WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RUBEN PEDROZA, ***Applicant***

vs.

OC JONES & SONS, INC.;
NATIONAL UNION FIRE INSURANCE CO., administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., ***Defendants***

Adjudication Number: ADJ15306840
Oakland District Office

OPINION AND ORDERS GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the "Findings and Order and Opinion on Decision" (F&O) issued on February 11, 2025, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that the facts and medical evidence were irreconcilable in this case and found no substantial medical evidence proving industrial injury. The WCJ ordered that applicant take nothing on his claim.

Applicant contends that the medical record constitutes substantial medical evidence to establish industrial injury and that the WCJ erred in relying upon the qualified medical evaluator (QME)'s summary of subrosa video as the video was not submitted in evidence.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record we will grant applicant's Petition for Reconsideration and as our Decision After Reconsideration, we will rescind the February 11, 2025 F&O and return this matter to the trial level for further proceedings.

FACTS

Applicant claims to have sustained an industrial injury to his right shoulder while working as a construction laborer on September 24, 2021. (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 14, 2025, p. 2, lines 5-7.)

Applicant was seen by QME Joseph Centeno, M.D., who authored four reports in evidence. (Joint Exhibit 101 through 104.) Dr. Centeno took a history of injury as follows:

> At the time of the injury, the applicant was sent to go pick up scraps from the shrubs and other materials from the excavation site. He was then sent to help move some wood as well as a metal fence that had been cut up. When he was picking up the metal fence, he felt a pull and pain in his entire back and right shoulder. After that, he was sent to go shovel and pick up debris in the street. He said this was on a main street with no safety barriers. When he was doing the shoveling, he had to keep twisting and turning around because cars passing them were honking their horns because they were in the road with no barricades between them and the traffic. This twisting and turning further aggravated his neck, back and shoulder from the earlier incident while picking up the metal fence. On top of all that, he said the supervisor was yelling at him to move it and hurry up.
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> The applicant described the pain in his back at the time as sharp and stabbing with the pain radiating to the legs. He described the pain in his right shoulder as sharp and throbbing with the pain radiating to his neck, across the upper back and down the right arm with numbness and tingling in the shoulder and arm.
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> He said there were other workers with him at the time of the injury but he did not mention anything to them at the time.
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> When he was completed with the shoveling, he reported his injuries to the supervisor, Darrell. He said he was offered medical attention but the supervisor told him to wait, and someone would come to help him.
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> After waiting for three hours with no one coming to help him, he left the worksite and went to Kaiser ER.
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> (Joint Exhibit 101, Report of Joseph Centeno, M.D., February 15, 2022, p. 3.)

Dr. Centeno summarized the Kaiser ER report as describing the mechanism of injury as follows:

> Mechanism of injury: Picked up a metal object at work and felt a pop on his right rib and back, pain radiating to right buttock. The patient presents to the emergency department after injuring his back and shoulder at work this morning.

> He was picking up a metal fence posts when he heard a crack in his back and had pain originating at the thoracic vertebrae/posterior ribs and radiating to right shoulder and down through right buttock into the thigh. He rates the pain as 10/10, throbbing/stabbing, associated with right-sided pain on inspiration, decreased sensation over the right posterior shoulder, nausea, and headache.

(*Id*. at pp. 7-8.)

An x-ray taken of the right shoulder on the date of injury was described as follows: "No acute fracture or dislocation. Moderate degenerative change." (*Id*. at p. 8.)

Dr. Centeno diagnosed the right shoulder as having a partial thickness rotator cuff tear and AC join arthrosis. (*Id*. at p. 11.)

Dr. Centeno noted that applicant presented in a "direct and straightforward fashion." (*Id*. at p. 12.) He further noted that applicant presented credibly and did not display any non-physiological findings on exam. (*Ibid*.) Dr. Centeno found the injury to the right shoulder industrial. (*Id*. at p. 13.)

> Right shoulder:
> The applicant's reported mechanism of injury is consistent with the subjective complaints and diagnoses. The applicant's subjective complaints to this body part are supported by my findings during the physical examination. I find, within a reasonable medical probability, that the applicant's need for medical care and impairments stems from the industrial injury that took place on 09/24/2021.

(*Ibid*.)

Defendant wrote to Dr. Centeno and noted that applicant failed to disclose prior work injuries from 1986 through 1995 during the initial examination. (Joint Exhibit 102, Report of Joseph Centeno, M.D., November 11, 2022, p. 4.) Dr. Centeno responded to this as follows:

> Given the references in the medical records, as described by Ms. Roberts, there is no question that there will be substantial apportionment. It is quite likely that industrial cumulative trauma is also at play in this case.
>
> Further comments are deferred pending my review of the records.
>
> Based on the information submitted thus far, it is my opinion, to a degree of reasonable medical probability, that the need for medical workup stems from the date of injury of 09/24/2021. It is unclear if the date of injury of 09/24/2021 will represent an exacerbation versus aggravation.

(*Id*. at p. 2.)

Upon reexamination, Dr. Centeno took a work history from applicant, which the doctor described as not cohesive. (Joint Exhibit 103, Report of Joseph Centeno, M.D., March 7, 2024, p. 3.) Dr. Centeno took a history of applicant not working since his 2021 injury and a history that applicant worked a couple of days through the union. (*Ibid*.)

Dr. Centeno was shown subrosa film of applicant working one day at a job site. (Joint Exhibit 104, Report of Joseph Centeno, M.D., August 28, 2024.) Dr. Centeno summarized his review of subrosa as follows:

> When the patient was seen by me on 03/07/2024, the patient advised me that had not worked in any capacity since 09/24/2021. This is clearly not accurate, per the subrosa video surveillance.
>
> The patient advised me that he had no income and was living off of his savings. The patient adamantly denied any side jobs, cash jobs, day labor jobs. As noted in my report, later in the history, the patient states that may worked [sic] for a couple of days through the union, but does not recall the details.
>
> Review of several hours of subrosa video surveillance obtained in late 2023 confirms that the applicant was able to perform his usual and customary job duties at that time.

(*Id*. at p. 4.)

Notwithstanding the subrosa film, Dr. Centeno continued to find injury to the right shoulder; however, he reduced the amount of impairment assigned to the right shoulder. (*Ibid*.) Dr. Centeno's final diagnosis of the shoulder was:

> Strain, right shoulder, moderate, chronic, secondary to the 09/24/21 industrial injury.
>
> 2. Partial-thickness rotator cuff tear with degenerative osteoarthritis, acromioclavicular joint, right shoulder, likely pre-existing, aggravated by the 09/24/21 industrial injury.
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> 3. Subacromial impingement syndrome, right shoulder, with associated capsulitis, resulting in ratable impairment.

(*Id*. at p. 3.)

Applicant obtained an MRI of his shoulder, but it does not appear that the QME reviewed it. (Joint Exhibit 101, at p. 4.)

DISCUSSION

I.

Former Labor Code section 5909[1] 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.
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> (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.

(§ 5909.)

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 March 25, 2025, and 60 days from the date of transmission is Saturday, May 24, 2025, which by operation of law means this decision is due by Tuesday, May 27, 2025. (Cal. Code Regs., tit. 8, § 10600.). This decision is issued by or on May 27, 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

[1] Unless otherwise stated, all further references are to the Labor Code.

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.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on March 25, 2025, and the case was transmitted to the Appeals Board on March 25, 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 March 25, 2025.

II.

The WCJ first notes an issue with service of the Petition for Reconsideration. Applicant timely served the Petition with the Appeals Board, but multiple offices for defense counsel remain as parties of record in EAMS and applicant served the initial Petition upon an incorrect counsel. Upon order of the WCJ, applicant reserved the Petition upon defendant's current counsel of record. Timely service of the petition for reconsideration on the Appeals Board establishes the jurisdiction of the Appeals Board to review the matter. (§§ 5900, et. seq.) While failing to serve the petition for reconsideration *on a party* may constitute a valid ground for dismissing a petition, dismissal is not automatic. (§ 5905 (service shall be made "forthwith"); Cal. Code Regs., tit. 8, § 10940.) Instead, it is the policy of the law to favor, whenever possible, a hearing on the merits. (*Fox v. Workers' Comp. Appeals Bd.*, (1992) 4 Cal.App.4th 1196, 1205 [57 Cal.Comp.Cases 149]; see also *Shamblin v. Brattain* (1988) 44 Cal. 3d 474, 478, "when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default.".) This is particularly true in workers' compensation cases, where there is a constitutional mandate "to accomplish substantial justice in all cases." (Cal. Const., art. XIV, § 4.)

The problem with service appears to result from defendants' failure to file a proper substitution of attorneys in violation of WCAB Rule 10402 (Cal. Code Regs., tit. 8, § 10402). It does not appear that the original firm representing defendant has ever been substituted out of the case. Defendant filed a substitution form but listed the incorrect firm name on the document. As it appears that defendant caused the confusion and that applicant quickly cured the defect in the

service of the Petition, and that no prejudice has been alleged to have occurred due to the errant filing, we will exercise our discretion to review the Petition on the merits.

When applicant claims a physical injury, applicant has the initial burden of proving industrial causation by showing the employment was a contributing cause. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; § 5705.) Applicant must prove by a preponderance of the evidence that an injury occurred AOE/COE. (§§ 3202.5; 3600(a).)

> The requirement of Labor Code section 3600 is twofold. On the one hand, the injury must occur in the course of the employment. This concept ordinarily refers to the time, place, and circumstances under which the injury occurs. On the other hand, the statute requires that an injury arise out of the employment. It has long been settled that for an injury to arise out of the employment it must occur by reason of a condition or incident of the employment. That is, the employment and the injury must be linked in some causal fashion. (citations)
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> * * *
>
> The statutory proximate cause language [of section 3600] has been held to be less restrictive than that used in tort law, because of the statutory policy set forth in the Labor Code favoring awards of employee benefits. In general, for the purposes of the causation requirement in workers' compensation, it is sufficient if the connection between work and the injury be a contributing cause of the injury.

(*Clark*, *supra*, at pp. 297; 298.)

Section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, *supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is

charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton*, *supra*, at p. 475.)

Turning to the merits of the case, ordinarily we would give the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza*, *supra*, 3 Cal.3d at pp. 318-319.) However, in this case, the WCJ's Report discusses credibility in terms of the substance of applicant's testimony and not based upon the demeanor of the witnesses. Furthermore, it appears that the WCJ based her determinations of credibility upon the evaluator's review of subrosa film that is not in evidence. For the reasons discussed below, this is not proper.

Generally, there are two uses of subrosa video in workers' compensation. First, subrosa can be sent to a medical evaluator with a request that the evaluator review any medical conclusions reached in light of the activities seen in the video. In such cases, the subrosa video is being used as *medical* evidence to establish the nature and extent of disability. Because the video is only germane to the medical expert's opinion, and unless a party objects to the expert's review, the video need not be admitted at trial because the purpose of the video is solely to affect the medical expert's conclusions. That is what occurred here.

A second use of subrosa occurs where defendant seeks to impeach applicant's credibility through activities seen in the video, which defendant argues are incongruent with applicant's testimony or other evidence. In such cases the video is no longer being used as *medical* evidence, but instead it is being used as *factual* evidence of credibility, which requires that the video be in evidence and that the judge review it. (Cal. Code Regs., tit. 8, § 10787(c)(6); *Hamilton*, *supra*, at p. 478; see also *Morgan v. United States* (1936) 298 U.S. 468, 481["The one who decides must hear."].) When deciding reconsideration, the Appeals Board is required "to achieve a substantial understanding of the record[.]" (*Allied Compensation Ins. Co. v. Industrial Acc. Com*. (1961) 57 Cal.2d 115, 120.) Here, we cannot rely upon the subrosa video as factual evidence of credibility as it is not in evidence. To that extent, the WCJ erred in relying upon a medical expert's summary of subrosa video to decide issues of credibility.

Next, even if we accepted the description of the video provided in the medical reporting, we do not reach the same conclusion as the trial judge regarding applicant's credibility. The doctor described a video of applicant working one day. This is the precise history that the doctor took from applicant prior to the subrosa video being disclosed. Dr. Centeno noted: "Later in the history,

the patient states that may worked for a couple of days through the union, but does not recall the details." (Joint Exhibit 103, *supra* at p. 3.) The subrosa video corroborates applicant's history to the doctor. Applicant initially represented that he was not working, and then corrected that representation to state that he worked one or two days in the course of two and a half years. We do not view this exchange as impacting applicant's credibility.

Finally, we note a significant discrepancy in this matter that was not raised by the parties. A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review" (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98]). Thus, once reconsideration has been granted, the Appeals Board has the full power 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.

In the initial QME report, according to the letterhead, Dr. Centeno appeared to be operating as a solo practitioner. In the next QME report, Dr. Centeno appears to have formed a practice with Teodoro Nissen, M.D., who is applicant's primary treating physician. Applicant testified at trial, which was summarized as follows:

> Applicant confirms he saw QME Dr. Centeno. Applicant also saw Dr. Nissen. The doctors discussed Applicant's injury and treatment in the form of physical therapy and possible surgery, but this was denied by the company. Applicant believes Dr. Nissen has the same opinion as Dr. Centeno.

(MOH/SOE, *supra* at p. 4, lines 9-12.)

Pursuant to Administrative Director Rule 41.5, a QME who is part of the same practice as the primary treating physician has a disqualifying conflict of interest in the case. (Cal. Code Regs., tit. 8, § 41.5.) When such a conflict arises, the QME must inform the parties and advise whether the QME is withdrawing from the case. (*Ibid*.) If the QME requests to continue with the evaluation notwithstanding the conflict, each party must advise whether they wish to waive the conflict or obtain a new evaluation. (Cal. Code Regs., tit. 8, § 41.6.) There is presently no record of any such proceedings occurring in this matter. Furthermore, there is no mention anywhere in the QME's reporting that any disqualifying conflict was waived. It does not appear that the parties have addressed this issue, and we do not address whether the parties have waived a challenge to Dr.

Centeno as the QME. Instead, the prudent course of action is to return this matter to the trial level for further development of the record.

Accordingly, we grant applicant's Petition for Reconsideration and as our Decision After Reconsideration, we rescind the March 12, 2025 F&O and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued on February 11, 2025, by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on February 11, 2025, by the WCJ is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

LISA A. SUSSMAN, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 27, 2025

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

RUBEN PEDROZA
LAW OFFICE OF CHRISTINA LOPEZ
HAWORTH BRADSHAW STALLKNECHT AND BARBER, INC.

EDL/mc

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