

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

OSEHAS E. FLORES, *Applicant*

vs.

**LOS FELIZ HEALTHCARE WELLNESS CENTRE LP;
XL SPECIALTY INSURANCE COMPANY; as administered by INTERCARE,
*Defendants***

**Adjudication Numbers: ADJ12471148; ADJ12471131
Marina Del Rey District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, we will affirm the Findings and Awards (F&As) in Case Numbers ADJ12471148 and ADJ12471131, except that we will grant reconsideration, and amend the WCJ's decisions to identify Los Feliz Healthcare Wellness Centre, LP, as the defendant employer and XL Specialty Insurance Company as the defendant insurer in each of the F&As. We make no other substantive changes to the F&As.

There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10940(a), 10615(b).)

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com.* (*Hinojoza*) (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73].)

The Petition in this matter was filed on May 12, 2023. This was more than 25 days after the service of the WCJ's April 10, 2023 decisions, which were served on April 12, 2023. Defendant contends that the Petition is timely filed because defendant Intercare was served via U.S. Mail to P.O. Box 211012, Eagan, MN 55121, an out-of-state address, so that the time for filing was extended by 5 days. The WCJ states in her Report that the decisions were sent by mail to Intercare Pasadena at its California address. However, the Official Address Record (OAR) in ADJ12471131 does not include Intercare Pasadena, and the OAR in ADJ12471148 shows an email address for service. Therefore, we are unable to discern whether service of the decisions was proper, and we will treat the Petition as timely filed.

Pursuant to *Coldiron v. Compuware Corporation* (2002) 67 Cal.Comp.Cases 1466 (Appeals Bd. en banc) and WCAB Rules 10390, 10400, 10402 (Cal. Code Regs., tit. 8, §§ 10390, 10400, 10402), all parties must properly identify their full legal names, including third party administrators, and all attorney representatives. Moreover, all parties have an ongoing obligation to properly update the OAR if changes occur throughout the span of a case. (Cal. Code Regs., tit. 8, § 10205.5.) It may be expedient to refer to a third-party administrator as simply "defendant," however, the liable defendant must be clearly identified to ensure that an award is legally enforceable. (See Lab. Code, §§ 5806, 5807.) Here, the WCJ correctly identified the liable parties, in her awards in the F&As: Los Feliz Healthcare Wellness Centre, LP, and XL Specialty Insurance Company, and the attorney for those defendants was properly served with the F&A. Defendant's attorneys Steven J. Alves and Alves Law Office Professional Corporation are reminded to correct the OARs in both cases forthwith.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decisions issued by the WCJ in Case Numbers ADJ12471131 and ADJ12471148 on April 12, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision issued by the WCJ in Case Number ADJ12471131 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDING OF FACT

1. Applicant, Osehas E. Flores, while employed by Los Feliz Healthcare Wellness Centre, LP, insured for workers' compensation by XL Specialty Insurance Company, on October 17, 2017 to June 28, 2019, as a CNA, sustained injury to his neck, wrists, hands, thoracic spine, lumbar spine and shoulders.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision issued by the WCJ in Case Number ADJ12471148 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDING OF FACT

1. Applicant, Osehas E. Flores, while employed by Los Feliz Healthcare Wellness Centre, LP, insured for workers' compensation by XL Specialty Insurance Company, on June 28, 2019, as a CNA, sustained injury to his head. Applicant did not sustain injury to his eye.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ NATALIE PALUGYAL, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 11, 2023

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

**OSEHAS FLORES
HIDNDEN & BRESLAVSKY, APC
ALVES LAW OFFICE**

AS/mc

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

- | | | |
|----|----------------------------------|--|
| 1. | Applicant's Occupation | Certified Nurse's |
| | Assistant Applicant's Age | 45 |
| | Date of Injury | 10/17/2017 to 6/28/2019 |
| | Parts of Body Injured | Neck, Wrists, Hands, Thoracic
Lumbar, and Shoulders |
| 2. | Identity of Petitioner | <u>DEFENDANT</u> Filed the |
| | Petition Timeliness | The Petition is Untimely. |
| | Verification | The Petition is Verified. |
| 3. | Date of Findings of Fact | 04/10/2023 |

Petitioner's Contention:

Petitioner/Defendant contends that the Petition for Reconsideration, was timely filed on 05/12/2023, where the Findings & Award and Opinion on Decision were filed on 04/11/2023, invoking 8 CCR Section 10605 (a)(2); that the medical evidence does not support the Finding of Fact that the applicant sustained an industrial injury, alleging that the reports of Danny Levi Harrison, M.D. and Susana Arroyo, D.C. are not substantial medical evidence, and that reports of PQME Ram are more persuasive; that the WCJ failed to identify where and how the report of PQME Ram was inconsistent; and misstating the testimony of the only Employer Witness, Janet Snow.

II
FACTUAL HISTORY

The Applicant has alleged a specific injury and a continuous trauma industrial injury while employed as a CNA for the Petitioner which allegedly occurred during his approximately two years of employment there. The Petitioner had denied both claims and this case was brought on the issue of AOE/COE only. There were three days of Trial, two of which involved testimony of the applicant and of the employer representative. A Findings & Award and Opinion on Decision were filed in each of two companion cases, and defendant petitioner has filed the instant Petitions for Reconsideration, on each case. A reply brief was submitted by the applicant, and the WCJ

hereby submits this Report and Recommendation that the Petitioned for Reconsideration both be denied.

III **DISCUSSION**

A. TIMELINESS OF FILING OF PETITION FOR RECONSIDERATION

The Petitioner filed an untimely Petition for Reconsideration on May 12, 2022, which is 20 plus 10 days after the Board's service of the Findings & Award and Opinion on Decision, filed and served on April 10, 2023. *Labor Code Section §5903* and 8 CCR 10605(a) (2), was cited by Petitioner to allow for 10 additional calendar days from date of service in lieu of 5 additional calendar days, to claim that the Petition is timely filed. Petitioner is correct that CCR 10605 (a) (2) allows for 10 additional days where a party, attorney **or** other agent of record being served is outside of California, but within the Unites States.

Petitioner incorrectly claims the address of the third-party Administrator, Intercare Pasadena, is P.O. Box 211012, Eagan, MN. In fact, the Board's Official Address Record shows Intercare Pasadena's address as P.O. Box 7111, Pasadena, CA 91109-7211. Based on these facts, it appears that all parties served are located in the state of California. 8 CCR 10605 (a) (1) allows for 20 plus 5 additional calendar days to file the Petition for Reconsideration, thereby rendering the Petition for Reconsideration untimely as it was due on May 8, 2023.

Furthermore, although the name and address of the actual carrier is not in EAMS, petitioner originally filed a Notice of Representation on November 4, 2019, where the carrier is identified as XL Catlin, without any address provided; the Minutes of Hearing, Order of Consolidation and Summary of Evidence dated November 3, 2022, identify the carrier as XL Specialty Insurance; and the Petitions for Reconsideration identify the carrier as AXA XL, leaving the Board confused as to the correct name and identity of the carrier. None of these entities are on the Official Address Record in EAMS nor have any addresses been provided by petitioner. The F&A and Opinion on Decision were served on Intercare Pasadena in the State of California. The Petitions are untimely.

Nevertheless, the Board will address the substantive issues raised by Petitioner as follows.

B. WHETHER THE BOARD'S FINDING OF INDUSTRIAL CAUSATION IS SUPPORTED BY THE MEDICAL EVIDENCE

Petitioner argues that the finding of industrial injury occurring from CT 10/17/17 to 6/28/19 is not supported by the medical evidence submitted by applicant, namely the Medical Reports of Susan Arroyo, D.C., 3/11/202, EAMS ID: 42116428; Danny Levi Harrison, M.D., 10/23/2020, EAMS ID: 43040525, and Jan Merman, M.D. 9/29/2020, EAMS ID 42116041. In fact, the WCJ's finding of industrial injury based on these medical reports in conjunction with the credible testimony of the applicant, and the lack of persuasive rebuttal evidence provided by the petitioner.

In the Minutes of Hearing and Summary of Evidence dated 1/18/23, page 2, lines 15 to 25, page 3, lines 1 to 25, and page 4, lines 1 to 19, the applicant described in great detail the various job duties he performed as a Certified Nurses' Assistant, including the lifting requirements involved in providing patients with personal care, many of whom were elderly. In particular on Page 3, lines 11 to 18, he described the need to transfer patients from beds to wheelchairs and/or shower chairs, some of whom weighed over 300 lbs. On Page 4, lines 19 to 24, he described the onset of discomfort in various parts of his body. On Page 6, lines 2 to 7, he clarified that he would use a Hoyer lift or get help from co-workers with the 300 lb. patients.

In the Minutes of Hearing and Summary of Evidence dated 2/22/23, the Petitioner's Witness, Janet Snow, who was also deemed credible by this WCJ, testified on Page 6, lines 8 to 12 regarding the job duties of a Certified Nurse's Assistant, which substantially coincided with the testimony of the applicant, albeit in far less detail. On Page 6, lines 13 to 15, when asked by applicant's counsel whether she would describe the CNA job duties as "strenuous", she testified that she would not, but she would use the term "physically demanding".

In her report, Susan Arroyo, D.C. took a detailed clinical examination of the applicant to conclude that he sustained injuries to various orthopedic body parts. Petitioner is accurate in saying that she did not review diagnostic testing and prior medical records as she requested. Petitioner is also correct that she reports that applicant denied any prior industrial injuries, when he in fact has had prior industrial claims. The WCJ took this into consideration but found the applicant's credibility as to the physically demanding nature of his job, as substantiated by the petitioner's witness, when combined with Dr. Arroyo's clinical examination which showed some positive

findings (Susan Arroyo, D.C., pages 6 to 9), superseded the statement that there were no prior industrial injuries. Statements made under oath carry more weight than statements found in a medical report. It should be noted that there was no attempt by petitioner to question or impeach the applicant regarding these statements.

The report of Dr. Harrison also conducts a clinical examination of the applicant with similar results as those found in Dr. Arroyo's Report, (See Dr. Harrison, Pages 6 to 8). He also indicated that the applicant reported no prior industrial injuries and requested review of further medical reports. Like Dr. Arroyo, he found an industrially related injury, a report of onset of pain in 2017 as did Dr. Arroyo (Page 2), reported detail job duties (Page 3). He found industrial causation and recommended further medical care (Page 10).

The issue of prior industrial or other injuries would be a relevant inquiry when discussing apportionment of permanent disability, an issue not before the WCJ at trial. The Trial was limited to the core issue of industrial causation.

It should be noted that the issue raised of the misstatement of the Petitioner's Witness, Ms. Janet Snow, pertains to ADJ12471148, and will be addressed there. Similarly, the Medical Reports of Dr. Merman addresses only the head injury, which is alleged in ADJ12471148, and will be addressed there as well.

C. WHETHER THE PQME REPORTS WERE SUFFICIENTLY PERSUASIVE TO REBUT THE FINDING OF INDUSTRIAL CAUSATION

In Dr. Ram's Deposition of 8/24/20, EAMS ID 42118934, page 16 lines 19 to 24, the doctor is indicating there is no industrial causation for the various orthopedic strain/sprain. Yet he elaborates further on pages 16 line 25, to page 17 lines 1 to 9, where he testifies "I am not going to tell the patient was telling lies. If he is saying 'I cannot move the neck, I cannot move the back.' I see there is a problem, so I tell you." Although the language is somewhat unclear, he seems to be saying he cannot say whether the applicant is credible or not, and that this is outside his area of expertise, a point he made in the subsequent supplemental report dated 3/16/22 EAMS ID 42118933. At pages 2 to 3 that he said did not receive the diagnostic tests he had repeatedly requested, nor did he receive any investigative reports he had previously requested, and therefore his opinion had not changed. This reporting appears to suggest that the lack of evidence requested but not provided was a factor in his conclusions, leaving open the possibility that the review of such records could have impacted his ultimate conclusion. The WCJ did not find this evidence

sufficient to overcome the applicant's testimony and the medical reports relied upon to find industrial causation.

Thus, based on the combined evidence of applicant's testimony and his medical evidence cited above, it is the WCJ's position that the applicant discharged his burden of proving industrial causation with a preponderance of the evidence. (L.C. Sec. §3202.5). Overall, the applicant's evidence was more persuasive and with a greater probability of proof when compared to the evidence submitted by petitioner.

IV

RECOMMENDATIONS

Based on the discussion above, and on the evidence cited, this WCJ recommends that the Petitioner's Petition for Reconsideration be hereby denied.

DATED: 2 June 2023

ANA MARIA VELLANOWETH

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE