WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

HORTENCIA RODRIGUEZ, *Applicant*

vs.

GRILLED SANDWICHES, LLC;
GREAT AMERICAN, administered by STRATEGIC COMP, *Defendants*

Adjudication Number: ADJ17474862
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Amended Findings and Award issued by the workers' compensation administrative law judge (WCJ) on March 23, 2026. Therein, and as relevant here, the WCJ found that applicant, "on or about January 1, 2021," sustained injury arising out of and in the course of employment (AOE/COE) to the bilateral shoulders, bilateral upper extremities, bilateral knees, cervical and lumbar spine, causing 34% permanent disability after apportionment. The WCJ made no finding on the tried issues of post-termination defense and statute of limitations.

Defendant contends that the WCJ erred in finding AOE/COE for a date of injury "on or about January 1, 2021." Defendant further contends that the WCJ should have found applicant's claim barred by the statute of limitation and/or the post-termination defense. Finally, defendant contends that the WCJ should have relied on the Disability Evaluation Unit (DEU)'s consultative rating to find 29% permanent disability after apportionment.

Applicant filed an Answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Opinion on Decision (Opinion) and Report with respect thereto. Based

on our review of the record, and for the reasons stated in the WCJ's Opinion and Report, both of which we adopt and incorporate to the extent quoted below, and for the reasons stated below, we will grant reconsideration, amend the March 23, 2026 Amended Findings and Award to find that applicant's claim is not barred by the statute of limitation or the post-termination defense, and otherwise affirm the WCJ's decision.

I.

Preliminarily, we note that former Labor Code[1] 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 April 16, 2026 and 60 days from the date of transmission is June 15, 2026. This decision is issued by or on June 15, 2026, 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] All further statutory references are to the Labor Code, unless otherwise noted.

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 April 16, 2026, and the case was transmitted to the Appeals Board on April 16, 2026. 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 April 16, 2026.

II.

The WCJ stated the following in the Opinion:

INTRODUCTION

> This matter came on for regular hearing before this Workers' Compensation Judge. This matter has complex factual, medical, and legal histories and a detailed discussion of them is necessary to understand the rationale of the Findings in this case.
>
> Applicant, a food prep worker, claimed a specific injury occurring at an uncertain date in approximately January 2021 when she tripped and fell at work. The claim was denied by Defendant. The primary issues before this Court are whether Applicant sustained an industrial injury; and if so, the date that the injury occurred; whether compensation is barred by a post-termination or statute of limitations affirmative defense; entitlement to temporary disability; permanent disability and apportionment; and the potential need for additional discovery.

DISCUSSION

Date of Injury

> Applicant's testimony was that she did not know the exact date that the injury occurred, even after being advised that documents in her claim file indicate it was January 1, 2021. The testimony of the employer witnesses was that there is no documentation of any injury in early 2021, and that the business is closed on New Year's Day.

The Court takes judicial notice that January 1, 2021 was a Friday. The payroll records submitted by Defendant indicate that the applicant was paid for a full 5-day work week covering the period including January 1, although she was paid for a 4-day week the previous pay period that included Christmas Day 2020. It is not clear how she worked a regular 5-day week if the business was closed for a day during her regular pay period.

All of the medical records that were obtained beginning in 2023 reference a date of injury of January 1, 2021, although these are not particularly persuasive as the doctors have no way of knowing the actual date.

The best inference from the evidence presented is that the injury occurred on or near January 1, 2021, and the Court will utilize this date as the date of injury.

Injury AOE/COE

The Court is persuaded by the Applicant's testimony and reporting of PQME Vincent Gumbs [Joint Exhibits 1-5] that the Applicant sustained an industrial injury in early 2021 while employed at Grilled Sandwiches, LLC due to a trip and fall incident.

Applicant's testimony included the names of at least three witnesses, co-workers Lorena, Sylvia and Vivi, as well as two supervisors to whom the Applicant reported her injury, Felix and Catalina. Defendant's witness also named another supervisor, David Gutierrez. However, Defendant did not offer rebuttal testimony from any of these witnesses to dispute Applicant's claim.

The weight of the evidence therefore favored the Applicant on the issue of whether there was a tripping incident.

* * *

Permanent Disability and Apportionment

The Court relies on the QME reporting of Vincents Gumbs, M.D. [Joint Exhibits 1 and 2]. The upper extremities rated to 27% with 50% apportionment, or 14%. The lower extremities rated to 15% with no apportionment. The spine rated to 19% with 50% apportionment, or 10%. Combining the ratings yielded 34% permanent disability after apportionment, or 159 weeks at $290.00 per week, for a total of $46,110.00.

The PQME's opinion on apportionment was supported by the existence of prior disability due to a well-documented previous work injury with another employer, Caitac. Applicant also admitted under cross examination at trial that she had "moderate pain" before her fall, and this was discussed in detail by Dr.

Gumbs in his reports of August 27, 2024 and October 10, 2024 [Joint Exhibits 1 and 2].

* * *

Post-Termination Defense and Statute of Limitations

These are affirmative defenses, and the burden is upon the employer to prove them. The Court is persuaded that the statute of limitations in this matter was tolled under the principles discussed in Honeywell v. WCAB (Wagner) (2005) 35 Cal. 4th 24, 70 Cal. Comp. Cases 97 and Reynolds v. Workmen's Comp. Appeals Bd (1974) 12 Cal. 3d 726. Absent testimony establishing notification to the Applicant of her workers' compensation rights, the statute of limitations was tolled and does not bar the claim.

Further, the Applicant testified that the injury was initially reported to an individual named Felix, well before termination. No testimony was presented in rebuttal. The weight of the evidence therefore favors the Applicant on the post-termination defense as well.

* * *

Need for Additional PTP Reporting

Applicant began treatment for her January 2021 claim in February of 2023, when she was sent to the employer clinic. The record contains treatment reports from Dr. Acoba from 01/23/2024 to 10/08/2024, with virtually identical complaints and objective findings over 10 months of treatment, nearly four years removed from the date of injury. Of note, PQME Gumbs declared the Applicant permanent and stationary on 08/27/2024, after a year of evaluation and reporting, and the Court found Dr. Gumbs' reporting persuasive and his reports substantial. Rather than address the MMI report of PQME Gumbs, Dr. Acoba continued to rehash his review of the initial report from Dr. Gumbs in 2023. The Court finds no need for additional reporting to support its decision.

* * *

(Opinion on Decision, at pp. 4-9, emphasis in original.)

The WCJ stated the following in the Report:

DISCUSSION

Petitioner challenges three points in the Amended Findings and Award and Opinion on Decision: 1. The finding of injury on or about January 1, 2021 arising out of and in the course of employment; 2. the rejection of the statute of

limitations and post-termination defenses; and 3. the Court's permanent disability rating.

Improper pleading

The Court notes initially that the Petition is improperly filed. WCAB Rule 10945 states, in pertinent part:

(c)(1) Copies of documents that have already been received in evidence or that have already been made part of the adjudication file shall not be attached or filed as exhibits to petitions for reconsideration, removal, or disqualification or answers. Documents attached in violation of this rule may be detached from the petition or answer and discarded. (Cal. Code Regs., tit. 8, § 10945.)

Here, Petitioner attached 10 pages of documents that are already contained in the record, in violation of WCAB 10945. The attachment of such documents is clearly prohibited. Such attachments should be discarded, in addition to the improper additional rating exhibit, as discussed below.

Date of Injury

It is undisputed that the Applicant could not state with certainty when the injury occurred. The testimony of the employer witnesses was that there is no documentation of any injury in early 2021, and that the business is closed on New Year's Day.

However, neither of the employer witnesses was actually working at the time of the claimed injury in January 2021, so they had no actual personal knowledge about the events of that time period.

The Court therefore determined the date of injury using the best inference from the evidence presented, including's Applicant's testimony.

Injury AOE/COE, Threshold Defenses

Petitioner contends that the Court unfairly shifted the burden of proof from the Applicant to the employer. This is not the case. The initial burden was upon the Applicant to prove that the incident occurred, and in the Court's estimation the burden was met by Applicant's testimony and supporting medical evidence.

Petitioner then had the burden to present substantial evidence to rebut the Applicant's testimony regarding the factual statements made. Defendant did not present witnesses who were working with or supervising the Applicant at the time of the alleged injury, but instead presented witnesses who began working for the employer a year after the incident. Summary of Evidence at pp. 6, 8.

While their testimony might generally be categorized as "rebuttal testimony" in the sense that they disputed the Applicant's statements, these witnesses had no personal knowledge about the events of January 2021 because they weren't working for the employer at that time, and therefore could not present direct rebuttal to the Applicant's account of the injury. The Court did not reject their testimony, but it was given less weight since they were not present at the time of the alleged incident. The employer witnesses were credible as to paperwork and procedures in the years that followed the incident, but that was much less persuasive than the testimony of the Applicant. As evidenced in the Petition, the Petitioner was certainly aware of potential witnesses including Applicant's supervisors from the Applicant's deposition testimony. However, there was no testimony from these individuals, who were actually present at the time of the incident, denying that it occurred. The weight of the evidence therefore favored the Applicant as to the factual occurrence of the injury.

Because the Court accepted the facts as presented by the Applicant, a claim was timely made before termination, and the defenses of statute of limitations and post-termination do not apply.

Petitioner highlights an alleged discrepancy between Applicant's deposition and trial testimony about to whom the injury was reported, Felix or Cata. However, the Court's reading of the deposition questions is that they were asking about discussion of symptoms in the year following the accident, rather than the immediate reporting of the fact of the fall. The discrepancy was therefore not given significant weight.

Permanent Disability Rating

Petitioner does not provide an actual analysis of disagreement with the Court's rating, but instead simply relies upon an inadmissible consultative rating determination.

Petitioner has improperly attached consultative rating determinations in direct violation of Rule 10166(b), which states in pertinent part: "…Consultative Rating Determinations will not be admissible in judicial proceedings." Attempting to introduce a consultative rating determination as evidence in the Petition was inappropriate because it is specifically prohibited by the Regulations. The appropriate method for challenging the rating would have been a written explanation in the pleading, rather than attaching a prohibited exhibit.

Without appropriate argument as to the rating discrepancy, Petitioner failed to meet its burden to demonstrate error in the rating.

(Report, at pp. 1-5, emphasis in original.)

III.

The employee bears the initial burden of proving injury AOE/COE by a preponderance of the evidence. (Lab. Code, § 5705; *South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3202.5, 3600(a).) The July 29, 2025 Minutes of Hearing and Summary of Evidence (MOH/SOE) summarize applicant's relevant testimony as follows:

> The applicant began working for Grilled Sandwiches in approximately 2021, about four years ago. She had an injury in February 2023. She does not recall the exact date of hire but believes she was working during the Covid shutdowns.
>
> * * *
>
> Applicant had a specific injury after about 3 months of work. She did not go to see a doctor on the date of her injury. The injury occurred when she had received permission to go to the restroom and she tripped over conveyor belt tires that were left outside the machine. She tripped and fell forward, striking the cement with her hands and knees. She was dizzy after the fall. There were no other parts of her body that struck the ground.
>
> The fall was witnessed by a co-worker named Lorena. There were other witnesses present including Sylvia and Vivi, but she does not remember their last names. After the fall, Lorena helped her up and she reported the injury to a manager. She was able to stand up and walk with pain to see the manager. She believes it was reported to Felipe or Felix. She does not recall his last name, but he was Latino from Mexico. Felipe asked how she felt and if she was in pain. She said yes. He asked if she was able to return to work and she said yes. A report was filled out and signed by the applicant.
>
> (MOH, 7/29/25, at pp. 2:20 - 3:4-14.)

We have given the WCJ's implicit credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) While the WCJ did not make an explicit finding that he found applicant credible, when his Opinion on Decision and Report are read as a whole, it is clear that he believed, relied upon, and gave more weight to applicant's testimony than that of defendant's witnesses. Moreover, any lack of specificity in applicant's testimony about the date of injury was not significant, and applicant's testimony was

not rebutted or impeached by evidence from defendant. (See *Nordstrom, Inc. v. Workers' Comp. Appeals Bd*. (2002) 67 Cal.Comp.Cases 358 (writ den.)

Next, we address defendant's affirmative defenses. As relevant here, section 3600(a)(10) states, that:

> Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:
> (A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.
> (B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.
> (C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.
> (D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff.
>
> (Lab. Code, § 3600(a)(10), emphasis added.)

Section 5405 provides in relevant part that, "[t]he period within which proceedings may he commenced for the collection of the benefits...is one year from any of the following: (a) The date of injury. (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2. (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished" (Lab. Code, § 5405.) However, the statute of limitations is tolled if an employer breaches its duty to notify an applicant of his or her workers' compensation rights. (See *Reynolds v. Workmen's Comp. Appeals Bd. (Reynolds)* (1974) 12 Cal. 3d 726 [39 Cal.Comp.Cases 768]; Kaiser Found. Hosps. Permanente Medical Group v. Workers' Comp. Appeals Bd. (Martin) (1985) 39 Cal.3d 57 [50 Cal.Comp.Cases 411]; *California Insurance Guarantee Association v. Workers' Comp. Appeals. Bd. (Carls)* (2008) 163 Cal. App. 4th 853 [73 Cal.Comp.Cases 771].)

The initial burden in asserting an affirmative defense to compensation rests with the defendant. (Lab. Code, § 5705.) Defendant must meet this burden by preponderance of the

evidence, and this requires "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth." (Lab. Code, § 3202.5)

We agree with the WCJ that defendant failed to meet its burden of proof on both affirmative defenses. Applicant testified that "After the fall, Lorena helped her up and she reported the injury to a manager. She was able to stand up and walk with pain to see the manager. She believes it was reported to Felipe or Felix…. Felipe asked how she felt and if she was in pain. She said yes. He asked if she was able to return to work and she said yes. A report was filled out and signed by the applicant." (MOH/SOE, 7/29/25, at p. 3:10-14.) Defendant did not present any rebuttal testimony from witnesses with personal knowledge of the events nor any evidence of notice of termination. Under cross-examination, defendant's director of human resources testified that applicant's supervisors were David Gutierrez and Catalina Guzman and that she was not aware of why they are not testifying. (*Id*. at p. 7:8-10.)

Finally, we admonish defendant for its violation of Rules 10945 and 10166 as noted by the WCJ's Report.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that March 23, 2026 Amended Findings and Award is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

11. Applicant's claim is not barred by the statute of limitation or as a post-termination claim.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ PAUL F. KELLY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 15, 2026

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

HORTENCIA RODRIGUEZ
SOLOV AND TEITELL, APC
HORA LAW FIRM
EMPLOYMENT DEVELOPMENT DEPARTMENT

PAG/cm

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