10, 2018, in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ, pursuant to findings 11 and 13 above; and further medical treatment pursuant to finding number 15 above.

**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/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ LISA A. SUSSMAN, DEPUTY COMMISSISONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



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

**April 14, 2025**

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

**AURELIO RAMIREZ  
LAW OFFICES OF BARSOUM LAW  
LAW OFFICES OF LAURA CHAPMAN AND ASSOCIATES**

**SRO/bp**

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