WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT JOLLEY, *Applicant*

vs.

UNITED MECHANICAL, INC.; ZURICH AMERICAN INSURANCE COMPANY, administered by ZURICH NORTH AMERICA, *Defendants*

Adjudication Number: ADJ12014398
San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the December 26, 2024 Findings of Fact and Orders (F&O) wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a tradesperson on March 8, 2019, sustained industrial injury to neck. The WCJ found, in relevant part, that defendant is entitled to credit against applicant's third-party negligence lawsuit filed in relation to his industrial injury. The WCJ further determined there was no negligence on the part of defendant United Mechanical, Inc. (defendant) that would bar defendant's right to credit.

Applicant contends defendant had constructive notice of the property owner's practice of putting containers on the floor which proximately caused applicant's injury, and that the defendant's own incident report admits its negligent conduct. Applicant contends defendant failed to implement proper communications protocols and safety training to alert applicant regarding hazards at the workplace, and that following applicant's injury, defendant instituted remedial measures which reflected the foreseeable nature of applicant's injury.

We have received an answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be dismissed because it is unverified and does not cite to the evidentiary record, and further recommending we deny the petition on the merits.

Following the issuance of the Report, applicant filed a verified Amended Petition. Pursuant to Workers' Compensation Appeals Board (WCAB) Rule 10964 (Cal. Code Regs., tit. 8, § 10964), we have accepted and considered applicant's Amended Petition.

We have considered the Amended Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on the reasons set forth in the WCJ's Report, which we adopt and incorporate, and for the reasons discussed below, we will deny reconsideration.

FACTS

Applicant sustained injury to his neck while employed as a tradesperson by defendant United Mechanical, Inc. on March 8, 2019. Applicant sustained injury when he tripped and fell on blue containers placed on the ground while carrying construction supplies at job site. Applicant's injuries resulted in 31 percent permanent partial disability.

In addition to the instant workers' compensation claim, applicant also filed a civil complaint against The Whiting Turner Contracting Company for negligence. (Exhibit U, Complaint for Damages, dated May 30, 2019.) The parties to applicant's civil lawsuit ultimately settled, with net proceeds to applicant of $536,846.16. (F&O, Finding of Fact No. 9.)

On October 6, 2023, defendant filed a Petition for Credit, seeking credit under Labor Code[1] sections 3858 and 3861 in an amount equal to applicant's civil recovery against any workers' compensation liability arising out of the same injury. (Petition for Credit, dated October 6, 2023, at p. 2:10.)

On September 4, 2024, the parties proceeded to trial and stipulated to injury resulting in 32 percent permanent partial disability. (Minutes of Hearing and Summary of Evidence (Minutes), dated September 4, 2024, at p. 2:30.) The parties further stipulated that applicant's weekly temporary total disability (TTD) rate was $1,251.38 and that applicant had received TTD in broken periods between March 9, 2019 and September 20, 2021. Applicant alleged that he was underpaid TTD at a weekly rate of $1,215.38, and entitlement to the differential with the correct weekly rate of $1,251.38. (*Id.* at p. 3:7.) The parties also placed in issue defendant's credit petition, with the associated issue of whether employer negligence was a cause of applicant's injury. (*Id.* at p. 2:44.)

[1] All further references are to the Labor Code unless otherwise noted.

The WCJ heard testimony from the applicant and ordered the matter submitted for decision as of September 27, 2024.

On December 26, 2024, the WCJ issued his F&O, determining in relevant part that applicant was entitled to the differential between his correct TTD rate of $1,251.38, and the rate at which he had been paid of $1,215.38. With respect to the issue of credit for third-party recovery, the WCJ determined that applicant received a net settlement of $538,846.16 from his civil negligence lawsuit, and that applicant's injuries were not caused by employer negligence. Accordingly, the WCJ determined that the employer was entitled to credit against compensation in an amount equal to applicant's entire net recovery from his civil suit. (F&O, Finding of Fact No. 10.) The WCJ ordered that no new money was owed applicant from his TTD underpayment because any outstanding compensation was subsumed by defendant's credit. (Finding of Fact No. 12.)

Applicant's Petition challenges the WCJ's determination that employer negligence was not a cause of applicant's injury. Applicant asserts that the employer had "constructive notice of [property owner] Stanford's practice of putting containers on the modular floor." (Amended Petition, at p. 4:5.) Applicant asserts that the agreement between the employer and Stanford University establishes that the employer had a right to observe and rectify any hazardous conditions on at the job site, and that given the employer's "constant presence … there is a reasonable inference that [the employer] was aware of Stanford's practice of placing containers on the ground." (*Id.* at p. 4:20.) Applicant further contends the employer's own "incident Report" admits that the modular building's walkways required regular inspections to ensure employee safety, and underscores defendant's recognition of its duty to monitor and addressed hazards. Applicant contends his coworkers failed to warn him of the hazards in his path, and that the employer's remedial measures taken after applicant's injuries further highlight the employer's preexisting duty to inspect and address hazards. (*Id.* at p. 5:23.)

Defendant's Answer responds that it had no prior knowledge of the cannisters being present in the walkway or in applicant's path, and that there is no evidence in the record that defendant "had a constant, regular or even prior presence in the modular building." (Answer, at p. 4:28.) Moreover, "the blue cannisters that had been placed there by Stanford, were also open, obvious and easily discernable by anyone exercising reasonable caution." (*Id.* at p. 6:19.) Defendant further

contends that any contention that its "Incident Report 'admits' its negligent conduct is patently false and…is contrary to the law and public policy." (*Id.* at p. 7:17.)

The WCJ's Report initially observes that applicant's Petition is not verified, as required under section 5902, and further notes that the petition does not properly cite to the evidentiary record. (Report, at p. 2.) The Report recommends we dismiss applicant's petition on either procedural ground. Substantively, the WCJ concludes that defendant cannot be found negligent because it did not know of the dangerous condition, and did not have a reasonable basis to suspect a potentially dangerous condition. (Report, at p. 15.) The WCJ recommends we deny applicant's Petition, accordingly.

DISCUSSION

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 January 30, 2025 and 60 days from the date of transmission is Monday, March 31, 2025. The next business day that is 60 days from the date of transmission is Tuesday, April 1, 2025. (See Cal. Code Regs.,

tit. 8, § 10600(b).)[2] This decision is issued by or on Tuesday, April 1, 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 be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on January 30, 2025, and the case was transmitted to the Appeals Board on January 30, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on January 30, 2025.

II.

We begin our discussion with the issue of verification. Pursuant to section 5902, a petition for reconsideration "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.) Under Workers' Compensation Appeals Board (WCAB) Rule 10940, "[a] verification and a proof of service shall be attached to each petition and answer," and "[f]ailure to file a proof of service shall constitute valid ground for dismissing the petition." (Cal. Code Regs., tit. 8, § 10940(c).)

Here, applicant's initial Petition filed on January 15, 2025, was not verified. However, following the issuance of the WCJ's Report which provided applicant with notice of the defect, applicant filed an Amended Petition on January 31, 2025, which was verified. (Cal. Code Regs., tit. 8, § 10940(e).) While our Rules provide for possible dismissal under these circumstances, we

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

also note that generally, the "lack of verification does not necessitate automatic dismissal of a nonconforming pleading." (*Torres v. Contra Costa Schools Ins. Group* (2014) 79 Cal.Comp.Cases 1181, 1186 (writ den.) citing *United Farm Workers v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 915; *Mullane v. Industrial Acc. Com.* (1931) 118 Cal.App.283, 286; *Wings West Airlines v. Workers' Comp. Appeals Bd.* (*Nebelon*) (1986) 187 Cal.App.3d 1047 [51 Cal.Comp.Cases 609]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 712, fn.3 [57 Cal.Comp.Cases 230].) In addition, WCAB Rule 10964 requires that after the initial petition for reconsideration is filed, "supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board." (Cal. Code Regs., tit. 8, § 10964(a).) A party seeking to file a supplemental pleading "shall file a petition setting forth good cause for the Appeals Board to approve the filing of a supplemental pleading and shall attach the proposed pleading." (Cal. Code Regs., tit. 8, § 10964(b).) We remind applicant that under our Rules, he must seek permission from the Appeals Board when filing supplemental pleadings. In the future, we expect that applicant will fully comply with our Rules.

Notwithstanding these irregularities, however, we are persuaded that applicant's Amended Petition timely cures any defect in verification, and we have accepted applicant's supplemental pleadings and considered the merits of applicant's Amended Petition accordingly.

We also note that WCAB Rule 10945(a) requires that "[e]very petition for reconsideration, removal or disqualification shall fairly state all of the material evidence relative to the point or points at issue. Each contention shall be separately stated and clearly set forth. A failure to fairly state all of the material evidence may be a basis for denying the petition." (Cal. Code Regs., tit. 8, § 10945(a).) Subdivision (b) further requires that "[e]very petition and answer shall support its evidentiary statements by specific references to the record." (Cal. Code Regs., tit. 8, § 10945(b).) Here, the WCJ's Report identifies numerous instances in applicant's Amended Petition in which applicant offers factual assertions without citing to corresponding evidence in the record. (Report, p. 3.) We remind applicant that a party cannot evade its responsibilities under our Rules to cite to the evidentiary record by placing the burden on the Appeals Board to discover where the evidence supporting a petition can be found in the record. In the future, we expect that applicant will fully comply with our Rules.

Turning to the merits of applicant's Petition, we observe that the issue before us involves defendant's petition seeking credit for applicant's third-party recovery arising out of the same injury for which he has sought workers' compensation benefits.

Section 3861 requires the Appeals Board to "allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorneys' fees, pursuant to the provisions of Sections 3856, 3858, and 3860 of this code, or has not been applied to reimburse the employer." (Lab. Code, § 3861.)

In *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd.* (*Cole*) (1978) 22 Cal.3d 829 [43 Cal.Comp.Cases 1333], the California Supreme Court observed "that the concurrent negligence of the employer bars his right to a credit against his liability for compensation for the amount of any recovery for his injury obtained by the employee by settlement of his cause of action against third parties; and [] that where the employer's negligence has not been adjudicated in such third party action, the applicant is entitled to have it adjudicated before the Board." (*Id.* at p. 835.) Accordingly, "[w]hen the issue of an employer's concurrent negligence arises in the context of his credit claim based on a third party settlement, the board must determine the appropriate contribution of the employer since the employee's recovery does not represent a judicial determination of tort damages. Specifically, the board must determine (1) the degree of fault of the employer, and (2) the total damages to which the employee is entitled. The board must then deny the employer credit until the ratio of his contribution to the employee's damages corresponds to his proportional share of fault." (*Id.* at p. 843.)

One year later, we issued our en banc decision in *Martinez v. Associated Engineering and Construction Co.* (1979) 44 Cal.Comp.Cases 1012 [1979 Cal. Wrk. Comp. LEXIS 2756], wherein we described the shifting burdens of proof necessary to effectuate the analysis described in *Cole*, *supra*:

> First, defendant has the burden of proof to establish its right to claim a credit. It must show that there was a third party settlement and that it has paid out compensation benefits or will likely have to pay such benefits in the future. This can be done by production of certified copies of the Superior Court documents reflecting a settlement or judgment. Normally however, as in this case, copies of the documents or a stipulation as to applicant's net recovery will suffice.

…

> Second, once a prima facie case has been made to show entitlement to credit, applicant has the burden of proof to establish the employer was negligent in any degree. If there is no employer negligence, the carrier is entitled to full credit.
>
> …
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> Third, the burden of going forward shifts to the employer or carrier to show comparative negligence of the third party defendant or defendants and any negligence by applicant.
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> …
>
> Fourth, the burden then shifts to applicant to establish his total damages, i.e., that figure to which the employer's negligence is applied after deducting applicant's proportionate share of comparative negligence, to determine credit in accordance with the formula in *Associated* (*Cole*), supra. In this case, it was unnecessary for applicant to prove, or the workers' compensation judge to determine, applicant's actual damages in view of the finding on employer negligence. Thus, where the evidence establishes 100% employer negligence, or overwhelming employer negligence, or even a high degree of employer negligence, it would be necessary to take only enough evidence to establish that compensation benefits could not possibly exceed the employer's share of the damages.

(*Id.* at p. 1021.)

Here, applicant's Amended Petition does not dispute defendant's right to claim a credit. The present dispute rests in the second inquiry described in *Martinez*, wherein applicant bears the burden of establishing that the employer was negligent in any degree. (*Martinez, supra*, 44 Cal.Comp.Cases at p. 1021.)

Applicant's Petition contends the employer had "constructive notice of [property owner] Stanford's practice of putting containers on the modular floor." (Amended Petition, at p. 4:5.) Applicant asserts that the agreement between the employer and Stanford University establishes that the employer had a right to observe and rectify any hazardous conditions on at the job site, and that given the employer's "constant presence … there is a reasonable inference that [the employer] was aware of Stanford's practice of placing containers on the ground." (*Id.* at p. 4:20.) Applicant further contends the employer's own "incident Report" admits that the modular building's walkways required regular inspections to ensure employee safety, and underscores defendant's recognition of its duty to monitor and addressed hazards. Applicant contends his

coworkers failed to warn him of the hazards in his path, and that the employer's remedial measures taken after applicant's injuries further highlight the employer's preexisting duty to inspect and address hazards. (*Id.* at p. 5:23.) Based on this alleged level of awareness of a dangerous condition, one which the employer failed to timely address, applicant concludes that employer negligence contributed to applicant's injuries.

The WCJ's Report observes, however, that the evidentiary record does not support the assertion that the employer was aware of a dangerous condition:

> I do not find that there is evidence that [defendant employer United Mechanical Inc.] UMI was aware of the periodic existence of the blue containers in Modular Unit D before March 8, 2019. There is also no evidence that UMI was aware of the blue containers on March 8, 2019. The applicant argues that, "Given UMI's constant presence in the modular, there is a reasonable inference that it was aware of Stanford's practice of placing the containers on the ground." (1/15/2025 Petition, p. 4, lines 17-18.) I do not find evidence that UMI had a constant presence, in the form of staff, in the Modular Unit. The MOU does establish that UMI had a right to use the Modular Unit, but it does not establish how much UMI actually went in and out of the Modular Unit or have employees in the unit. The applicant testified that he might have been in the Modular Unit on a prior occasion, and he believed UMI used the Modular Unit before, but was not certain. The declarations of Stanford employees do not establish that UMI was consistently present in the Modular Unit. Furthermore, even if UMI had regularly been in the Modular Unit, there is no evidence they had been present on a prior Friday so as to become aware of the blue containers. Accordingly, I do not find sufficient evidence to establish, or to reasonably infer, that UMI knew, or should have known, through its use of the Modular Unit that the blue canisters were periodically placed in the hall area.
>
> Applicant argues in a footnote in his 1/15/2025 Petition that the lack of direct evidence establishing that UMI knew of Stanford's practices regarding the blue containers triggered a need to develop the record pursuant to Labor Code section 5701 and 5906. (1/15/2025 Petition, p. 4, lines 27-28.) However, this would disregard Labor Code section 5705 which places the burden of proof on the applicant to prove the employer's negligence. I did not find any objection to the trial moving forward in the Minutes of Hearing in this matter. I do not find the evidence to be ambiguous or inconsistent to trigger a need to develop the record. Rather, I find the evidence to be lacking and the applicant to have failed to meet his burden of proof.
>
> Although remedial steps were taken by UMI to ensure the inspection of pathways in Modular Unit D subsequent to the injury, that does not mean that UMI should have reasonably known about the dangerous condition before the applicant's fall. Even if UMI had been in the building before 10 am on March 8,

2019, they may not have been able to observe the blue containers since the Stanford employee declarations indicate they had only been present for about an hour before the injury.

Applicant argues that UMI had a duty to inspect the Modular Unit for potential hazards such as the blue containers. Labor Code section 6306, and the cases discussed above, confirm that the employer must make reasonable efforts to prevent risk and ensure a safe work environment. However, I do not find that a failure to inspect the pathway to the Modular Unit immediately prior to the applicant carrying in boxes was a breach of that duty. There is no evidence submitted that there was any reason to suspect a dangerous condition in Modular Unit D that would make it reasonably necessary to inspect the pathway before entering. UMI may have regularly been in Modular Unit D before the date of the accident without the opportunity to observe the blue canisters being left in the hall.

After the injury on March 8, 2019, it was clear that there was a potentially dangerous condition in Modular Unit D in the form of the blue containers. The remedial steps taken by UMI were therefore reasonable efforts to avoid what was, after the injury, a known risk. However, I am not persuaded that UMI knew, or should have known, of the risk posed by the potential presence of the blue containers at any time before the injury on March 8, 2019. The UMI Incident Investigation Form answered "yes" to both, "Was there a failure by supervision to detect a hazardous condition, deviation from safety policy or infrequently performed task?" and "Was there failure by supervision to take corrective action for a known hazardous condition, deviation from safety policy or infrequently performed task?" the UMI report checked "yes." (Applicant's Exhibit 11, p. 6.) Although the second question could indicate that there was a "known hazardous condition," that interpretation is undermined by the first of the two questions indicating that there was a failure to detect a hazardous condition. Therefore, the investigation form is not sufficient evidence on its own that UMI knew of the presence, or potential presence, of the blue containers. It is also noted that while the evidence of the remedial measures taken can be used to establish what UMI may have known about the potential hazard before the injury, the evidence of the remedial measures cannot be used to establish negligence on their own. (Evidence Code section 1151.)

Applicant also argues that UMI breached its duty when Ray Dominguez, having passed the blue containers, failed to warn the applicant of their presence. I am not persuaded by this argument. There is no evidence suggesting that Mr. Dominguez saw the blue containers before the applicant's fall. That Mr. Dominguez was carrying two boxes, like the applicant, would suggest that he may not have seen the blue containers either, and was simply lucky in not tripping over the blue containers.

(Report, at pp. 12-15.)

We concur with the WCJ's analysis. Following our independent review of the evidentiary record, we find no substantial evidence affirmatively establishing that defendant breached its duty to maintain a safe workplace or otherwise neglected its obligation "to inspect the workplace, to discover and correct a dangerous condition, and to give an adequate warning of its existence." (*Bonner v. Workers' Comp. Appeals Bd.* (1990) 225 Cal.App.3d 1023, 1034 [58 Cal.Comp.Cases 470].)

Because the defendant has met its burden of establishing a right to claim a credit, but applicant has not met the burden of establishing that the employer was negligent in any degree, the defendant is entitled to full credit for applicant's net third party recovery. (*Martinez, supra*, 44 Cal.Comp.Cases at p. 1021). We will affirm the F&O, accordingly.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 28, 2025

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

ROBERT JOLLEY
ARNS DAVIS LAW
LAUGHLIN, FALBO, LEVY & MORESSI

SAR/abs

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

REPORT AND RECOMMENTATION ON PETITION FOR RECONSIDERATION

Lawrence Keller, Workers' Compensation Judge, hereby submits his report and recommendation on the Petition for Reconsideration filed herein.

I. INTRODUCTION

Applicant Robert Jolley seeks reconsideration of my December 26, 2024 Finding of Fact that there was not negligence by employer United Mechanical, Inc. (UMI) that bars defendant's right to credit from a third-party settlement. The applicant's Petition for Reconsideration was timely filed on January 15, 2025 (the 1/15/2025 Petition) but is not verified. Defendant San Francisco Bay Area Rapid Transit District did not file an Answer to the 1/15/2025 Petition.

The applicant Robert Jolley, while employed on March 8, 2019, as a tradesperson at Stanford, California, by UMI, sustained injury arising out of and in the course of employment to his neck. This matter proceeded to trial on September 4, 2024 on three issues, including defendant's entitlement to credit for a third-party settlement. This issue included whether there was employer negligence, as asserted by the applicant, and the percentage of fault of the employer. The issue of the total damages for the civil case was deferred. The applicant provided testimony, and the parties submitted voluminous documentary exhibits. Both applicant and defendant submitted post-trial briefs, and the matter was submitted for decision on September 27, 2024.

II. THE PETITION IS NOT VERIFIED

All petitions for reconsideration must be verified upon oath. (Labor Code section 5902.) The applicant's 1/15/2025 Petition is not so verified. It is noted that conclusion section of the petition ends with, "… workplace; and" with nothing further. (1/15/2025 Petition, p. 6, line 12.) This indicates that there may have been something inadvertently left out of the 1/15/2025 Petition, but there was no amended filing. Verification of pleadings is an essential aspect of Workers' Compensation Appeals Procedure. (Labor Code § 5902 and *Lucena v. Diablo Autobody* (2000) 65 CCC 1425 (significant panel decision).) The defect in the proceeding was not noticed until the date this report and recommendation is being served, so applicant was not afforded notice from the Board of this defect in advance of this report. Applicant's 1/15/2025 Petition should be denied upon its merits, as discussed below. However, it should also be denied for the failure to verify the

1/15/2025, unless within a reasonable period the applicant verifies the document. (See *Lucena*, *supra* at p. 1426; *McAuliffe v. Workers' Compensation Appeals Bd.* (2006) 71 Cal. Comp. Cases 696, 702-703.)

III. THE PETITION DOES NOT PROPERLY CITE TO THE EVIDENTIARY RECORD

Title 8 California Code of Regulations section 10945 states the requirements for a Petition for Reconsideration, including that:

> "(b) Every petition and answer shall support its evidentiary statements by specific references to the record.
>
> (1) References to any stipulations, issues or testimony contained in any Minutes of Hearing, Summary of Evidence or hearing transcript shall specify:
>
> (A) The date and time of the hearing; and
>
> (B) If available, the page(s) and line number(s) of the Minutes, Summary, or transcript to which the evidentiary statement relates (e.g., "Summary of Evidence, 5/1/08 trial, 1:30pm session, at 6:11-6:15").
>
> (2) References to any documentary evidence shall specify:
>
> (A)The exhibit number or letter of the document;
>
> (B)Where applicable, the author(s) of the document;
>
> (C)Where applicable, the date(s) of the document; and
>
> (D)The relevant page number(s) (e.g., "Exhibit M, Report of John A. Jones, M.D., 6/16/08 at p. 7.")."

Title 8 California Code of Regulations section 10972 provides that, "[a] petition for reconsideration, removal or disqualification may be denied or dismissed if it is unsupported by specific references to the record and to the principles of law involved." Applicant's Petition for Reconsideration makes statements of alleged facts without citation to the record in support of the assertions. For example, applicant states "The language of the MOU [Memorandum of Understanding], which explicitly outlines UMI's right to use the building every day (which it did), highlights UMI's consistent presence and the foreseeability of the recurring hazard." (1/15/2025 Petition, p. 4, lines 10-12.) I found no evidence of actual daily use of the building by UMI in question and the 1/15/2025 Petition does not cite to such evidence. Another example is the applicant asserting that, "Mr. Jolley's coworker, who walked ahead of him and passed by the containers, had a clear opportunity to alert him to the danger." (1/15/2025 Petition, p. 5, lines 10-11.) However, the 1/15/2025 Petition does not cite to the evidence to support such a contention,

namely that the co-worker saw the containers to allow him to warn the applicant. Because of the failure to reference the evidentiary record with specificity, applicant's Petition for Reconsideration should be denied. Notwithstanding the foregoing, applicant's 1/15/2025 Petition should be denied upon its merits as well, as discussed below.

IV. EVIDENCE

The following evidence summaries are primarily taken from the December 26, 2024 Opinion on Decision, pages 2 through 9. Parties stipulated that:

> "Stanford University is the owner of the property at issue in this matter, Whiting-Turner Contracting Company (Whiting-Turner) were contractors for Stanford University, and United Mechanical, Inc. (UMI), was a subcontractor to Whiting-Turner. The parties have also stipulated that the blue containers the applicant tripped over in the incident leading to injury were owned by, and placed by, Stanford University, who were still actively working in the building where the incident occurred. For clarity of the record, due to its reference in some of the documents and exhibits, BMI or the BMI Project is reference to Bio-Medical Innovations and the Bio-Medical Innovations Project." (12/26/2024 Opinion on Decision, p. 2.)

TESTIMONY OF THE APPLICANT

> "The applicant was employed by UMI on March 8, 2019, and had been employed by them for about three months. His job title was tradesman, responsible to making sure that the guys on the jobsite were supplied and had what they needed for their jobs, and he also performed odd jobs. As part of his job as a tradesman, he routinely had to lift and carry things. It is common for him to lift and carry up to 40 pounds. His job duties as a tradesman included keeping the jobsite organized and making sure that the other workers had their equipment, and general cleanup. He was not responsible for cleaning up any work areas except those of UMI. The exception was on Fridays when Whiting-Turner had a requirement that everyone would chip in to help clean the worksite of hazardous items.
>
> He had been working with UMI for about three months on this project. He had previously worked for UMI under a different supervisor, Evan, for five to six months. Then he had time off. He was on another job for about a month, but his coworkers did not like him and he was fired. Then Evan brought him back on for the Stanford job.
>
> It was in September 2016 was when he was working approximately five months for a UMI project for a company called Aruba. After that, he worked for about

a month on another project. He had no other work before working on the Stanford project for about four years. He had not been working for some personal reasons, including his son's death, his divorce, that he was on disability, and that he had a prior neck injury.

He was working at the Stanford Biolab site when he suffered his injury on March 8, 2019. It occurred in an office where more valuable equipment is stored, also known as a modular. He was coming from the staging yard where equipment was dropped off into the modular unit. With him were Russell Esparza, his foreman, and Ray Dominguez, also a tradesman. He had been in the modular unit once previously but doesn't remember when. He had not previously been in the modular unit on March 8, 2019. He does not recall seeing blue containers[1] on the ground in the modular unit prior to the day of his injury.

The applicant was carrying special sanitary wash basins in two boxes. They were being taken to an office in the modular building. He believes that UMI had used the office before, but he's not sure. It was the first day he had been asked to move items into the modular unit. He believes the boxes were two feet or less, square, and six to seven inches thick, and weighed approximately 20 pounds each. He was carrying the boxes stacked one on top of the other. Nobody at UMI had warned him of the tripping hazard.

As he walked into the modular building, a cubicle wall was directly in front of him and he had to walk to the right to go around the cubicle wall. He was following Ray and looking at his back when he tripped on the boxes. It all happened so fast, and he went down. He knew he broke his neck right away. It was all over in seconds. He was not able to brace his fall.

When he walked into the modular unit, there was one door to the left and one to the right. It was somewhat dim, but there was more light coming from the right side. There could have been Stanford or United Mechanical guys there; he did not know. He did not identify anyone as being in the building besides Ray, who he was following before his accident.

There was no hand cart available to get the boxes into the modular unit. Ray went into the modular unit first, followed by the applicant. Then Russell was behind him. He did not see the blue containers as he was walking into the building. Ray must have gone by the blue containers and did not warn the applicant about them. Russell did not warn the applicant about the blue containers. He was not warned by anyone to be aware of a trip hazard. To his knowledge, nobody had mentioned inspecting the building.

He has no knowledge of anyone from United Mechanical having been in the modular building before he went in and suffered his accident. He did not take any instructions from Whiting-Turner. He had never seen the blue containers before. He does not know if Ray or Russell had seen the blue containers.

> The Friday clean-ups were of the BMI Project, not of the modular building. The applicant was referred to page 4 of Applicant's Exhibit 9, which is a picture of two boxes on a cart. The applicant confirmed that these were the types of boxes he was moving at the time of his injury. In the picture is a roller dolly that is used to move heavy items. UMI did not offer a dolly cart to move into the modular that day." (12/26/2024 Opinion on Decision, pp. 2-5.)

DOCUMENTARY EXHIBITS

All exhibits were reviewed but are summarized below insofar as they were relevant in my decision. As summarized in my December 26, 2024 Opinion on Decision:

> A March 8, 2019 Stanford Incident Report stated that the incident which resulted in Mr. Jolley's[2] neck injury occurred on March 8, 20219 at approximately 11:00am in Modular Unit D. (Applicant's Exhibit 9, p. 1.) At that time, the applicant, fellow UMI employee Ray Dominguez, and a foreman were carrying 20-inch by 20-inch boxes into a storage area inside Modular D. (*Id*. at p. 2.) Mr. Dominguez entered the Modular unit first, carrying two boxes. (*Ibid*.) He was followed by the applicant, also carrying two boxes, and then the foreman carrying one box. (*Ibid*.) The foreman, Mr. Esparza, saw the applicant fall forward and to the floor. (*Ibid*.) When Mr. Esparza asked the applicant if he was okay, the applicant responded that he was not okay and had had heard his neck snap. (*Ibid*.) A handwritten statement by Russell Esparza from March 8, 2019 confirms the sequence of events laid out in the Stanford Incident Report. (Applicant's Exhibit 12.) Mr. Esparza noticed that there were three plastic boxes in the path to the back room where they were headed and that those were the boxes that the applicant tripped over.
>
> A UMI Incident Investigation Form[3] was completed on March 11, 20219. (Applicant's Exhibit 11, p. 1.) The UMI incident report is largely identical to the Stanford Incident Report in describing how the workers entered the modular unit, what they were carrying, and how the applicant fell. (*Id*. at p. 2.) It was additionally noted that there were a total of 20 boxes that were to be taken into the modular unit. (*Ibid*.) Boxes on the form are checked "no" to the questions of "Was any defect with the equipment noted or reported prior to accident/incident?" "Was any recent maintenance/service performed on this equipment?" and "Was a safety rule or specific instruction violated?" (*Id*. at p. 3.)
>
> The fundamental cause of the incident was listed as, "Lack of proper procedure to ensure walkway was clear." (Applicant's Exhibit 11, p. 4.) Among the corrective actions to be taken was that crew members would inspect that any walkway was clear before carrying materials into a small area and communicate with Stanford employees working in the offices. (*Ibid*.) Additionally, after the

injury, the UMI site safety manager had spoken with Stanford employees that the blue containers had been placed as they were on the date of the injury every Friday for collection. (*Ibid*.) The blue containers were thereafter to be placed in a workstation cubicle to remove them as a tripping hazard. (*Ibid*.) To the questions "Was there a failure by supervision to detect a hazardous condition, deviation from safety policy or infrequently performed task?" and "Was there failure by supervision to take corrective action for a known hazardous condition, deviation from safety policy or infrequently performed task?" the UMI report checked "yes." (*Id*. at p. 6.)

On June 11, 2019 the applicant filed a complaint in Alameda County Superior Court against The Whiting Turner Contracting Company for negligence. (Defendants' Exhibit U, pp. 1-2, 4.) In the complaint the applicant claimed a negligent failure to maintain a safe work environment, including a breach of the duties imposed by Labor Code sections 6400, et al. (*Id*. at pp. 4-6.)

As part of a motion for summary judgment in the civil action, three declarations were submitted by employees of The Board of Trustees of the Leland Standorf Junior University (Stanford). (Defendants' Exhibits V, W, and X.) Declarant Bijendra Sewak stated Whiting-Turner were responsible for overseeing work on the project that applicant was working on at the time of injury, including daily monitoring of the work. (Defendants' Exhibit V, p. 3, lines 15-27.) Bijendra Sewak did not specifically mention UMI.

Declarant Marlon Tarape worked in one of the offices in Modular Unit D at the time of applicant's injury. (Defendants' Exhibit W, p. 1, line 26 – p. 2, line 1.) He stated that the blue containers had been present in the location where applicant tripped over them "for the better part of an hour" before the applicant entered Modular unit D on March 8, 2019. (*Id*. at p. 2, line 28 –p. 3, line 2.) Declarant asserts that the blue containers were easily visible, and that nobody ever requested that the blue containers be moved. (*Id*. at p. 3, lines 5-9.) Marlon Tarape stated that the contractor and subcontractor never scheduled their work in Modular Unit D and did not announce themselves on the date of the injury. (*Id*. at p. 3, lines 19-24.) Declarant Ruel Basiloy was also present in Modular Unit D at the time of the injury. (Defendants' Exhibit X, p. 1, line 26 – p. 2, line 1.) Ruel Basiloy also asserted the blue cannisters were obvious and visible in their location and had been in that location for just under an hour. (*Id*. at p. 2, lines 13-24.)

There were a number of sections of contracts and agreements between Stanford and Whiting-Turner and between Whiting-Turner and UMI that were admitted as exhibits. (Applicant's Exhibits 2, 3, 4, 5, 6, 7, 8 and Defendants' Exhibits R, S, T.) These exhibits would have greater relevancy if a determination of the relative contribution of UMI was to be made. Since the burden of proof of negligence by UMI is not met, they are not summarized in detail here.

> However, it is noted that the subcontractor agreement between Whiting-Turner and [UMI] required UMI to clean up dirt, trash and debris that arose from UMI's work at the direction of Whiting-Turner, and that UMI shall comply with all applicable state laws, including ensuring the safety of the job site and removing hazards. (Defendants' Exhibit T, pp. 6-7, see also Applicant's Exhibit 4, p. 6; Applicant's Exhibit 6, pp. 2-3.) In the Safety Acknowledgement Program section of the Whiting-Turner and UMI contract, UMI was to keep work areas and aisles clear of materials and tripping hazards, but also to coordinate on-site storage with the whiting-Turner Project superintendent. (Applicant's Exhibit 6, pp. 4-5.) It is also noted in the Whiting-Turner and UMI contract that use of staging areas was to be at the instruction and approval of Whiting-Turner. (Applicant's Exhibit 5, p. 13.[4]) It is also noted that the subcontractor (UMI) was to make arrangements in advance with the Project Superintendent for access to work within existing facilities. (*Id*. at p. 15.)" (12/26/2024 Opinion on Decision, pp. 5-8.)

In the 1/15/2025 Petition the applicant refers to the Memorandum of Understanding (MOU), which was not fully summarized in the December 26, 2024 Opinion on Decision. The MOU between Stanford, UMI and Whiting-Turner was dated July 26, 2017, but not executed by UMI until November 14, 2017. (Applicant's Exhibit 8, p. 3.) The MOU allowed UMI to use the office space of Modular Unit D, among other buildings, while engaged on the construction project. (*Id*. at p. 1.) UMI was permitted to use Modular Unit D, in part, upon final signature approval, with full use once certain current occupants had relocated. (*Id*. at pp. 1-2.)

V. CONTENTIONS ON RECONSIDERATION

The applicant petitioned for reconsideration of my December 26, 2024 decision on the grounds that the decision "… did not properly apply the law to the facts regarding Defendant UMI's negligence, and whether UMI was sufficiently on notice of the injury-causing hazard. (1/15/2025 Petition, p. 2, lines 5-6.) Applicant contends that my decision that UMI did not have notice of the blue containers and the hazard they posed was in error, and I did not properly address UMI's statutory duty to provide a safe workplace. (1/15/2025 Petition, p. 2, lines 9-11.) Additionally, the December 26, 2024 decision failed to adequately evaluate the failure of co-worker Ray Dominguez to warn the applicant of the hazard of the blue containers. (1/15/2025 Petition, p. 2, lines 11-13.) Central to applicant's contentions is that UMI knew of the presence of the blue containers or had constructive notice of the presence of the blue containers through the MOU. (see for example, 1/15/2025 Petition, p. 2, lines 15-19; p. 3, lines 1-7; p. 4, lines 2-20; p. 5,

lines 8-17.) Applicant does not challenge my finding that defendant is entitled to credit from the applicant's third-party settlement. Rather, the challenge is whether defendant's credit is to be reduced due to employer negligence.

VI. DISCUSSION

Where an employer is concurrently negligent in the harm to the applicant, the credit to the employer from the third-party settlement is reduced in proportion to its percentage of comparative negligence. (*Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd*. (1978) 22 Cal.3d 829, 842.) Negligence is, "… conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." (Rest.2d, Torts § 282.) "The essential elements of negligence include: a legal duty to exercise due care; a breach of that duty; and the breach as the proximate or legal cause of the resulting injury." (*Bonner v. Workers' Comp. Appeals Bd*. (1990) 225 Cal.App.3d 1023, 1033.)

As is correctly argued by applicant, the defendant has a statutory duty to provide a safe workplace for its employees. (Labor Code sections 6400, 6402, 6403, and 6404.) A "safe" workplace is, "… freedom from danger to the life, safety, or health of employees as the nature of the employment reasonably permits." (Labor Code section 6306.) As stated by the California Supreme Court, "The rule is well established that an employer is under a duty to furnish a safe working place for his employees. […] This duty requires the employer to exercise ordinary care and "to make a reasonably careful inspection at reasonable intervals to learn of dangers not apparent to the eye." (*Devens v. Goldberg* (1948) 33 Cal.2d 173, 178 [internal citations omitted].) Furthermore, that duty is non-delegable. (*Bonner v. Workers' Comp. Appeals Bd*. (1990) 225 Cal.App.3d 1023, 1035; citing *Austin v. Riverside Portland Cement Co*. (1955) 44 Cal.2d 225, 233-234; *Conner v. Utah Constr. & Mining Co*. (1964) 231 Cal.App.2d 263, 276.)

As further explained in *Bonner, supra*: "In general, an employer's statutory duty under the Labor Code is greater than a duty of care imposed pursuant to common law principles, as codified in Civil Code section 1714. 4 (*Conner v. Utah Constr. & Mining Co*. (1964) 231 Cal.App.2d 263, 271-272 [41 Cal.Rptr. 728]; see generally *Rowland v. Christian* (1968) 69 Cal.2d 108, 112 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496].) The duty to maintain a safe workplace encompasses many responsibilities, including the duty to inspect the workplace, to discover and correct a dangerous condition, and to give an adequate warning of its existence. Here, it was Moodie's [the

employer] duty to maintain a workplace free "from danger to the life, safety, or health of employees as the nature of the employment reasonably" permitted, and to utilize "any practicable method of mitigating or preventing a specific danger ...." (§ 6306.)" (*Bonner v. Workers' Comp. Appeals Bd*. (1990) 225 Cal.App.3d 1023, 1034 [275 Cal.Rptr. 337].)

However, *Bonner*, *supra*, also held that an employer is liable for contributory negligence only, "Where the employer has knowledge of a dangerous condition in the workplace caused by the negligence of a third party, or reasonably should have discovered it, and fails to take reasonable steps either to alleviate the danger or to give an adequate warning in order to prevent injury to employees…." (*Bonner v. Workers' Comp. Appeals Bd*. (1990) 225 Cal.App.3d 1023, 1028.) More recently, the Appeals Board in *Perez-Zepeda v. DMS Facility Servs.*, 2015 Cal. Wrk. Comp. P.D. LEXIS 568, stated that "… the employer will be found responsible for injuries caused by a dangerous condition only if the employer knows of it, or reasonably should have known of it." (*Perez-Zepeda v. DMS Facility Servs*., *supra*, at p. 13.)

Regarding the knowledge standard, even circumstantial evidence can establish a finding of knowledge. (*American Smelting & Refining Co. v. Workers' Comp. Appeals Bd*. (1978) 79 Cal.App.3d 615, 620.) Additionally, Labor Code sections 6400, 6402, 6403, and 6404 are not strict liability statutes.

"The Labor Code requires only that the employer use measures that are reasonably adequate or necessary to render the employment and work place safe. See Labor Code §§ 6401, 6403. The test for determining whether the employer has provided a safe place of employment is what is reasonable under the circumstances. See *American Smelting & Refining Co. v. W.C.A.B*. (*Rael*) (1978) 79 Cal. App. 3d 615, 144 Cal. Rptr. 898, 43 Cal. Comp. Cases 424." (*Dependent v. Workers' Compensation Appeals Bd*., 68 Cal. Comp. Cases 1191, 1193-1194.)

In this matter I found that the employer had a legal duty to maintain a safe work environment for the applicant. I also found that the blue boxes placed by Stanford were the proximate cause of the applicant's fall which resulted in injury to his neck. I was persuaded by the applicant's credible testimony, and the lack of any evidence to the contrary, that UMI did not previously warn the applicant of the potential existence of boxes in the path to the Modular Unit D offices. I was also persuaded by the applicant's credible testimony, and the lack of any evidence to the contrary, that UMI did not specifically warn the applicant on March 8, 2019 that there were the blue boxes in the pathway he was walking.

The issue comes down to whether UMI breached its duty to the applicant by failing to move the blue containers before having the applicant enter the Modular Unit D on March 8, 2019; by failing to warn him of the boxes on March 8, 2019; or by failing to have previously warned the applicant that there may potentially be the blue boxes in Modular Unit D.

I do not find that there is evidence that UMI was aware of the periodic existence of the blue containers in Modular Unit D before March 8, 2019. There is also no evidence that UMI was aware of the blue containers on March 8, 2019. The applicant argues that, "Given UMI's constant presence in the modular, there is a reasonable inference that it was aware of Stanford's practice of placing the containers on the ground." (1/15/2025 Petition, p. 4, lines 1718.) I do not find evidence that UMI had a constant presence, in the form of staff, in the Modular Unit. The MOU does establish that UMI had a right to use the Modular Unit, but it does not establish how much UMI actually went in and out of the Modular Unit or have employees in the unit. The applicant testified that he might have been in the Modular Unit on a prior occasion, and he believed UMI used the Modular Unit before, but was not certain. The declarations of Stanford employees do not establish that UMI was consistently present in the Modular Unit. Furthermore, even if UMI had regularly been in the Modular Unit, there is no evidence they had been present on a prior Friday so as to become aware of the blue containers. Accordingly, I do not find sufficient evidence to establish, or to reasonably infer, that UMI knew, or should have known, through its use of the Modular Unit that the blue canisters were periodically placed in the hall area.

Applicant argues in a footnote in his 1/15/2025 Petition that the lack of direct evidence establishing that UMI knew of Stanford's practices regarding the blue containers triggered a need to develop the record pursuant to Labor Code section 5701 and 5906. (1/15/2025 Petition, p. 4, lines 27-28.) However, this would disregard Labor Code section 5705 which places the burden of proof on the applicant to prove the employer's negligence. I did not find any objection to the trial moving forward in the Minutes of Hearing in this matter. I do not find the evidence to be ambiguous or inconsistent to trigger a need to develop the record. Rather, I find the evidence to be lacking and the applicant to have failed to meet his burden of proof.

Although remedial steps were taken by UMI to ensure the inspection of pathways in Modular Unit D subsequent to the injury, that does not mean that UMI should have reasonably known about the dangerous condition before the applicant's fall. Even if UMI had been in the building before 10 am on March 8, 2019, they may not have been able to observe the blue

containers since the Stanford employee declarations indicate they had only been present for about an hour before the injury.

Applicant argues that UMI had a duty to inspect the Modular Unit for potential hazards such as the blue containers. Labor Code section 6306, and the cases discussed above, confirm that the employer must make reasonable efforts to prevent risk and ensure a safe work environment. However, I do not find that a failure to inspect the pathway to the Modular Unit immediately prior to the applicant carrying in boxes was a breach of that duty. There is no evidence submitted that there was any reason to suspect a dangerous condition in Modular Unit D that would make it reasonably necessary to inspect the pathway before entering. UMI may have regularly been in Modular Unit D before the date of the accident without the opportunity to observe the blue canisters being left in the hall.

After the injury on March 8, 2019, it was clear that there was a potentially dangerous condition in Modular Unit D in the form of the blue containers. The remedial steps taken by UMI were therefore reasonable efforts to avoid what was, after the injury, a known risk. However, I am not persuaded that UMI knew, or should have known, of the risk posed by the potential presence of the blue containers at any time before the injury on March 8, 2019. The UMI Incident Investigation Form answered "yes" to both, "Was there a failure by supervision to detect a hazardous condition, deviation from safety policy or infrequently performed task?" and "Was there failure by supervision to take corrective action for a known hazardous condition, deviation from safety policy or infrequently performed task?" the UMI report checked "yes." (Applicant's Exhibit 11, p. 6.) Although the second question could indicate that there was a "known hazardous condition," that interpretation is undermined by the first of the two questions indicating that there was a failure to detect a hazardous condition. Therefore, the investigation form is not sufficient evidence on its own that UMI knew of the presence, or potential presence, of the blue containers. It is also noted that while the evidence of the remedial measures taken can be used to establish what UMI may have known about the potential hazard before the injury, the evidence of the remedial measures cannot be used to establish negligence on their own. (Evidence Code section 1151.)

Applicant also argues that UMI breached its duty when Ray Dominguez, having passed the blue containers, failed to warn the applicant of their presence. I am not persuaded by this argument. There is no evidence suggesting that Mr. Dominguez saw the blue containers before the applicant's

fall. That Mr. Dominguez was carrying two boxes, like the applicant, would suggest that he may not have seen the blue containers either, and was simply lucky in not tripping over the blue containers.

Consistent with *Bonner*, *supra*, and *Perez-Zepeda v. DMS Facility Servs*., *supra* I continue to believe that defendant cannot be found negligent where UMI did not know of the dangerous condition, and did not have a reasonable basis to suspect a potentially dangerous condition. Therefore, I found and continue to find that applicant failed to meet his burden in establishing employer negligence relating to the applicant's injury. Because I find that the applicant has not met its burden to establish employer negligence in this matter, there were not grounds to reduce the third-party credit afforded the defendant.

VII. RECOMMENDATION

For the foregoing reasons, I recommend that the applicant's Petition for Reconsideration, filed January 15, 2025, be DENIED.

DATE: January 30, 2025

LAWRENCE A. KELLER
WORKERS' COMPENSATION JUDGE