WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE ESPINOZA, *Applicant*

vs.

ARIANA AUTO BODY;
NATIONAL CASUALTY COMPANY,
administered by ILLINOIS MIDWEST, *Defendants*

Adjudication Number: ADJ16740659

Oakland District Office

OPINION AND ORDER
DISMISSING PETITION
FOR RECONSIDERATION

Defendant seeks reconsideration of the "Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration" (Decision) issued on August 13, 2024, by the Appeals Board.

The Decision rescinded the May 28, 2024 Findings and Award issued by the workers' compensation administrative law judge (WCJ) and returned the matter to the trial level for further proceedings.

Defendant argues that the Appeals Board erred because the findings of the qualified medical evaluator (QME) constituted substantial medical evidence on the issues of permanent and stationary status and injury to the lumbar spine.

We have received an Answer from applicant.

We have considered the allegations of the Petition for Reconsideration and the Answer. Based on our review of the record, and for the reasons stated in the August 13, 2024 Decision, which are adopted and incorporated herein, we will dismiss defendant's Petition for Reconsideration.

I.

Former Labor Code section 5909 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, Labor Code 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.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code 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 September 6, 2024, and 60 days from the date of transmission is November 5, 2024. This decision is issued by or on November 5, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, since the Petition for Reconsideration was filed in response to our Decision, there is no Report and Recommendation by a WCJ. However, a notice of transmission was served by the district office on September 6, 2024, which is the same day as the transmission of the case to the Appeals Board on September 6, 2024. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1), and consequently they had actual notice as to the commencement of the 60-day period on September 6, 2024.

II.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) 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. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id*. at p. 1075 ["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"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, we rescinded the May 28, 2024 Findings and Award (F&A) by the WCJ, and procedurally, the effect of the recission is that the F&A is no longer legally enforceable. The basis of our Decision was that the record was not sufficient and required further development. Thus, our Decision solely resolved an intermediate procedural or evidentiary issue or issues and did not determine any substantive right or liability, or any threshold issue. Accordingly, it is not a "final" decision, and the Petition for Reconsideration will be dismissed.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70

Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

We observe that Labor Code section 4064(a) provides that the employer shall be liable for the cost of each reasonable and necessary comprehensive medical-legal evaluation. Thus, a defendant is generally not irreparably harmed by the cost of potential additional medical-legal discovery as defendants are responsible for such costs under the Labor Code. (*Lopez v. Fresno Unified School District* 2018 Cal. Wrk. Comp. P.D. LEXIS 127.) That is, the costs associated with potential additional discovery do not amount to irreparable harm, especially where the Labor Code explicitly thrusts the liability of costs for medical-legal discovery upon the defendant.

While defendant seeks to reinstate the F&A as it previously existed, defendant is not prevented from seeking the same result based on the new evidentiary record. Thus, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied, or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to defendant.

Although we are dismissing the Petition for Reconsideration, as to the merits of defendant's Petition, we would have denied it as one for removal as set forth in our August 13, 2024 Decision.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the August 13, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 22, 2024

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

JOSE ESPINOZA
LAW OFFICES OF JOHN E. HILL
D'ANDRE LAW LLP

EDL/mc

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

OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the "Findings and Award and Opinion on Decision" (F&A) issued on May 28, 2024, by the workers' compensation administrative law judge (WCJ).

The WCJ found, in pertinent part, that applicant sustained industrial injury to his left knee and left ankle, but did not sustain industrial injury to his lumbar spine. The WCJ further found that applicant's injury became permanent and stationary on March 21, 2023, and awarded 12% permanent partial disability benefits.

Applicant argues that the WCJ erred because the finding of permanent and stationary status is not based upon substantial medical evidence. Applicant further alleges that the finding of non-industrial injury to the lumbar spine is not supported by substantial medical evidence.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, and the contents of the WCJ's Report. Based on our review of the record, we will grant reconsideration, and as our Decision After Reconsideration, we will rescind the WCJ's May 28, 2024 F&A and return this matter to the trial level for further proceedings consistent with this decision.

FACTS

Applicant, while working as an auto detailer, sustained an admitted industrial injury on September 13, 2022, to his left knee and left ankle. (Minutes of Hearing and Summary of Evidence, March 18, 2024, p. 2, lines 3-5.) Applicant claimed to have sustained further injury to the lumbar spine. (*Ibid*.)

Applicant was examined by Qualified Medical Evaluator (QME) James Stark, M.D., who issued one report in evidence and was deposed. (Defendant's Exhibits A and B.) Dr. Stark took the following history of injury:

> On September 13, 2022, Mr. Espinoza was polishing the hood of a car. He struck his left knee on a bar and felt immediate pain. He reported that he moved suddenly and thereby injured not only his knee, but also his lower back and left ankle.

(Defendant's Exhibit A, Report of QME James Stark, M.D., March 22, 2023, p. 2.)

Dr. Stark did not provide a permanent and stationary opinion in his report, but he did provide permanent disability ratings. (See generally, *id*.) He opined on applicant's condition as follows:

> Despite the 6 months that have elapsed since the injury, he has not improved and reports that he is actually worsening . His treating physician, Dr. Retodo, has recommended additional physical therapy to all 3 anatomical areas, anti-inflammatory medication and gabapentin.
>
> Before going further with this discussion, it is suggested by this examiner that this case be settled through whatever administrative means are necessary. I do not anticipate subjective improvement in the foreseeable future based upon the history and fear iatrogenic injury, if there are considerations for invasive treatment.

(*Id*. at p. 6.)

Applicant was diagnosed with:

> 1. Left knee contusion- 09/13/2022.
> 2. Left ankle sprain- 09/13/2022 .
> 3. Lower back pain-chronic with probable radiculopathy secondary to multilevel degenerative disk and joint disease, lumbar spinal stenosis and L5-S1 intervertebral disk herniation (chronic).
> 4. Psychological and/or motivational factors affecting physical examination.

(*Id*. at p. 6.)

In deposition, Dr. Stark commented upon causation of injury to the low back as follows:

> Q. Okay. So, now, in light of the medical care that Mr. Espinoza had very early in this case, would you agree that his back was injured?
>
> A. I don't know that. If he's taken at his word that his back somehow became asymptomatic after years of problems, the answer is yes. But we have that four-year gap without records and no way of answering that question with substantial medical evidence.

(Defendant's Exhibit B, Deposition of James Stark, M.D., August 28, 2023, p. 24, lines 8-17.)

Applicant sought treatment through a functional restoration program. In deposition, Dr. Stark testified to applicant's permanent and stationary date as follows:

> Q. . . . [Y]ou are indicating that it's a -- it could help Mr. Espinoza if he were to attend the Feinberg Functional Restoration Program, would you consider changing your permanent and stationary date?
>
> A. By definition, yes. If he's still undergoing diagnostic testing and treatment, he's not permanent and stationary.
>
> MR. KHARSHAN: Dr. Stark, I –
>
> THE WITNESS: In retrospect, we can answer that question better after -- after that is done, whether it was actually permanent and stationary now. But I think, by definition, because things are slowly progressing, he's not permanent and stationary.

(Defendant's Exhibit B, Deposition of James Stark, M.D., August 28, 2023, p. 15, lines 1-15.)

Applicant provided the opinions of multiple treating doctors. In particular, Dr. Wedemeyer provided the following analysis of Dr. Stark's testimony:

> I reviewed QME Dr. Starks deposition taken on 8/28/23. He was asked about participation in a functional restoration program. He would recommend the program but with some reservation. Dr. Stark had indicated in his report that psychological and/or motivational factors were affecting his presentation. He indicated that his depression might answer some of the questions regarding his presentation. Dr. Stark agreed that a psychiatric evaluation might shed light on the patient's behavior. He did not think his knee was surgical. The left ankle might be surgical but he would be reluctant to recommend anything invasive given his presentation. He would recommend consultation with orthopedic foot specialist Dr. Jeffrey

> Mann. He apparently has a referral to see a podiatrist. Given the discussion, Dr. Stark had previously opined that the patient was permanent and stationary because he could not think of any treatment that would lead to measurable improvement in the foreseeable future. A lot of that had to do with non-orthopedic issues including psychiatric or motivational. He felt the patient's response to injury or injuries was excessive. There was no medical evidence of treatment from 2018 through 2022 to support a continuing problem. It was possible that his chronic pain could improve with a functional restoration program.
>
> I agree with PQME Dr. Stark that Mr. Espinoza is not yet permanent and stationary.
>
> **Work Status:** Modified duty. He is precluded from lifting, carrying, pushing, pulling more than 10 pounds and no repetitive bending at the waist.

(Applicant's Exhibit 6, Report of Matthew Wedemeyer, M.D., December 4, 2023.)

DISCUSSION

When applicant claims a physical injury, applicant has the initial burden of proving industrial causation by showing the employment was a contributing cause. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302; § 5705.) Applicant must prove by a preponderance of the evidence that an injury occurred AOE/COE. (Lab. Code[1], §§ 3202.5; 3600(a).)

> The requirement of Labor Code section 3600 is twofold. On the one hand, the injury must occur in the course of the employment. This concept ordinarily refers to the time, place, and circumstances under which the injury occurs. On the other hand, the statute requires that an injury arise out of the employment. It has long been settled that for an injury to arise out of the employment it must occur by reason of a condition or incident of the employment. That is, the employment and the injury must be linked in some causal fashion. (*Clark*, 61 Cal.4th at 297 (internal citations and quotations omitted).)
>
> * * *

[1] All future references are to the Labor Code unless noted.

> The statutory proximate cause language [of section 3600] has been held to be less restrictive than that used in tort law, because of the statutory policy set forth in the Labor Code favoring awards of employee benefits. In general, for the purposes of the causation requirement in workers' compensation, it is sufficient if the connection between work and the injury be a contributing cause of the injury.

(*Clark, supra* at 298 (internal citations and quotations omitted).)

To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

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.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

"'Permanent and stationary status' means the point when the employee has reached maximal medical improvement his or her condition is well stabilized and unlikely to change substantially in the next year with or without medical treatment." (Cal. Code Regs., tit. 8, § 9811(k).)

The evidence in this case indicates that applicant is not permanent and stationary. Both the QME and the primary treater appear to agree. The QME testified: "I think, by definition, because things are slowly progressing, he's not permanent and stationary." (Defendant's Exhibit B, *supra* at p. 15, lines 1-15.) While other parts of the record contain ambiguous indications of permanent

and stationary status, Dr. Stark's unambiguous testimony is that applicant is not permanent and stationary. Accordingly, the F&A erred in finding that applicant is permanent and stationary.

Next, the parties dispute whether applicant's injury to the low back was industrial. No doctor has provided a clear opinion explaining causation to the low back. At one point, the QME concludes that there is no way to answer that question. The QME failed to adequately explain how and why he was incapable of answering the question. It further appears that the QME failed to consider the proper legal standard of causation in workers' compensation, which is contributory causation. The September 13, 2022 injury need not be the sole cause of injury to the low back. It is sufficient if the September 13, 2022 injury aggravated or exacerbated prior injury to the low back.

At another point of testimony, the QME opines that if applicant's back was asymptomatic prior to the September 13, 2022 injury, then the back is industrial. The QME did not explain why the back must be asymptomatic for an industrial injury to have occurred. As explained above, aggravation and exacerbation are also industrial injuries.

We agree with the WCJ that much equivocation exists in the record as to Dr. Stark's causation opinion. However, in deposition, Dr. Stark opined that if applicant is taken at his word that his back was asymptomatic at the time of the September 13, 2022 injury, then applicant's low back injury was industrial. The WCJ needed to address this issue with credibility determinations, but no such determinations were made as part of the F&A. Thus, development of the record is warranted.

Accordingly, we will grant reconsideration and as our Decision After Reconsideration we will rescind the WCJ's May 28, 2024 F&A and return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the May 28, 2024 Findings and Award and Opinion on Decision is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the May 28, 2024 Findings and Award and Opinion on Decision is **RESCINDED**.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 13, 2024

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

JOSE ESPINOZA
LAW OFFICES OF JOHN E. HILL
D'ANDRE LAW LLP

EDL/mc

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