

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

GARY CASTRO, *Applicant*

vs.

**ASSOCIATIONS, INC., DBA MASSINGHAM & ASSOCIATES,
AND AMERICAN ZURICH INSURANCE,
*Defendants***

**Adjudication Number: ADJ9023911
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant American Zurich Insurance Company seeks reconsideration of the January 3, 2025 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (O&O), wherein we rescinded the June 19, 2019 Findings and Order (F&O) issued by the Workers' Compensation Administrative Law Judge (WCJ) that found that applicant was an initial physical aggressor in a confrontation that resulted in industrial injury and therefore his claim for benefits is barred by Labor Code section 3600(a)(7). Our O&O substituted new Findings of Fact that found that: 1)applicant sustained injury arising out of and in the course of employment to his low back/tailbone and to the right elbow and deferred the issue of injury to any other body parts; 2) applicant was not the initial physical aggressor and defendant did not meet its burden to show that applicant's claim for benefits is barred under section 3600(a)(7); and, 3) applicant is entitled to medical treatment.

Defendant contends that the Appeals Board could not rescind the WCJ's June 19, 2019 F&O because "evidence of considerable substantiality" does not exist to reject the WCJ's credibility determinations. (Petition, 7:3-11.)

We have received an Answer from applicant.

We have considered the Petition for Reconsideration, and the Answer, and we have reviewed the record in this matter. For the reasons discussed below, we will deny reconsideration.

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
 - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
 - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on February 7, 2025, and 60 days from the date of transmission is April 8, 2025. This decision is issued by or on April 8, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall constitute notice of transmission.

Here, since this is a Petition filed in response to our decision, we did not receive a Report and Recommendation by a workers’ compensation administrative law judge, and no other notice

to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with the notice of transmission required by section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on February 7, 2025.

II.

Applicant claims that on February 4, 2013, while employed as a maintenance man by Massingham & Associates at a large apartment/condominium complex in Union City California, he sustained injury arising out of a physical altercation between the applicant and a trespasser in the complex where applicant worked. A two day trial proceeded on January 8, 2019 and March 11, 2019 on the sole issue of whether applicant's claim of injury was barred by the initial physical aggressor defense pursuant to Labor Code section 3600(a)(7). The stipulations provided that "[t]he parties agree that if the court finds the claim is not barred by the initial physical aggressor defense, defendant stipulates to injury to the low back/tailbone and to the right elbow only, and that there is a need for further medical treatment of those body parts." (MOH/SOE I at p. 2:35-3:2.) All other issues were deferred.

On June 19, 2019, the WCJ issued the F&O, finding that applicant's claim for workers' compensation benefits in this claim was barred in light of the finding that he was the initial physical aggressor in the altercation which resulted in his injuries and ordered that applicant take nothing by way of his claim.

On July 9, 2019, applicant filed a Petition for Reconsideration contending that it was defendant's burden to show that the claim is barred under section 3600(a)(7) and that applicant provided credible testimony at trial; defendant failed to call any witnesses for testimony at trial; that the only evidence submitted by defendant with respect to the circumstances of the injury was the incident report from the police department; and that the investigating officer failed to conduct a complete and unbiased investigation.

On January 3, 2025, the Appeals Board rescinded the WCJ's June 19, 2019 Findings and Order, and substituted a new Finding of Facts, finding that applicant sustained injury to his low back/tailbone and to the right elbow and deferred the issue of injury to any other body parts. Based on a review of the record, the Appeals Board found that defendant did not meet its burden under

section 3600(a)(7); that applicant was not the initial physical aggressor; and that applicant is entitled to medical treatment

Defendant seeks reconsideration of the January 3, 2025 Order.

III.

Defendant contends in its Petition that the Appeals Board could not rescind the WCJ's June 19, 2019 F&O unless "evidence of considerable substantiality" existed to reject the WCJ's credibility determinations. We emphasize here that the board in its January 3, 2025 O&O determined that *defendant failed to satisfy its burden of proving that applicant was the initial physical aggressor*. We also reiterate that while we accord great weight to WCJs' findings on the credibility of witnesses, if they are supported by "ample, credible evidence" or "substantial evidence," we exercise independent judgment as to whether the evidence satisfies the required elements of the applicable law. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500].) As detailed in the O&O, we found the evidence relied on by the WCJ that applicant was the initial physical aggressor lacking.

Specifically, the Appeals Board found that the police report and the victim's statements contained therein do not serve as substantial evidence that applicant acted as the initial physical aggressor. Defendant's petition fails to address the shortcomings in the record that would support an argument that defendant satisfied their burden of proof that applicant was the initial physical aggressor. Challenging applicant's credibility alone does not satisfy defendant's burden of proof, nor does it make the police report relied upon by defendant any more substantial, nor does it make the problematic inferences in the WCJ's decision any more reasonable.

The Appeals Board is empowered on reconsideration to resolve conflicts in the evidence, to make its own credibility determinations, and to reject the findings of the WCJ and enter its own findings on the basis of its review of the record. (*Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901, 908 [55 Cal.Comp.Cases 196].) Based on our review of the record, there is ample evidence supporting that applicant suffered injury arising out of and occurring in the course of employment (AOE/COE). There does not appear to be any dispute that applicant was at work during his encounter with the trespasser, or any dispute whether a physical altercation occurred. Furthermore, the Appeals Board findings related to injury AOE/COE addressed only the

parties' stipulation to injury to applicant's low back/tailbone and to the right elbow and all remaining issues were deferred.

We will deny reconsideration, accordingly.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 8, 2025

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

**GARY CASTRO
DOUGLAS MACKAY
EDD SDI
JAMES LATIMER**

LN/md

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