

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

FEDERICO PEREZ, *Applicant*

vs.

**FIRST BAPTIST CHURCH OF WALNUT CREEK;
WALNUT CREEK CHRISTIAN ACADEMY;
CHURCH MUTUAL INSURANCE COMPANY,
*Adjusted by ATHENS, Defendants***

**Adjudication Numbers: ADJ18803348, ADJ19338915
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
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 discussed below and in the WCJ's Report, which we adopt and incorporate, we will deny reconsideration.

I.

Former Labor Code section 5909¹ 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.

¹ All section references are to the Labor Code, unless otherwise indicated.

(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 1, 2025 and 60 days from the date of transmission is Saturday, May 31, 2025. The next business day that is 60 days from the date of transmission is Monday, June 2, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Monday, June 2, 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 April 1, 2025, and the case was transmitted to the Appeals Board on April 1, 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 April 1, 2025.

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.

II.

A petition for reconsideration must fairly state all of the material evidence relative to the point or points at issue. (Lab. Code, § 5902; Cal. Code Regs., tit. 8, § 10945(a).) The evidentiary statements in a petition for reconsideration must be supported by specific references to the record. (Cal. Code Regs., tit. 8, § 10945(b).) References to testimony must specify the date and time of the hearing and the page numbers in the Minutes where the testimony is found, if available. (Cal. Code Regs., tit. 8, § 10945(b)(1).) References to documentary evidence must specify the exhibit number, and relevant descriptive information including the author of the document, the document date, and page numbers. (Cal. Code Regs., tit. 8, § 10945(b)(2).) References to deposition transcripts must specify the exhibit number, the name of the person deposed, the date of the deposition and the page number. (Cal. Code Regs., tit. 8, § 10945(b)(3).)

Here, as the WCJ pointed out in the Report, defendant misstated the material facts of the case in the petition several times, by mischaracterizing the trial testimony and by referring to documents and a deposition that are not part of the trial record in this matter. (Report, at pp. 2-3.) These misrepresentations of the evidence, and citations to documents not in evidence, are violations of WCAB Rule 10945. (Cal. Code Regs., tit. 8, § 10945(a), (b)(1), (b)(2), (b)(3).)

We therefore find it necessary to admonish defendants and their attorneys.

We admonish defendants First Baptist Church of Walnut Creek and Walnut Creek Christian Academy, their insurance carrier Church Mutual Insurance, and their attorney David Na with David Jane & Associates, for failing to follow the applicable statutes and the Appeals Board's Rules of Practice and Procedure, including but not limited to WCAB Rule 10945. (Lab. Code, § 5902; Cal. Code Regs., tit. 8, § 10945.) Future compliance with the WCAB Rules is expected, and failure to do so will subject the offending party to sanctions. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421.)

Accordingly, defendant's petition is denied.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 30, 2025

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

**FEDERICO PEREZ
LAW OFFICE OF CHRISTINA LOPEZ
DAVID JANE & ASSOCIATES**

MB/ara

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

**REPORT AND RECOMMENDATION ON PETITION
FOR RECONSIDERATION**

INTRODUCTION

Issue:	Disagreement with Findings & Award
Date of Findings and Award:	February 21, 2025
Petitioner:	Defendant
Timeliness of Petition:	Timely
Verification of Petition:	Verified

BACKGROUND INFORMATION

Applicant, Federico Perez, was employed as a maintenance laborer by First Baptist Church of Walnut Creek; Walnut Creek Christian Academy, on September 7, 2023 when he claims to have sustained injury arising out of and in the course of his employment an alleged injury to his right shoulder. The claim was denied and defendants asserted a post termination defense.

The only case that was heard at trial was ADJ18803348 DOI: September 7, 2023 injury to the right shoulder. Defendants mistakenly included a second case number ADJ19338915 which was not a case involved in this trial.

This matter came regularly to trial on February 6, 2025. After trial, I found that that defendants did not uphold their burden of proving the Post Termination Defense and that the applicant did uphold his burden of proving AOE/COE and a period of temporary disability.

DISCUSSION

First and foremost, when filing a Petition for Reconsideration, defendants must comply with CCR 10945 which requires that every Petition for Reconsideration shall fairly state all the material evidence relative to the point or points at issue. A failure to fairly state all the material evidence may be a basis for denying the Petition.

In this case, in several instances, defendants misstate the material facts of this case in their “Statement of Material Facts” section of their Petition concerning the trial testimony and as such, do not fairly state the material evidence in the case and further violate CCR 10945 with respect to some documents referred in their Petition for Reconsideration that are not part of the trial record.

In their “Statement of Material Facts”, under the section entitled “Trial Testimony” Defendant States on page 7, lines 3 through 11 that “Given the ultimate facts of this case and the record as a whole, there is no evidence that the applicant is entitled to temporary total disability (TTD) benefits because AOE/COE has not been established. The applicant did not report his alleged shoulder injury in a timely and proper manner to his employer. The applicant claims the injury occurred on September 7, 2023, but there is no evidence that the injury was reported until after his termination. During his employment, despite multiple opportunities to report the injury, the Applicant failed to

notify his employer or seek medical attention. He only raised the issue after being informed of his termination in December 2023-months after the alleged incident.”

On the same page, lines 17 through 20, defendants again misstates the trial testimony in their material fact section on page 7 lines 17 through 20 stating that “Both pastor Hall and principal Duncan state that the applicant never reported the injury during his employment, nor was it mentioned during the termination meeting. Had the injury been communicated to the employer, they would have taken appropriate action. This further highlights, the Applicant’s failure to report the injury when it occurred.” As discussed below, the above statements do not fairly state the evidence relative to the point or points at issue in violation of CCR 10945.

Review of the Minutes of Hearing and Summary of Evidence indicate that the applicant did testify that he reported the injury the day it occurred to Erica, the secretary at the school where he was working, and she directed him to tell the principal, Mr. Duncan, which he testified that he did on the day of the injury. The Applicant further testified that he had mentioned to the secretary between 8 to 10 times that his shoulder was hurting him between the date of the injury when he initially told her, up until his last day of work on December 16, 2023.

Review of the Minutes of Hearing and Summary of Evidence further indicate that the Applicant and Pastor Hull both testified that at the meeting on December 16, 2023, Pastor Hull started the meeting by telling the Applicant all the days he was absent from work and asked him why he had missed work and the Applicant informed him that it was because he has hurt himself at work. When Mr. Hull asked him why he had not told him prior to that date about the injury, the Applicant told him that he told, Erica, the secretary the day of the injury at the school where he was working that he sustained the injury and she told him to tell the headmaster, Mr. Duncan, which Applicant testified that he did tell Mr. Duncan the day he was injured. (Minutes of Hearing Summary of Evidence page 7; Lines 15 – 20)

Based on the above testimony, Defendant’s statement that the injury was not mentioned in the meeting of December 16, 2023 is not an accurate statement of the material facts and violates CCR 10945 (a).

Further, Defendant’s statement that “Given the ultimate facts of this case and based the record as a whole, that there is no evidence that the applicant is entitled to temporary total disability because AOE/COE is not been established” does not fairly state the material evidence relative to the point or the points at issue and also violated CCR 10945(a). There was testimony from both the Applicant and the Defense witness Mr. Hull that addressed these issues. Further the issues of AOE/COE and temporary disability were the core issues in dispute being decided at trial and that is precisely why testimony and evidence was presented at trial.

It is important to note that Defendants did not present either Erica or Mr. Duncan at trial to testify on the issue of reporting the injury the day it occurred and, therefore, the applicant’s testimony was un rebutted on that issue.

Defendant’s Statement of Material Facts also includes discussion of documents and unsubstantiated statements that was never even presented at trial as evidence, yet is stated as a

material fact of the case which again is in clear violation of CCR 10945. This includes discussion of the Applicant's deposition testimony in the Statement of Material Facts, which was never presented as evidence at trial. It also includes statements written in their brief on page 2 lines 19 through 27 and page 3; lines 1 – 4, which states information that was not provided through testimony nor through evidence at trial.

Lastly in the Argument section of their Petition, in further violation of CCR 10945, Defendants on page 11; Lines 10 – 27 and page 12; lines 1- 7 reference and directly quote a written statement from Mr. Hull, who testified on Defendant's behalf at trial, that was never produced as an Exhibit at trial. This document has never been reviewed by the parties nor by the trier of Fact yet Defendants quote it directly in their Petition for Reconsideration as if it were part of the evidentiary record, which it is not.

Based on the foregoing defendants Petition for Reconsideration should be denied due to their failure to comply with CCR 10945.

Should the Petition for Reconsideration not be denied under CCR10945, below is my discussion and reasons to support my recommendation that the Petition for Reconsideration be denied.

1. Post termination defense Under labor code section 3600(a)(10).

The statute 3600 holds that there is a general rule that no compensation shall be paid after an employee is notified that they are being fired, laid off or otherwise removed from their position unless you meet one of the exceptions. The exceptions include

- 1) The employer had pre-termination notice of the injury.
- 2) pre-termination medical records suggest injury.
- 3) work injury, post termination notice, but pre-effective termination date
- 4) it is a cumulative trauma claim, and the technical onset of date could potentially extend back before the termination date.

In this case, the applicant credibly testified that he had given notice of the September 7, 2023 injury on the same day of the injury to, Erica, the secretary in the school office where he worked that an injury had occurred as well as to the headmaster of the Walnut Creek Christian Academy, Mr. Damon Duncan. In addition to that notice on the date of the injury, the Applicant testified that he frequently would comment to Erica, the same secretary at the school, that he had pain in his shoulder and did so approximately 8 to 10 times between the date of the injury and the last date he worked on December 16, 2023.

In addition to the above, the applicant testified that at the meeting on December 16, 2023 with Mr. Hull and Mr. Duncan, when he was told about his absences from work and Mr. Hull asked him why he had missed work, the applicant told him he had an injury at work and that he was in a lot of pain and the pain was intense.

The applicant testified that when Mr. Hull asked him why he had not told Mr Hull directly about the injury, the applicant stated he did tell Mr. Duncan the headmaster, about the injury as he was directed to do so by the secretary, Erica. After the discussion concerning his absences and the applicant telling Mr. Hull that he had missed work due to a work injury, Mr. Hull terminated the employment of the applicant.

The applicant testified that he had not gone to a doctor on his own after the injury initially because he was waiting for the employer to file a Worker's Compensation claim and a report and to send him to a doctor.

Based on the above credible testimony, the applicant meets the exception that the employer had pre-termination notice of the injury prior to the Applicant being terminated. Per the Applicant's testimony, notice of the injury was provided on the date of injury to the employer as well as at the time of the meeting on December 16, 2023 prior to being terminated.

2. Injury AOE/COE.

An employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (South Coast Framing v. Workers' Comp. Appeals Bd. (Clark) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a) & 3202.5.) The Supreme Court of California has long held that an employee need only show that the "proof of industrial causation is reasonably probable, although not certain or 'convincing.'" (McAllister v. Workmen's Comp. Appeals Bd. (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (Rosas v. Workers' Comp. Appeals Bd. (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313]. In order for an injury to be compensable, an injury must arise out of an in the course of employment.

In this case, the Applicant's testimony that he injured himself on September 7, 2023, when he pulled the cord to start a leaf blowing machine and felt pain in his right shoulder feeling like something was separating, coupled with the panel QME report of Dr. Adam Brooks dated September 5, 2024 provides substantial medical evidence to support work related causation of injury in this case.

Dr. Brooks concludes in his report, Joint Exhibit 101 on page 7 that:

"The applicant reported on September 7, 2023, while attempting to start a machine, Mr. Perez felt something cracked in his shoulder, resulting in immediate increase in pain and a burning sensation."

Dr. Brook's further reported that:

"Mr. Perez reported the injury to his employer, specifically to principal Dillan sic. Duncan on September 7, 2023 and that he was not offered any medical treatment. Mr. Perez continued working with increased pain until his employment was terminated on December 15, 2023."

Regarding causation of injury, Dr. Brooks finds on page 14 of his report:

Causation: “In reviewing the patient’s history and medical records and examination today, it appears that the applicant did sustain an injury to the right shoulder as a result of the industrial injury of September 7, 2023, with two months of antecedent and a repetitive stress injury prior to this.”

Dr. Brooks concluded in his report that the applicant is not yet permanent and stationary and that he needs treatment, including an MRI to the right shoulder as well as other treatment modalities addressed below.

Based on the above, the Applicant’s testimony about the mechanism of injury and the Panel QME report of Dr. Brooks provide substantial evidence supporting an injury arising out of and in the course of employment.

3. Temporary Disability.

The report of the Panel QME Dr. Brooks, Joint Exhibit 101, and the treatment reports of Dr. Lance Miller, applicant’s Exhibits 1 through 5, provide substantial medical evidence for a finding of temporary total disability to be paid from December 16, 2023 until the present and continuing.

Dr. Brooks concludes in his September 5, 2020 report on page 15 that the applicant cannot perform his customary job duties and is precluded from use of his right upper extremity. Under the section “impression” Dr. Brooks concludes that the applicant has right shoulder pain, likely, acute on chronic rotator cuff tear versus strain and biceps, tendinitis and impingement.

Regarding medical treatment, he finds that it should be provided on an industrial basis, which could improve his medical condition, including an MRI of the right shoulder, followed by a consultation with a shoulder specialist for consideration of treatment, which may include physical therapy, acupuncture, inflammatory medication, cortisone, injections, or surgery.

In addition to Dr. Brooks’s Panel QME report, the treating physician Dr. Lance Miller concludes in his treatment reports that the applicant was in need of medical treatment and was to remain off work in the most recent report through November 1, 2024. (Applicant’s Exhibit 5) In his treatment reports an RFA was prepared dated September 4, 2024, requesting an MRI, 12 sessions of physical therapy as well as stress management. (Applicant’s Exhibit 3)

Based on the foregoing, the medical record supports temporary total disability from the first day off work on December 16, 2023 up until the present and continuing.

4. Earnings weekly rate:

The record needs to be further developed on the issue of the proper temporary disability rate as there was no documentation provided to establish the earnings rate and the testimony provided at trial was not sufficient to determine the accurate earnings rate.

The applicant provided testimony of only approximate earnings and his yearly salary, but when you divide the yearly salary it does not add up of the weekly earning testified to. The employer witness, Mr. Hull, gave an approximate number as well but testified he did not know. (Minutes of Hearing Summary of Evidence; page 8; lines 1 – 2)

The parties were ordered to file earnings information within 10 days of service of this Findings and Award and to meet and confer on this issue to resolve it informally within 5 days thereafter.

5. Applicant's Exhibit 6 marked for identification, the personnel file from the employer

There were no records filed 20 days before trial as an Exhibit, as ordered by the court concerning a personnel file. Further, an Order Quashing the Subpoena Duces Tecum without prejudice, for the records from the employer was issued on May 6, 2024, in response to a Petition filed by Defendants, and the parties were ordered to meet and confer over this issue and any other outstanding discovery issues. No evidence was presented at trial addressing this issue and as there are no documents being provided to be admitted into evidence.

Based on the above, Applicant's exhibit 6 was not admitted into evidence.

Based on the forgoing I recommend that the Petition for Reconsideration be denied.

Date: April 1, 2025

Sarah B. Carr
Workers' Compensation Judge