

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

CHERYL THERIAULT, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

**Adjudication Number: ADJ10411402
Sacramento District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact issued by the workers' compensation administrative law judge (WCJ) on March 11, 2024, whereby the WCJ found that applicant sustained injury arising out of and in the course of employment to her brain, head, cervical spine, thoracic spine, lumbar spine, right wrist and right hip while employed by Home Depot on June 25, 2015. The WCJ also found that, pursuant to a Stipulations and Award between applicant and Home Depot, applicant's weekly earnings at the time of injury were \$388.83. In the Opinion on Decision, the WCJ extended that stipulation to applicant's petition for benefits from the Subsequent Injuries Benefits Trust Fund (SIBTF).

Applicant contends that the WCJ erroneously bound her to the stipulated earnings in the SIBTF action, as SIBTF was not a party to the stipulation. Applicant also requests that her Petition for Reconsideration be granted, and the matter returned to the trial level, if additional evidence of her earnings capacity is necessary.

We received an answer from SIBTF. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration.

We have considered the allegations in the Petition for Reconsideration, the answer, and the contents of the WCJ's Report with respect thereto.

Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting applicant's 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.

The known background of the case is as follows:

On June 15, 2020, applicant settled her case with her employer, Home Depot, via Stipulations and Award, whereby the parties stipulated to industrial injury and permanent disability (PD) of 51%. (Def. Exh. A.) According to the Stipulations and Award, applicant's temporary total disability (TD) and permanent disability (PD) rate was \$259.22 per week. Applicant and Home Depot also stipulated to the same TD and PD rate based upon applicant's weekly earnings of \$388.83 in a Pretrial Conference Statement dated May 12, 2021.

On June 14, 2021, applicant filed a petition for SIBTF benefits for the same injuries. (Def. Exh. C.) Applicant and SIBTF were unable to agree upon applicant's weekly earnings and thus set the issue for trial on March 4, 2024.

At trial, applicant claimed that her weekly earnings were \$1,651.00 based upon her earnings capacity, versus \$388.83 as claimed by SIBTF. Applicant submitted one exhibit in support of her claim, namely, a document titled "Social Security Earnings," reflecting her earnings for the years 1981 through 2022. (App. Exh. 1.) Applicant also testified on her own behalf.

According to the WCJ's Minutes of Hearing and Summary of Evidence, applicant testified that she was hired by Home Depot in approximately May 2015 as an "outside sales agent." (MOH/SOE, March 4, 2024, p. 3.) When the injury occurred on June 25, 2015, applicant was less than six weeks into an eight- to twelve-week training period, earning minimum wage. Applicant stated that it was her "expectation" that, after her training period concluded, she would be making a minimum commission of \$75,000 per year, which was determined based upon a "percentage of sales." (*Id.* at pp. 3-4.) Applicant planned to work for Home Depot for approximately one year, after which time she planned to begin working with her sister-in-law, who owned an interior design business. Applicant stated that, had she gone to work with her sister-in-law, she expected to have made approximately \$95,000 to \$115,000 per year. (*Id.* at p. 3.)

According to applicant's "Social Security Earnings" form, applicant earned \$179,385.00 between 2001 and 2005 while working "outside sales" or "international sales" for DHL. (App.

Exh. 1; MOH/SOE, March 4, 2024, p. 4.) Between 2006 and 2011, applicant earned an average of \$88,002.00 working for either UPS, DHL, or CEVA, and in 2012, she earned \$57,738.00. Applicant made \$18,306.00 in 2013 and zero dollars in 2014, when she took time off of work to care for an ill child. (App. Exh. 1; MOH/SOE, March 4, 2024, p. 4.)

On March 11, 2024, the WCJ issued the disputed decision, finding that applicant's weekly earnings were \$388.83 based upon her stipulation in her case in chief against Home Depot. The WCJ further found that applicant failed to provide any legal or evidentiary basis to free her from the stipulated earnings in her subsequent claim against SIBTF.

II.

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.)

Further, 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 WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a 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.)

Here, it is unclear from our preliminary review of the evidence and the existing record as to whether the legal issues have been properly identified and addressed; whether the existing record is sufficient to support the decision, order, and legal conclusions of the WCJ; and/or whether further development of the record may be necessary. Thus, we will 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.

III.

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.

IV.

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.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the March 11, 2024 Findings of Fact 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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 28, 2024

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

**CHERYL THERIAULT
EASON & TAMBORNINI
OFFICE OF THE DIRECTOR – LEGAL UNIT**

AH/cs

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