WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LUIS TOLENTINO, ***Applicant***

vs.

LUKE'S ROOFING, INC.; REDWOOD FIRE AND CASUALTY INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, ***Defendants***

Adjudication Number: ADJ11314069
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant has petitioned for reconsideration of the Findings of Fact and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) in this matter on August 20, 2024. In that decision, the WCJ found that applicant, while employed on June 19, 2017 as a roofer by defendant Luke Roofing, Inc., sustained injury arising out of and in the course of his employment to his brain, head, lumbar spine, chest, thoracic cavity, right rib, cardiovascular system (in the form of hypertension), vestibular system, respiratory system, auditory system (in the form of tinnitus), visual system (in the form of light sensitivity and low vision), and psychiatric system, but did not sustain an industrial injury to his cervical spine and endocrine system (in the form of diabetes).

Applicant was awarded permanent disability of 100%, less reasonable attorney fees, and future medical care.

Petitioner contends that the medical evaluators misunderstand the law of 4662(a)(4)[1] and that their reports are not substantial evidence upon which the WCJ may rely in finding that applicant is permanently and totally disabled.

Further, petitioner asserts that the reporting of the vocational expert, Enrique Vega, does not constitute substantial evidence upon which the WCJ may rely for such a finding.

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[1] Cal. Lab. Code § 4662(a)(4).

Petitioner requests that reconsideration be granted and that the applicant be found to be permanently partially disabled, as found by the medical evaluators, in accordance with the AMA Guides and the combined values chart (CVC).

Applicant filed an answer requesting the Petition be denied.

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

We have considered the Petition for Reconsideration (Petition), 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 defendant's Petition for Reconsideration. Our order granting the Petition 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.

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 11, 2024 and 60 days from the date of transmission is Sunday, November 10, 2024. The next business day that is 60 days from the date of transmission is Tuesday, November 12, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on November 12, 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, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 11, 2024, and the case was transmitted to the Appeals Board on September 11, 2024. 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 11, 2024.

II.

Petitioner asserts that the WCJ's findings of fact as to total permanent disability in accordance with Labor Code section 4662(a)(4) was in error as it was based upon a misunderstanding by the medical evaluators as to the law of such section, and thus their reporting does not constitute substantial medical evidence upon which to support such a finding.

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[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.

Labor Code §4662, states, in pertinent part:

(a) Any of the following permanent disabilities shall be conclusively presumed to be total in character:
... (4) An injury to the brain resulting in permanent mental incapacity.

(Cal. Lab. Code § 4662(a)(4).)

As stated by Petitioner:

> Labor Code Section 4662(a)(4) allows a presumption of permanent total disability from "an injury to the brain resulting in permanent mental incapacity." The footnote regarding the amendments in 2007 indicates the amendments at that time were not intended to disturb the prior decisional case law. The WCAB has instructed that the conclusive presumption of 4662(a)(4) "only arises when an injury to the brain causes *severe* cognitive impairment" (emphasis added) (*Winningham v. WCAB* (2016) 81 CCC 828 (writ denied); *Baldwin v. Delphi Energy & Engine Management,* 2017 Cal. Wrk. Comp. P.D. LEXIS 212).
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> As noted above, none of the medical evaluators describe the applicant's cognitive impairment as severe. To the contrary, AME in neuropsychology Dr. Tomaszewski specifically describes the applicant having "mild neurocognitive disorder" (joint exhibit N page 30). The PQME in neurology Dr. Schreiber also found the applicant with mild cognitive impairment (joint exhibit M page 9 lines 3-6) and interpreted applicant's neuropsychology report from Dr. Ponton accordingly (joint exhibit M pages 25-26 lines 24-3). Additionally, applicant's neuropsychologist Dr. Ponton found the applicant completely independent in: housekeeping; shopping; medication management; money-management; and telephone use (applicant's Exhibit 10 page 6). Furthermore, the applicant testified similarly (8/15/2024 summary of evidence page 7 lines 19-24).
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> Despite this cumulative evidence that the applicant suffered from no severe cognitive impairment, both neuropsychology AME Dr. Tomaszewski (joint exhibit N page 33) and applicant's neuropsychologist Dr. Ponton (applicant's exhibit 10 page 79) **clearly erroneously** determine the applicant is permanently and totally disabled in accordance with 4662(a)(4).
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> Each of these physicians also determined the applicant had permanent partial disability incorporating the descriptions and measurements of physical impairments and the corresponding percentages of impairments from the AMA Guides. If labor code section 4662(a)(4) cannot support these physicians' opinions on permanent and total disability, the WCAB must apply their opinions on permanent partial disability of 84% (see ratings and modifications below).

(Petition, pp. 6 -7.)

With respect to the WCJ's reliance on Vega as applicant's vocational expert as an additional basis for finding applicant to be totally permanently disabled, petitioner argues:

> Labor code section 5952(d) requires any award from the WCAB to be supported by substantial evidence. A vocational expert's report supports an award only if it's found to be substantial evidence (*White v. WCAB*) (2016) 81 CCC 547 (writ denied).
>
> Mr. Vega evaluated the applicant on 9/2/2020 (10/22/2020 report applicant's Exhibit 11), however the applicant was evaluated by psychiatric PQME Dr. Cervantes on 5/6/2020 (6/3/2020 report joint exhibit U) and Dr. Cervantes found the applicant was not yet permanent and stationary on a psychological basis and could benefit from treatment (see pages 35-36 of joint exhibit U). Psychiatric PQME Dr. Cervantes did not find the applicant maximally medically improved psychiatrically until her 1/13/2021 reevaluation (2/9/2021 report joint exhibit V). Significantly, Dr. Cervantes opined the applicant's psychiatric status improved from her initial examination on 5/6/2020 and her reevaluation on 2/9/2021 (compare Dr. Cervantes' 5/6/2020 psychiatric GAF score on page 29 of joint exhibit U with her 1/13/2021 findings on page 24 of joint exhibit V).
>
> Mr. Vega evaluated the applicant for vocational feasibility while the applicant was still recovering and improving psychiatrically. Therefore, Mr. Vega's opinion cannot be found to be substantial evidence. We will never know whether Mr. Vega would have had a different opinion regarding the applicant's vocational feasibility once the applicant had improved and plateaued psychiatrically, however clearly Mr. Vega's evaluation was premature.
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> Additionally, Mr. Vega never reviewed the AME reporting of Dr. Tomaszewski or the 3/21/2022 deposition of internal medicine PQME Dr. Yavari, changing his opinion that the applicant's diabetes was 100% pre-existing and nonindustrial (joint exhibit J pages 18-19 lines 14-12) and Dr. Yavari's opinion on nonindustrial work restrictions (joint exhibit J page 20 lines 6-23).

(Petition, pp. 7-8.)

Finally, petitioner asserts that the medical reporting of Dr. Tomaszewski as to permanent partial disability does not support the use of adding together disabilities sufficient to rebut the use of the presumptively correct Combined Values Chart (CVC).

The WCJ addresses these issues in his Report, in pertinent part, as follows:

> Pursuant to Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick) (2018) 83 Cal. Comp. Cases 1680, permanent total disability can only be made through impairment ratings by application of the AMA

Guides pursuant to Labor Code § 4660, and that a finding under Labor Code § 4662(b), "in accordance with the fact," does not provide a second independent path to permanent total disability separate from § 4660. [Id., at p. 1692; Bermejo v. Jorge Castro Farms (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 93, *18-19 (Appeals Board noteworthy panel decision).]

The Court noted, however, that it did not abrogate conclusive presumptions of permanent total disability pursuant to Labor Code § 4662(a) declaring that certain specified disabilities "shall be conclusively presumed to be total in character." [Fitzpatrick, *supra*, 83 Cal. Comp. Cases at p. 1685; Fraire v. California Dept. of Corrections and Rehabilitation (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 60, *9 (Appeals Board noteworthy panel decision).]

In addition, Fitzpatrick acknowledged that the scheduled rating is not absolute, and it is permissible to depart from the scheduled rating based on vocational expert opinion that an employee has a greater loss of future earning capacity than reflected in a scheduled rating. [Id., at pp. 1684-1686 and 1689-1690; see Ogilvie v. Worker's Comp. Appeals Bd. (2011) 76 Cal. Comp. Cases 624, 633-634; Contra Costa County v. Worker's Comp. Appeals Bd. (Dahl) (2015) 80 Cal. Comp. Cases 1119, 1128; LeBoeuf v. Worker's Comp. Appeals Bd. (1983) 48 Cal. Comp. Cases 587, 594.]

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For an expert's medical opinion to be substantial evidence it must be framed in terms of reasonable medical probability that is based on pertinent facts, an adequate examination, an accurate history and set forth proper reasoning in support of its conclusions. [Escobedo v. Marshalls (2005) 70 Cal. Comp. Cases 604, 621

(Appeals Board en banc).] Reports and opinions are not substantial evidence if they are known to be erroneous, based on facts no longer germane, contain inadequate medical histories and examinations, or are based on incorrect legal theories, surmise, speculation, conjecture, or guess. [Hegglin v. Workmen's Comp. Appeals Bd. (1971) 36 Cal. Comp. Cases 93, 97.]

Finally, if an agreed medical evaluator has been chosen by the parties and is deemed substantial evidence, a WCJ must rule consistent with the findings of that physician. [Power v. Workers' Comp. Appeals Bd. (1986) 51 Cal. Comp. Cases 114, 117]

In this case, the undersigned WCJ relied primarily on the agreed medical evaluation report of Dr. Tomaszewski dated December 27, 2022, on page 33, who wrote as follows:

> "The medical legal evaluations in neurology, orthopedic surgery, and internal medicine indicate ongoing permanent physical factors of disability that further limit his functioning. Based upon the combination of physical, cognitive, and emotional factors of disability, with reasonable medical probability Mr. Tolentino is most likely unable to compete in the open labor market and is permanently totally disabled per Labor Code [§] 4662 (a)(4). His ability to

> learn and adapt to his disability is limited significantly due to cognitive and emotional factors of disability."

> On page 32, Dr. Tomaszewski opined that "100% of [the Applicant's] residual cognitive and psychological impairment is apportioned to the injury of June 19, 2017."

> In addition, pursuant to the vocational expert report of Mr. Vega dated October 22, 2020, on page 16, he wrote the following:

>> In this case, Mr. Tolentino is not able to benefit from vocational rehabilitation services and is not competitive for work due to industrial factors; any non-industrial, pre-existing medical impairments are not what prevent him from being vocationally retrained or from working. Likewise, Mr. Tolentino's pre-morbid intellectual, academic, and vocational abilities are not what prevent him from working or being retrained. His industrially related neurological, orthopedic, and psychological impairments and problems with pain are what prevent him from benefitting from vocational rehabilitation services. I have addressed the issue of feasibility for vocational rehabilitation services in the Rehabilitation Plan section of this report. Therefore, Mr. Tolentino meets the requirements for rebutting the scheduled rating."

> With respect to apportionment, Mr. Vega wrote the following:

>> "Medical evaluators have noted that Mr. Tolentino's impairments are primarily industrial. The only non-industrial apportionment is related to his diabetes and insomnia, which are not the reason that he is unable to work. There is no evidence that Mr. Tolentino had any pre-existing or non-industrial impairments that resulted in a work disabling condition. If not for his injuries at Luke Roofing, Inc. in 2017, Mr. Tolentino would have been able to continue working. Thus, Mr. Tolentino's loss of future earnings is apportioned entirely to industrial factors on a vocational basis."

> Based on the above medical and vocational evidence, there were two pathways for the undersigned WCJ to find an award of permanent total disability without apportionment. Dr. Tomaszewski opined that the Applicant was entitled to a conclusive presumption of permanent total disability pursuant to Labor Code § 4662(a)(4) and Mr. Vega provided a basis for permanent disability in accordance with LeBoeuf and Nunes.

(Report, pp. 2 - 4.)

It appears that the WCJ based his findings that applicant was permanently totally disabled based upon Labor Code section 4662(a)(4), as well as the medical evidence and the findings of applicant's vocational expert. Here, however, there does not appear to be any discussion by the WCJ or explanation as to what the scheduled rating would be under the AMA Guides, in

accordance with Labor Code section 4660 and *Fitzpatrick*, as well as whether and why such rating was rebutted by the vocational evidence.

III.

Any decision of the WCAB must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd. (1974)* 11 Cal.3d 274, 281 [520 P.2d 978, 113 Cal. Rptr. 162] [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd. (1970)* 3 Cal.3d 312, 317 [475 P.2d 451, 90 Cal. Rptr. 355] [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd. (1970)* 1 Cal.3d 627, 635 [463 P.2d 432, 83 Cal. Rptr. 208] [35 Cal.Comp.Cases 16].)

In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [445 P.2d 313, 71 Cal. Rptr. 697] [33 Cal.Comp.Cases 660]; *Travelers Ins. Co. v. Industrial Acc. Com. (Odello)* (1949) 33 Cal.2d 685, 687-688 [203 P.2d 747] [14 Cal.Comp.Cases 54]; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [20 Cal. Rptr. 2d 778] [58 Cal.Comp.Cases 313].)

Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399, 407 [445 P.2d 294, 71 Cal. Rptr. 678] (a mere legal conclusion does not furnish a basis for a finding); *Zemke v. Workmen's Comp. Appeals Bd., supra,* 68 Cal.2d at pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence); see also *People v. Bassett (1968)* 69 Cal.2d 122, 141, 144 [443 P.2d 777, 70 Cal. Rptr. 193] (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based). (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, it is unclear from our preliminary review whether the existing record is sufficient to support the decision, findings, 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 defendant'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 defendant's Petition for Reconsideration of the Findings of Fact and Award issued on August 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.

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.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 12, 2024

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

LUIS TOLENTINO
LAW OFFICE OF ARASH KHORSANDI
LAW OFFICES OF SAUL ALWEISS

LAS/*abs*

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