WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CHARLES PURCELL, *Applicant*

vs.

PROCTOR & GAMBLE; OLD REPUBLIC INSURANCE COMPANY, adjusted by SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ15987800
Oxnard District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant has petitioned for reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) in this matter on March 20, 2024. In that decision, the WCJ found that the applicant sustained industrial injury arising out of and in the course of employment on May 31, 2021 to his neck, causing permanent disability of 92%, and awarded temporary total disability, permanent disability, future medical care, and attorney fees of 12% of the permanent disability and life pension awarded.

Petitioner contends that the WCJ erred in failing to find that applicant is permanently and totally disabled without apportionment based upon the existing evidence at trial. Petitioner requests that if reconsideration is granted, that the attorney fee be adjusted to provide for 15% of the benefits awarded applicant instead of 12% based upon the responsibility, care, time, results, and expertise provided.

Defendant filed an answer to the petition.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending denial of the Petition.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is

deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

Applicant filed an application for adjudication alleging industrial injury to his neck and nervous system arising out of and in the course of his employment with defendant on May 31, 2021.

On December 27, 2023, the matter was heard at which time injury to the neck was admitted, and the issues to be decided were temporary disability as well as any overpayment of same, the permanent and stationary date, permanent disability, apportionment, the need for further medical treatment, liability for self-procured medical treatment, attorney fees, and the application of Labor Code section 4660.1(a). Exhibits were admitted and the applicant testified at trial. The parties were provided time to submit optional briefs, and the matter was to stand submitted as of January 19, 2024 (Minutes of Hearing/Summary of Evidence, December 27, 2023).

On February 5, 2024, after receipt of post-trial briefs from the parties, the WCJ issued an Order Striking Submission and Order for Development of the Record. The WCJ stated as follows:

> **IT APPEARING THAT** the report of Dr. Narvi[sic] states that additional reporting in different specialties is necessary to provide ratings for sexual disfunction[sic], fecal incontinence and urinary incontinence and insufficient evidence supports a decision in this case;
>
> **GOOD CAUSE APPEARING;**
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> **IT IS ORDERED THAT** submission in this case is stricken.
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> **IT IS FURTHER ORDERED THAT** the record in this be developed pursuant to the McDuffie case [(en banc, 2002) 67 CCC 138.]
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> **IT IS FURTHER ORDERED THAT** as a first step in the McDuffie process, the parties meet and confer by telephone and/or email on the subject of an Agreed Medical Evaluator (AME) or Evaluators in neurology and/or urology to complete the record.

IT IS FURTHER ORDERED THAT as a second step in the McDuffie process, the parties shall appear by telephone at a status conference prepared to discuss the progress to AME's and alternatives should the parties not agree to an AME or AME's.

IT IS FURTHER ORDERED THAT the matter be set for a status conference to be set by separate notice.

The Order was served on the parties on February 6, 2024, and a status conference was set for February 29, 2024.

On February 26, 2024, defendant filed a petition for removal of the WCJ's February 5, 2024 Order alleging significant prejudice and irreparable harm, and further, that the WCJ "cannot develop the record to bail out applicant's attorney's conscious decision not to present substantial evidence to support disability related to incontinence or sexual dysfunction." (Petition for Removal, February 6, 2024, pg. 9, lines 16-18).

On February 29, 2024, the WCJ issued an Order Rescinding [the] Order to Develop the Record and Order Resubmitting the Case for Decision. This Order stated as follows:

IT APPEARING THAT both sides agreed at the Status Conference of 29 February 2024 that they do not want to develop the record and that both sides want a decision based on the current record;

GOOD CAUSE APPEARING;

IT IS ORDERED THAT the Order to Develop the Record dated 05 February 2024 is rescinded.

IT IS FURTHER ORDERED THAT the matter stand submitted as of 29 February 2024.

On March 20, 2024, the WCJ issued and served his Findings and Award, in which he found, in relevant part, that applicant sustained industrial injury to his neck, awarding temporary disability, permanent disability of 92%, further medical treatment, and attorney fees of 12%. The Opinion on Decision indicated that the disability was based upon the reporting and deposition of Steven Narvy, M.D., the orthopedic QME in this case.

On April 9, 2024, the applicant filed a Petition for Reconsideration alleging that the WCJ erred in failing to find the applicant 100% permanently totally disabled based upon the existing medical evidence of applicant's treating physician, Ha Nguyen, M.D., the panel Qualified Medical

Evaluator (QME) Steven Narvy, M.D., and both the vocational reporting of Steve Ramirez and applicant's testimony at trial.

On April 26, 2024, the WCJ issued a Report and Recommendation (Report) recommending denial of the Petition. In his Report, the WCJ stated, in pertinent part:

> The injury occurred in a single vehicle accident when the tire of the vehicle he was driving struck a soft dirt patch causing the vehicle to roll over. After the injury occurred, he was first transported to a hospital in Utah before being flown to a specialized hospital in Denver, Colorado.
> Initially, from the time of injury, the applicant was a quadriplegic but through surgery and physical therapy he was able to regain the use of his arms and legs, albeit with limitations. The applicant then returned home to California and obtained follow-up care with Dr. Halloran and went to a PQME for evaluation. The parties selected Dr. Narvi through the panel process and Dr. Narvi issued a report which rates as follows:
>
> 15.04.02.00 – 50 – [1.4] 70 – 110C – 61 – 71
> 15.04.03.00 – 39 – [1.4] 55 – 110C – 46 – 56
> 15.01.01.00 – 28 [1.4] 39 – 110C 31 – 39
> 71 C 56 C 39 = 92%
>
> In addition, Dr. Narvi also stated that the applicant, "would not be able to return to work in the open labor market." However, Dr. Narvi notes in his report that his report is incomplete. He notes that the applicant has problems with both urinary and fecal incontinence as well as problems with sexual dysfunction. He defers these issues to specialists in the appropriate fields.

With respect to the vocational reporting of Steve Ramirez, the WCJ quotes the Vocational Evaluator (VE) and states:

> While it would be helpful from a vocational perspective to have detailed work restrictions, no specific work restrictions were provided by Dr. Narvy or any of the other medical professionals. However, based on Dr. Narvy's diagnoses of a cervical spine impairment, corticospinal tract impairment of the upper extremities, and a corticospinal tract impairment of the lower extremities with whole person impairment ratings of 28%, 59%, and 39% respectively, it is reasonable to conclude Mr. Purcell's spinal cord injury and deficits are very significant.
>
> This demonstrates that Mr. Ramirez is inferring or speculating that impairments that high lead to the conclusion that the applicant is totally permanently disabled.
> In addition to that, Mr. Ramirez devotes a section of his report to the applicant's amenability to vocational rehabilitation and concludes that applicant is amenable.
> However, he concludes that applicant is totally permanently disabled anyway based on the incontinence.
>
> (Report, pg. 4).

As to the issue of the stipulation of the parties to submit the matter for decision without further development of the record, the WCJ notes:

> The first issue to discuss is an issue not addressed by the Petition for Reconsideration. In this case when asked to develop the record by obtaining medical reports to obtain ratings for the urinary and fecal incontinence and for sexual dysfunction, the parties chose to stipulate not to develop the record and requested that the undersigned resubmit the case on the current record. This appears to be a binding stipulation, which means that the undersigned was then required to proceed under the burden of proof rule in Labor Code § 3202.5 without developing the record as recommended by the Panel QME, Dr. Narvi. Thus, the undersigned was forced to choose between 92 % disability and 100% disability with each side seeming confident in the evidence supporting their position. Both sides were against developing the record when it seemed plain to the undersigned that the truth lies somewhere in-between.
>
> ….
>
> In sum, the medical record in this case is incomplete but the parties have stipulated not to develop the record. Furthermore, the vocational record in this case is not persuasive of the applicant's position and does not follow the requirements of the Dahl and LeBoeuf cases. Consequently, following the burden of proof under Labor Code § 3202.5, the undersigned found 92% disability on this record. The applicant's attorney is consistent and is not requesting development of the record in his Petition for Reconsideration. Unless the stipulation of the attorneys is found to be unenforceable, the undersigned recommends that the Petition for Reconsideration be denied (Report, pp.6-7).

II.

We highlight the following legal principles that may be relevant to our review of this matter:

A stipulation between the parties obviates the need to provide an opportunity to be heard or to create a record. (Cal. Code Regs., tit. 8, § 10835.)

Stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. (*County of Sacramento v. Workers' Comp. Appeals Bd.* (*Weatherall*) (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1] (*Weatherall*).) As defined in *Weatherall*, "A stipulation is 'An agreement between opposing counsel . . . ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,' (Ballentine, Law Dict. (1930) p. 1235, col. 2) and serves 'to obviate need

for proof or to narrow range of litigable issues' (Black's Law Dict. (6th ed. 1990) p. 1415, col. 1) in a legal proceeding." (*Weatherall*, *supra,* at p. 1119.)

Section 5702 states:

> The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. The appeals board may thereupon make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.

Labor Code section 5702 provides that the WCAB "may" make findings based upon the parties' stipulations. However, a WCJ is not required to accept the parties' stipulations, and may make further inquiry into the matter "to enable it to determine the matter in controversy." (Lab. Code, § 5702; see also *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1119 [65 Cal.Comp.Cases 1]; *Turner Gas Co. v. Workers' Comp. Appeals Bd. (Kinney)* (1975) 47 Cal.App.3d 286 [40 Cal.Comp.Cases 253].)

Thus, the Appeals Board has the discretion under section 5702 to reject factual stipulations. (See, *P.M & Associates v. Workers' Comp. Appeals Bd. (Wagner)* 65 Cal.Comp.Cases 878, 882 (writ den.); *Frankfort General Ins. Co. v. Pillsbury* (1916) 173 Cal. 56, 58-59 [159 P. 150] [decided under predecessor statute].) However, the Appeals Board should not reject a stipulation clarifying the issues in controversy absent good cause. (See *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 790-791 [52 Cal.Comp.Cases 419]; *Weatherall, supra,* p. 1119; See *Bailey v. Taaffe* (1866) 29 Cal. 422, 424 [exercise of discretion should not be capricious].)

In this regard we must review the stipulations of the parties against our constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

With respect to applicant's counsel's request for attorney fees of 15% versus 12%, the record indicates that while the standard fee disclosure statement (DWC-3 form) filed by applicant's counsel on March 31, 2022 states that "Attorney's fees normally range from 9% to 12% of the benefits awarded," additional language was also added to state that "Attorney's fees in the amount of 15% of the benefits awarded are customarily approved by the Oxnard WCAB, and 15% will be requested in your case." (Fee Disclosure Statement, dated March 23, 2022).

The Appeals Board has exclusive jurisdiction over fees to be allowed or paid to applicants' attorneys. (*Vierra v. Workers' Comp. Appeals Bd*. (*Vierra*) (2007) 154 Cal.App.4th 1142, 1149 [72 Cal.Comp.Cases 1128]; Cal. Code Regs., tit. 8, § 10840.) In calculating attorney fees, our basic statutory command is that the fees awarded must be "reasonable." (Lab. Code, §§ 4903, 4906(a), (d).) Pursuant to Labor Code section 4906, in determining what constitutes a "reasonable" attorney fee, the Appeals Board must consider four factors: 1) the responsibility assumed by the attorney; 2) the care exercised by the attorney; 3) the time expended by the attorney; and 4) the results obtained by the attorney. (Lab. Code, § 4906(d); see also Cal. Code Regs., tit. 8, § 10844.)

Additionally, although not binding, WCAB/DIR Policy & Procedure Manual, section 1.140 also provides guidance in our analysis of this matter. Under section 1.140, we may also consider the complexity of the issues, whether the case involved highly disputed factual issues, and whether detailed investigation, interrogation of prospective witnesses, and/or participation in lengthy proceedings are involved.

III.

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties,

and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id*. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).)

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924] ["The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims."]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

Here, it is unclear from our preliminary review whether the existing record is sufficient to support the decision, order, award, and legal conclusions of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above.

IV.

Finally, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial*

Acci. Com. (1958) 50 Cal. 2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [62 Cal.Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra,* at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code section 5901 states in relevant part that:

> "No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …"

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

V.

Accordingly, we grant applicant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Award issued on March 20, 2024 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 7, 2024

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

CHARLES PURCELL
LAW OFFICES OF DONALD A. COCQUYT
GILSON DAUB

LAS/abs

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