WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MIGUEL VALDIVIA (Deceased); MARIA VALDIVIA (Widow), ***Applicant***

vs.

CONDOR PACIFIC INDUSTRIES; SAFECO INSURANCE, ***Defendants***

Adjudication Number: ADJ3613146 (VNO 0532199)
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

In order to further study the factual and legal issues in this case, we[1] granted applicant's Petition for Reconsideration of a workers' compensation administrative law judge's (WCJ) Supplemental Findings and Order of January 19, 2021, wherein it was found that the injured worker did not sustain industrial injury to the immune system and in the forms of leukemia and myelodysplasia while employed as a gyroscope repairer during a cumulative period ending August 22, 1999.[2] The WCJ thus issued an order that applicant take nothing by way of their workers' compensation claim.

Applicant contends that the WCJ erred in finding that the injured worker did not sustain compensable industrial injury. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will affirm the WCJ's decision for the reasons stated in the Report, which we adopt, incorporate, and quote below, and for the additional reasons stated below.

Preliminarily, we note that only the Appeals Board is statutorily authorized to issue a decision on a petition for reconsideration. (Lab. Code, §§ 112, 115, 5301, 5901, 5908.5, 5950; see

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[1] Since our Order Granting Reconsideration, Commissioners Deidra E. Lowe and Marguerite Sweeney have retired from the Appeals Board. Commissioner Joseph V. Capurro and Deputy Commissioner Lisa A. Sussman have been substituted in their place in the instant matter.

[2] During the course of the proceedings, the injured worker passed away. Applicant's widow continued litigating the issue of applicant's right any to retroactive benefits due prior to his passing. No claim for death benefits was filed.

Cal. Code Regs., tit. 8, §§ 10320, 10330.)[3] The Appeals Board must conduct de novo review as to the merits of the petition and review the entire proceedings in the case. (Lab. Code, §§ 5906, 5908; see Lab. Code, §§ 5301, 5315, 5701, 5911.) Once a final decision by the Appeals Board on the merits of the petition issues, the parties may seek review under Labor Code section 5950, but appellate review is limited to review of the record certified by the Appeals Board. (Lab. Code, §§ 5901, 5951.)

Former Labor Code section 5909 provided that a petition was denied by operation of law if the Appeals Board did not "act on" the petition within 60 days of the petition's filing with the 'appeals board' and not within 60 days of its filing at a DWC district office. A petition for reconsideration is initially filed at a DWC district office so that the WCJ may review the petition in the first instance and determine whether their decision is legally correct and based on substantial evidence. Then the WCJ determines whether to timely rescind their decision, or to prepare a report on the petition and transmit the case to the Appeals Board to act on the petition. (Cal. Code Regs., tit. 8, §§ 10961, 10962.)[4] Once the Appeals Board receives the case file, it also receives the petition in the case file, and the Appeals Board can then "act" on the petition.

If the case file is never sent to the Appeals Board, the Appeals Board does not receive the petition contained in the case file. On rare occasions, due to an administrative error by the district office, a case is not sent to the Appeals Board before the lapse of the 60-day period. On other rare occasions, the case file may be transmitted, but may not be received and processed by the Appeals Board within the 60-day period, due to an administrative error or other similar occurrence. When the Appeals Board does not review the petition within 60 days due to irregularities outside the petitioner's control, and the 60-day period lapses through no fault of the petitioner, the Appeals

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[3] The use of the term 'appeals board' throughout the Labor Code refers to the Appeals Board and not a DWC district office. (See e.g., Lab. Code, §§ 110, et. seq. (Specifically, § 110 (a) provides: "'Appeals board' means the Workers' Compensation Appeals Board. The title of a member of the board is 'commissioner.'").) Section 111 clearly spells out that the Appeals Board and DWC are two different entities.

[4] Petitions for reconsideration are required to be filed at the district office and are not directly filed with the Appeals Board. (Cal. Code Regs., tit. 8, § 10995(b); see Cal. Code Regs., tit. 8, § 10205(l) [defining a "district office" as a "trial level workers' compensation court."].) Although the Appeals Board and the DWC district office are separate entities, they do not maintain separate case files; instead, there is only ***one*** *case file*, and it is maintained at the trial level by DWC. (Cal. Code Regs., tit. 8, § 10205.4.)

When a petition for reconsideration is filed, the petition is automatically routed electronically through the Electronic Adjudication Management System (EAMS) to the WCJ to review the petition. Thereafter, the entire case file, *including the petition for reconsideration*, is then electronically transmitted, i.e., sent, from the DWC district office to the Appeals Board for review.

Board must then consider whether circumstances exist to allow an equitable remedy, such as equitable tolling.

It is well-settled that the Appeals Board has broad equitable powers. (*Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board* (1978) 83 Cal.App.3d 413, 418 [43 Cal.Comp.Cases 785] citing *Bankers Indem. Ins. Co.* v. *Indus. Acc. Com*. (1935) 4 Cal.2d 89, 94-98; see *Truck Ins. Exchange v. Workers' Comp. Appeals Bd. (Kwok)* (2016) 2 Cal.App.5th 394, 401 [81 Cal.Comp.Cases 685]; *State Farm General Ins. Co. v. Workers' Comp. Appeals Bd. (Lutz)* (2013) 218 Cal.App.4th 258, 268 [78 Cal.Comp.Cases 758]; *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [59 Cal.Comp.Cases 96].) It is an issue of fact whether an equitable doctrine such as laches applies. (*Kwok*, *supra* 2 Cal.App.5th at p. 402.) The doctrine of equitable tolling applies to workers' compensation cases, and the analysis turns on the factual determination of whether an opposing party received notice and will suffer prejudice if equitable tolling is permitted. (*Elkins v. Derby* (1974) 12 Cal.3d 410, 412 [39 Cal.Comp.Cases 624].) As explained above, only the Appeals Board is empowered to make this factual determination.[5]

In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493], the Appeals Board denied applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced, especially in light of the fact that the Appeals Board had repeatedly assured the petitioner that it would rule on the merits of the petition. (*Id.*, at p. 1108.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Ibid.*) The touchstone of the workers' compensation system is our constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.) "Substantial justice" is not a euphemism for inadequate justice. Instead, it is an exhortation that the workers' compensation system must focus on the *substance* of justice, rather than on the arcana

[5] Labor Code section 5952 sets forth the scope of appellate review, and states that: "Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence." (Lab. Code, § 5952; see Lab. Code, § 5953.)

or minutiae of its administration. (See Lab. Code, § 4709 ["No informality in any proceeding . . . shall invalidate any order, decision, award, or rule made and filed as specified in this division."].)

With that goal in mind, all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) If a timely filed petition is never considered by the Appeals Board because it is "deemed denied" due to an administrative irregularity not within the control of the parties, the petitioning party is deprived of their right to a decision on the merits of the petition. (Lab. Code, §5908.5; see *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350]; *LeVesque, supra* 1 Cal.3d 627, 635.) Just as significantly, the parties' ability to seek meaningful appellate review is compromised, raising issues of due process. (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra,* 68 Cal.2d 753.)

Substantial justice is not compatible with such a result. A litigant should not be deprived of their due process rights based upon the administrative errors of a third party, for which they bear no blame and over whom they have no control. This is doubly true when the Appeals Board's action in granting a petition for reconsideration has indicated to the parties that we will exercise jurisdiction and issue a final decision on the merits of the petition, and when, as a result of that representation, the petitioner has forgone any attempt to seek judicial review of the "deemed denial." Having induced a petitioner not to seek review by granting the petition, it would be the height of injustice to then leave the petitioner with no remedy.

In this case, the WCJ issued the Findings and Award on January 19, 2021, and applicant filed a timely petition on February 16, 2021. According to EAMS, the case file was transmitted to the Appeals Board on March 3, 2021. However, for reasons that are not entirely clear from the record, the Appeals Board did not actually receive notice of and review the petition until April 21, 2021. Accordingly, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties. The Appeals Board granted the petition on June 10, 2021, within 60 days of receiving actual notice of the petition. In so doing so, we sent a clear signal to the parties of our intention to exercise jurisdiction and issue a final decision after reconsideration. Neither party expressed any opposition to this course of action, and it appears clear from the fact that neither party sought judicial review of our grant of reconsideration that both parties have acted in reliance on our grant.

Under the circumstances, the requirements for equitable tolling have been satisfied in this case. Accordingly, our time to act on defendant's petition was equitably tolled until 60 days after April 21, 2021. Because we granted the petition on June 10, 2021, our grant of reconsideration was timely, and we may issue a decision after reconsideration addressing the merits of the petition.

Turning to the merits, we will affirm the WCJ's decision for the reasons stated in the Report, which we adopt, incorporate, and quote below. "The applicant for workers' compensation benefits has the burden of establishing the 'reasonable probability of industrial causation.'" (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.App.4th 644, 650 [63 Cal.Comp.Cases 253] citing *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) The relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (*Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 639 [35 Cal.Comp.Cases 16].) The WCJ is empowered to choose among conflicting medical reports and rely on those deemed most persuasive. (*Jones v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 476, 479 [33 Cal.Comp.Cases 221].) Here, the WCJ carefully explained why he found the conclusions of qualified medical evaluator Edward O'Neill, M.D. more persuasive.

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

> The applicant, Miguel Valdivia, now deceased, [birthdate redacted], while employed during the period from 5/5/1989 to 8/22/1999 (ADJ3613146) as a gyroscope repairer, at Westlake, California by Condor Pacific Industries, whose workers' compensation insurer was Safeco Insurance (subsequently purchased by Liberty Mutual Insurance), claims to have sustained injury arising out of and in the course of employment resulting in leukemia, myelodysplasia, and to the immune system resulting in his death on 7/24/2009. [The applicant's widow is pursuing the disputed industrial claim under Labor Code section 4700 for unpaid accrued benefits.]
>
> Applicant's claim having been heard and regularly submitted following development of the record pursuant to an Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration dated 5/28/2019, and a Supplemental Findings and Order having been issued by the Honorable Ralph Zamudio, Workers' Compensation Judge, to which a Petition for Reconsideration was filed, and Judge Zamudio having retired, and Presiding

Judge Brotman having vacated the 2/13/20 submission and having assigned to this matter to the undersigned Workers' Compensation Judge, and the parties having waived the provisions of Labor Code § 5700 and accepting Judge Hursh to decide the case based on the record as it existed on 2/13/20, the matter was submitted and a Supplemental Findings and Order issued by the undersigned Worker's Compensation Judge on January 15, 2021 finding that Applicant, Miguel Valdivia, did not sustain injury arising out of and in the course of employment resulting in leukemia, myelodysplasia, and to the immune system.

Applicant filed a timely verified petition for reconsideration of the January 15, 2021 Findings and Order. Petitioner contends the WCJ erred by: a) relying on the medical opinion of Panel Qualified Medical Evaluator Edward O'Neill, M.D. rather than the opinion of James Padova, M.D. which applicant contends is better reasoned.

II
FACTS

Miguel Valdivia was employed as a as a gyroscope repairer by Condor Pacific Industries from 5/5/1989 to 8/22/1999. His job duties included repairing and overhauling gyroscopes utilizing solder, flux, various cleaners, and paint. Mr. Valdivia had previously worked between 1983 and 1989 as an auto mechanic in Mexico performing general mechanical work utilizing degreasers, including either gasoline or petroleum. He would soak parts in gasoline or petroleum to clean them and would have to dip his hands into the gasoline or petroleum to remove the parts.

During the course of litigation, some MSDS sheets were obtained and reviewed by the reporting physicians. Further effort was made to obtain additional MSDS sheets in 2013 and a Discovery Order Re: MSDS Sheets issued on 9/10/2013. Senior Counsel for BAE Systems by letters dated 7/1/2014 and 6/16/2014 informed the parties that whatever [MSDS] records BAE Systems had from Condor Pacific Industries were shipped to a facility in Johnson City, New York, and were no longer available, as they had been destroyed in September of 2011 due to flooding from Tropical Storm Lee. That any additional MSDS sheets, if any, could not be obtained is the result of natural disaster following a flood in 2011, and not any overt act by the employer to withhold evidence, and does not give rise to the drawing of any adverse inference.

The record in this matter includes medical reporting from Dr. Nachman Brautbar, medical reporting and the transcripts of depositions of Dr. James A. Padova, and the medical reports of Dr. Edward O'Neill. For the reasons set forth below this WCJ found the medical opinion of Dr. Edward O'Neill is the better reasoned and gave it full weight over the contrary opinions of Dr. Brautbar and Dr. Padova. Applicant's petition for reconsideration followed.

III
DISCUSSION

A
Opinion by Edward O'Neill, M.D. Better Reasoned and More Persuasive Than Contrary Opinion of James A. Padova, M.D.

Petitioner contends that Dr. Padova's opinion should be considered to be the most persuasive. Petitioner points to the transcript of the deposition of Dr. Padova dated August 20, 2015, and in particular Dr. Padova's response of "yes" on page 87 line 24 to a question that had been posed. Petitioner represents that the doctor was responding to a question as to whether the chemicals applicant was working with would "probably be responsible for him developing the initial leukemia …." (Petition for Reconsideration dated February 12, 2021, page 10, lines 12 through 13.) However, the actual question to which he responded was:

> "And it was this information about, assuming that these are materials that he worked with, which resulted in you giving me your earlier opinion that you believe that it's most probable that the chemicals that he was working with, ***assuming that it was a significant exposure***, was probably responsible for the initial leukemia development?"(Exhibit 2, transcript of deposition of James A Padova M.D., Volume II, dated August 20, 2015, page 87, lines 17 through 23.) (Emphasis added.)

In his November 25, 2019 report Dr. O'Neil reviewed the transcript of Dr. Padova's deposition explaining as follows:

> "The initial question of solvent exposures having been responsible for the onset of the process to begin with has actually been answered by Dr. Padova in his deposition as well as my own comments; namely, that without some idea of levels of exposure, including duration, frequency, ventilation, concentration of the materials, etc., we are speculating whether there is a cause-and-effect relationship for materials that are not listed as containing benzene and the development of medical conditions, such as lymphomas and leukemias that are specifically related to benzene exposures.
>
> I certainly agree with Dr. Padova's statements where he has noted on several occasions in his two depositions that without knowing the levels of exposure, he could not make a cause and effect relationship. That is the same thing that I have been saying from the outset. The specific reference that Judge Zamudio refers to on page 87 applies exactly to that question, where the attorney from Mr. McGuire's office states, '. . . (line 21) assuming that it was a significant exposure, was probably responsible for the initial leukemia development?' Answer, 'Yes, that's correct.'

> Essentially, that is a hypothetical question, since the person asking the question has no information that it was a significant exposure.
>
> Unfortunately, we live in an urban environmentally contaminated world which causes us all to have certain exposure on a periodic or regular basis. That fact not only makes Dr. Brautbar's theory of zero tolerance unreasonable, but rather absurd." (Defendant's Exhibit O, report of Dr. Edward O'Neill dated 11/25/2019.)

The opinion of Dr. Padova that petitioner urges the court to follow is based upon a hypothetical, not based on the record in this case. It is, in essence, based on speculation. Full weight was given to the better-reasoned opinion Dr. Edward O'Neill over the contrary opinion of Dr. Padova. It is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (Place v. Workers' Comp. Appeals Bd. (1970) 3 Cal. 3d 372, [35 Cal. Comp. Cases 525].).

IV
RECOMMENDATION

It is respectfully recommended the applicant's petition for reconsideration be denied.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Supplemental Findings and Order of January 19, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 14, 2024

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

MARIA VALDIVIA C/O PHILIP J. MCGUIRE
LAW OFFICES OF PHILIP J. MCGUIRE
LAW OFFICES OF KIRK & MYERS

DW/oo

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