

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

3
4 **Case No. ADJ9953749**
5 **(Santa Barbara District Office)**

6 **TSHA JOHNSON,**

7 *Applicant,*

8 **vs.**

9 **KNOWLEDGE UNIVERSE/KINDERCARE;**
10 **ARCH INSURANCE COMPANY, administered**
11 **by SEDGWICK CLAIMS MANAGEMENT,**

12 *Defendants.*

13 **OPINION AND ORDER**
14 **DENYING PETITION FOR**
15 **RECONSIDERATION**

16 We have considered the allegations of the Petition for Reconsideration and the contents of the
17 report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our
18 review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we
19 will deny reconsideration.

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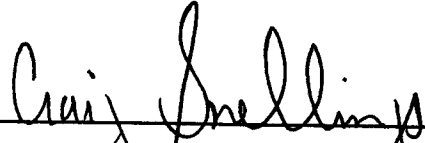
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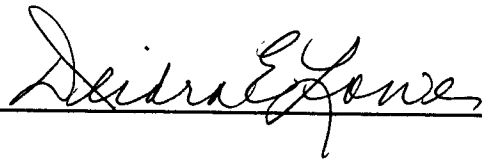
1 For the foregoing reasons,

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

3 **WORKERS' COMPENSATION APPEALS BOARD**

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6 **CRAIG SNELLINGS**

7 **I CONCUR,**

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11 **DEIDRA E. LOWE**



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14 **MARGUERITE SWEENEY**

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16 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

17
18 **MAY 22 2019**

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

21 **TSHA JOHNSON**
22 **BAGBY, GAJDOS & ZACHARY**
23 **MICHAEL BURGIS & ASSOCIATES, PC**

24
25
26
27 **ebc**

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NO. ADJ9953749

TSHA JOHNSON

v.

KNOWLEDGE
UNIVERSE/KINDER CARE; ARCH
INSURANCE COMPANY, administered
by SEDGWICK CMS,

Workers' Compensation
Administrative Law Judge: Tracy L. Hughes

Date: April 11, 2019

**REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

Applicant, by and through her attorney of record, filed a timely, verified Petition for Reconsideration.

STATEMENT OF FACTS

On July 25, 2013 the Applicant sustained an injury to her low back and right ankle while employed by the Defendant. The Applicant's case resolved by Stipulations with Request for Award and Award on May 13, 2015. (See Exhibit B) In October 2017 Applicant retained Michael Burgis and Associates to represent her in a Workers' Compensation Case. In December 2017 Applicant's Attorney served the Defendant a representation letter with enclosures in which included an Application for Adjudication of Claim, Employee's Claim for Workers' Compensation Benefits, Venue Authorization and 4906(g) letter. (See Exhibit 5) Although the enclosures mentioned in Applicant's Exhibit 5 were not submitted into evidence, the court has

reviewed Defendant's Answer to Application for Adjudication of Claim which acknowledged receipt of Applicant's Application for Adjudication of Claim dated October 30, 2017. (See Exhibit 3) The court acknowledges that the Defendant had receipt of the Applicant's Application for Adjudication of Claim prior to February 27, 2018 when the Defendant filed their Answer to Application of Adjudication of Claim with the WCAB. (See Exhibit 3)

On March 28, 2018, prior to the five (5) year period to file a Petition for New and Further ran, Dr. Abrams served a report indicating increased disability on Defendant. It is specifically noted Dr. Abrams' report indicating additional disability was not filed with the WCAB prior to July 25, 2018. The five (5) year period in which Applicant had to file a Petition to Re-Open for New and Further expired on July 25, 2018. The Applicant filed a Petition to Re-Open for New and Further disability on July 31, 2018. The Petition to Re-Open filed with the WCAB on July 31, 2018 was dated January 4, 2018.

The matter proceeded to trial on whether the Petition to Re-Open was timely filed. The matter was subsequently vacated to develop the record. The case was then re-submitted. A Findings of Fact and Opinion on Decision was served on the parties on March 15, 2019. It is from the Findings of Fact that found the Applicant's Petition to Re-Open for New and Further Disability was untimely filed that the Applicant now seeks reconsideration.

CONTENTIONS

A. The WCJ erred in not finding Defendant's answer, filed within the five year period, sufficient to constitute a Petition to Re-Open

Labor Code section 5410 states in relevant part, "Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation within five years

after the date of injury upon the grounds that the original injury has caused new and further disability. The jurisdiction of the Appeals Board in these cases shall be a continuing jurisdiction within this time period....” Likewise, Labor Code section 5804 states in relevant part, “No award compensation shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition by a party in interest filed within such five years and any counter petition seeking other relief filed by the adverse party within thirty days of the original petition raising issues in addition to those raised by such original petition....”

Applicant’s counsel contends the Defendant’s Answer to Application filed with the Board, relieved the Applicant of her duty to file a Petition for New and Further Disability or some other document to establish jurisdiction with the WCAB. The Applicant, in her Petition for Reconsideration cites several cases which find that various documents filed by the Applicant, or on the Applicant’s behalf by a physician can constitute a Petition to Re-Open for New and Further Disability.

The court has reviewed the cases cited by the Applicant in which several documents filed by the Applicant, or on the Applicant’s behalf have been construed as a Petition to Re-Open for New and Further Disability. In *Bekins Moving and Storage Co. v. WCAB* (1982) 137 Cal. App. 3d 665, 671 the court concluded that a RB-5 filed by the Applicant constituted a timely Petition to Re-Open under Labor Code sections 5803 and 5804. In *Beida v. WCAB* (1968) 263 Cal. App. 2d 204, 210 the court found that a letter from Applicant’s treating physician, served on the WCAB, that expressed concern the Applicant’s prior Award was inadequate was construed to constitute a Petition to Re-Open for “good cause” under Labor Code section 5803. The court noted that the letter from the doctor was served on the board with the five (5) year period to Re-Open his case.

Further, the Applicant cited *Zurich Insurance Company v. WCAB* (1973) 9 Cal. 3d 848, 853 where a Petition to Re-Open for New and Further had not be filed, however, the court considered a referees Notice to Increase the Award, which occurred within the five (5) year period should be treated as a Petition to Re-open. The Applicant also cited *CMIS/Springfield Insurance Company, Super Value Market v. Workers' Compensation Appeals Board* (2006) 71 C.C.C. 274, where a medical report of the Applicant's treating physician, filed with the WCAB within five (5) year period could be construed as a Petition to Re-Open. In *CMIS/Springfield* the Applicant's treating psychologist's report, which indicated increased permanent disability, was filed within the five (5) year statute to petition for new and further disability.

Finally, the Applicant appeared to rely on the case of *Southern California Edison Company/ Edison International v. Workers' Compensation Appeals Board* (2001) 66 C.C.C. 1433. In that case the court found that a DWC-1 Notice of Employee Claim Form served as a Petition to Re-Open for New and Further Disability if filed with the WCAB within the five (5) year statutory period.

The undersigned found all cases cited by the Applicant were distinguishable to the case herein. In all cases cited by the Applicant, either a physician reporting on behalf of the Applicant's behalf, or the applicant filed a document with WCAB which was construed as a Petition to Re-Open. The doctor's reports, filed with the board within the five (5) year period, were construed as a Petition to Re-Open. Likewise a form RB-5 filed by the Applicant within the five (5) year statutory period was considered a Petition to Re-Open. A Notice on Intention to Increase an Award of Disability issued by a WCAB referee within the five (5) year statutory period was again considered to be a Petition to Re-Open. Finally, a DWC-I Employee Claim Form filed within the five (5) year period was considered to be a Petition to Re-Open.

However, as mentioned previously all the above referenced cases are distinguishable from the case herein. The Applicant in this case failed to file anything with the board within the statutory five (5) year period. Had the Applicant filed the Application for Adjudication of Claim, which was signed by the Applicant on October 30, 2017, with the WCAB prior to July 25, 2018 the undersigned would have found that sufficient to constitute a Petition to Re-Open as permanent disability was checked as an issue. (See Exhibit 2) Likewise, had the Applicant filed Dr. Abrams' March 28, 2018 report with the WCAB, the undersigned would have found that constituted a Petition to Re-Open for New and Further Disability as Dr. Abrams indicated the Applicant had an increased level of impairment prior to July 25, 2018. (See Exhibit 4)

Finally, had the Applicant filed the Employee Claim Form DWC-1 with the WCAB prior to the five (5) year statutory period running, based on the *Southern California Edison Co. / Edison International*, the undersigned would have found that constituted a Petition to Re-Open. However, the Applicant failed to file any document with the WCAB prior to the five (5) year statutory period running on July 25, 2018.

The Applicant contends the court should consider the Defendant's Answer to Application as a Petition to Re-Open for New and Further. It is noted by the undersigned that Defendant's Answer to Application was the only document filed with the WCAB subsequent to the Stipulations with Request for Award and prior to the July 25, 2018. The undersigned did not believe it would be equitable to penalize the Defendant for filing an Answer, and serving it upon the WCAB to establish jurisdiction when Applicant's counsel did nothing to preserve the Applicant's right to re-open her case.

The Defendant was well aware the Applicant was claiming new and further disability. Dr. Abrams' March 28, 2018 report, served on Defendant, indicated increased permanent

impairment. A fair reading of the Applicant's Application for Adjudication of Claim as well as Defendant's Answer to Application essentially removed any doubt the Defendant knew the Applicant had or was alleging increased disability.

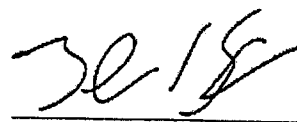
Had the Defendant failed to file their Answer to Application, there would have been no documentation filed with the WCAB after issuance of Award in May 2015 until the statutory five (5) year period to file for new and further disability had run.

In light of the case law referenced by Applicant in which either the Applicant or a medical provider reporting on behalf of the Applicant filed a document with the WCAB, the court did not find the Defendant's Answer to Application constituted a Petition to Re-Open for New and Further Disability.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Date: 04/16/2019



TRACY L. HUGHES
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

Served on all parties as shown on
The Proof of Service attached.

On: 04/16/2019 By: *T. Calente*