WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NERISSA WATSON, *Applicant*

vs.

LOS ANGELES COUNTY PROBATION DEPARTMENT, permissibly self-insured, administered by SEDGWICK CLAIMS, *Defendants*

Adjudication Numbers: ADJ8545914; ADJ9694061
Marina del Rey District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration in response to the Second Amended Findings and Award (F&A), issued on June 3, 2024, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that applicant, while employed from October 1, 2009 to January 1, 2012, as a Detention Services Officer by the Los Angeles County Probation Department sustained injury to her right wrist, right hand, left knee, heart, lungs, psyche, headaches and gastrointestinal system; and that applicant's injury caused permanent disability of 100%. As relevant herein, the WCJ awarded: "Permanent disability of 100% payable at the rate of $1051.79 per week starting 6/1/17, subject to annual cost of living adjustments pursuant to Labor Code Section 4659 (c), less credit for sums and attorney fees previously paid and less reasonable attorney fees in the amount of 15% which are to be commuted off the side of the applicant's award."

Defendant contends that further development of the record is necessary and that the WCJ failed to consider Labor Code section 4664(c)[1] in her decision.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending applicant's petition be denied.

We have considered the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

preliminary review of the record, we will grant applicant'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 section 5950 et seq.

I.

Applicant claimed injury to the right wrist, right hand, left knee, right knee, heart and lungs psyche, headaches and gastrointestinal system, while employed as a Detention Services Officer for the Los Angeles County Probation Department.

The parties have selected Howard Greils, M.D., as the Agreed Medical Evaluator (AME) in psychiatry, Mark Hyman, M.D., as the AME in internal medicine, and Stephen Wertheimer, M.D., as the AME in orthopedic medicine. Applicant has also obtained reporting from vocational expert Enrique Vega.

On February 10, 2010, a WCJ approved a Stipulations and Award, which provided that applicant sustained injury to her left knee on December 24, 2005, with permanent disability of 24%. (ADJ2576517)

On June 24, 2012, applicant filed an Application for Adjudication (Application) in ADJ8545914, claiming cumulative injury from January 5, 2010 to January 5, 2011.

On October 23, 2014, applicant filed an Amended Application in ADJ8545914, claiming injury from November 2004 to October 2009. The Amended Application states:

> CUMULATIVE TRAUMA INJURY WITH DEVELOPMENT OF SEPTICEMIA AND RESULTING COMPLICATIONS AND SECONDARY CONDITIONS AMENDING START AND END DATE CUMULATIVE TRAUMA INJURY CLAIMED

On October 27, 2014, applicant filed an Application in ADJ9694061, alleging cumulative injury up from October 2009 to January 1, 2011.

On July 13, 2015, the parties stipulated that applicant sustained permanent disability arising out of and the course of employment to to her right wrist/right hand, left knee, heart and lungs from January 1, 2008 to January 1, 2009. They agreed that applicant had 49% permanent disability in ADJ2576517 and ADJ8545914. They agreed that defendant was to receive a credit in the amount

of $17,858.50, that had been previously awarded under ADJ2576517 for applicant's original 2005 injury and that the petition to reopen in ADJ2576517 was dismissed. The settlement was based on the AME opinions of Dr. Wertheimer and Dr. Hyman. The stipulations were approved by a WCJ, and an Award issued the same day.

On this same date, the parties also reached settlement via Stipulations with Request for Award in ADJ9694061 at 6% PD, equivalent to $4,465.29, for the right wrist and right hand, left knee, head and lungs from January 1, 2010 to January 1, 2011. The settlement was based on the AME opinions of Dr. Wertheimer and Dr. Hyman. The stipulations were approved by a WCJ, and an Award issued the same day.

There is an indication that there were amended Stipulations in ADJ9694061 on August 3, 2015, but the Stipulations and Award are not in the record.

On August 31, 2015, applicant filed a Petition to Reopen in ADJ9694061 alleging an interim change in her condition resulting in new disability and need for medical treatment.

On March 6, 2019, the parties proceeded to trial, stipulating that applicant sustained injury to her right wrist, right hand, left knee, heart and lungs, psych, headaches, and gastrointestinal system. (Minutes of Hearing and Summary of Evidence (Minutes), dated March 6, 2019, at p. 2:5.) The parties placed in issue, in relevant part, injury to the right knee, permanent disability, apportionment, the need for further medical treatment and attorney fees. Applicant submitted a rating from the DEU, which was marked as Exhibit 5 for ID. It is unclear why it was not admitted.

On June 18, 2019, the WCJ ordered the submission vacated and further ordered development of the record, to include supplemental reporting from orthopedic AME Dr. Wertheimer.

On November 14, 2019, the matter was again heard at trial, and on December 6, 2019, the parties submitted the matter for decision. (Minutes of Hearing (Further), November 14, 2019, at p. 1:22.) The WCJ ordered that the parties were to file trial briefs by December 4, 2019. As relevant herein, applicant alleged that the strict rating, after adding, should be 100% as follows:

Dr. Wertheimer Ortho AME:

> Left knee – Total knee replacement 20 WPI
> 17.05-20-[2]23-490I-31-28% (As found by DEU) (No change from prior award)
> Right Arm/Hand Nerve: 9/11/19 report finds 23.5% WPI (Increased since prior award) 16.01.02.03 – 24% [5]31-490I-40-37%

Dr. Hyman Internal AME:

Valvular Heart Disease: 9 WPI (As found by DEU) (No change from prior award)
03.01.00.00-9[5]11-490I-16-14%
Arrhythmia: 9 WPI (As found by DEU) (No change from prior award)
03.06.00.00-9[5]11-490I-16-14%
Pulmonary Circulation Disease: 5WPI (As found by DEU) (No change from prior award)
04.04.00.99-5[7]7-490I-11-10%
Headaches: 2% New additional impairment
18.00.00 -2[5]3-490I-5-4%
Upper GI 9% New additional impairment
06.01-9[6]12-490F-12-10%

Dr. Greils Psych AME:

Psych: GAF 52 = 27 WPI
14.01.00.00-27[8]38-490J-50-46% New additional impairment (as found by DEU).

CVC: 37%-28%-14%-14%-10%-10%-4%+46% (Per Dr. Greils Kite analysis)
= 73% + 46% = 119% = 100%

On February 25, 2020, the WCJ vacated the submission, noting that defendant may not have filed a trial brief. (Order for Defendants to File a Trial Brief; Amended Order Vacating Submission; Order of Submission, dated February 25, 2020, at pp. 1-2.)

On March 13, 2020, the WCJ submitted the matter for decision.

On May 22, 2020, the WCJ ordered the submission vacated, and ordered that the vocational expert reevaluate the applicant.

On December 7, 2020, the matter was again heard at trial and on December 11, 2020, the matter was submitted for decision. (Minutes of Hearing (Further), dated December 7, 2020, at p. 1:23.)

On March 10, 2021, the WCJ issued her Findings and Order, vacating the order submitting, and further ordering that the internal medicine and orthopedic AMEs prepare supplemental reporting addressing "apportionment to each separate date of injury pursuant to *Benson*." The psychiatric AME was directed to prepare a supplemental report "explaining 'how' and 'why' the nonindustrial factors did not cause disability."

On April 5, 2021, applicant sought removal in response to the WCJ's March 10, 2021 decision, averring no good cause for development of the record.

On January 31, 2022, we affirmed the WCJ's Findings and Order. (Opinion and Decision After Reconsideration, dated January 31, 2022.)

On July 19, 2022, the Court of Appeal denied applicant's Petition for Writ of Review.

On August 14, 2023, the parties proceeded to trial and offered additional reporting into evidence. Applicant withdrew her claim of injury to the right knee. (Minutes of Hearing (Further), dated August 14, 2023, at p. 2:1.) The parties submitted the matter for decision. (*Id.* at p. 1:22.)

On November 2, 2023, the WCJ issued a Findings and Order, ordering in relevant part that the August 14, 2023 submission be vacated, and directing the orthopedic AME to "write a supplemental report with a complete *Benson* analysis which includes the right hand/wrist and assesses apportionment to each separate date of injury."

On November 27, 2023, applicant sought removal in response to the November 2, 2023 decision. Applicant contended that the decision would result in significant prejudice and irreparable harm, and that the finding of no industrial injury to the right knee was unsupported in the record. (Petition, at p. 1:23.) The WCJ's Report observed that following further reflection on the issues raised by applicant, she recommended the Petition be granted.

On January 24, 2024, we issued our Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, wherein we rescinded the November 2, 2023 F&O. We stated that:

> We acknowledge that section 4663(b) requires that "[a] physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address in that report the issue of causation of the permanent disability." (Lab. Code, § 4663(b).) However, the *Benson* court addressed the issue as follows:
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> > [T]here may be limited circumstances … when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability. In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified.
> >
> > (*Benson, supra*, at p. 1560.)
>
> Thus, an applicant is entitled to an unapportioned award where a party fails to meet its affirmative burden of establishing apportionment between industrial injuries, or to prior injuries or to nonindustrial factors.

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> Here, the F&O vacated the submission of the matter for decision on the grounds that the record required further development to address apportionment. (F&O, Finding of Fact No. 2.) However, as was explained in *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113] (*Benson*), and *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc) (*Escobedo*), when the employer has failed to meet its burden of proof, a combined award of permanent disability is appropriate. (*Escobedo, supra*, at p. 613; *Benson, supra*, at p. 1560; see also *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].)
>
> In meeting that burden of proof, defendant's options included doing nothing based on a belief that the physician(s) upon whom it intended to rely were persuasive and substantial medical evidence, or obtaining supplemental reporting, or deposing the evaluating physicians. (*Escobedo, supra*, at p. 613.) In addition, the WCJ has previously ordered the parties to obtain supplemental reporting addressing apportionment, resulting in the admission of six additional AME reports. (Findings and Order, March 10, 2021, Order No. 2; Minutes, at p. 2:3.)
>
> We therefore conclude that the order to develop the record with respect to apportionment will result in irreparable harm to applicant. The Appeals Board does not have a duty to develop the record where a party who has the burden of proof recognizes the insufficiency of the record and does not take appropriate action. (*Lozano v. Workers' Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 970 [2002 Cal. Wrk. Comp. LEXIS 1420] (writ den.).)

On February 29, 2024, the parties returned to trial and the matter was resubmitted on the existing record.

In its Petition, defendant contends that section 4663 and *Benson, supra,* must apply to "prevent" the finding of 100% permanent disability; that the reporting of internal AME Dr. Hyman, psychiatric AME Dr. Greils, and applicant's vocational reporting are not substantial evidence; that it is entitled to further discovery to cross-examine orthopedic AME Dr. Wertheimer, internal AME Dr. Hyman, and psychiatric AME Dr. Greils; and that the WCAB has a duty to develop the record.

Preliminarily, based on our initial review, we believe that we thoroughly addressed those contentions in our previous Opinion and Decision, and we note when the matter returned to trial on February 29, 2024, defendant did not seek to augment the record and did not object to re-submission on the existing record. While defendant was not required to seek appellate review of our non-final order, if defendant disputed it, defendant should have made a record at the trial on February 29, 2024, and not in a petition for reconsideration after an unfavorable decision issued.

Defendant further contends that the F&A failed to address whether applicant successfully rebutted the AMA Guides. As pointed out by the WCJ in her Report, and in applicant's Answer, applicant provided strict rating strings as requested by the WCJ in her Post-Trial brief of December 4, 2019 and the strict rating was 100% because the injuries were inextricably intertwined based on *Benson, supra*. Thus, we do not believe that this contention is well-founded because as explained above, and in our Opinion and Decision, we believe that defendant did not meet its burden, and a combined award is appropriate.

Finally, defendant raises the issue of section 4664. It contends that the WCJ failed to address the issue of (a)(b) because she did not consider the medical evidence that it submitted to demonstrate overlap, and that she failed to address section 4664(c).

In her Opinion on Decision, with respect to apportionment and section 4664, the WCJ states that:

> Section 4664 states the following:
>
> a. The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.
>
> b. If the applicant has received a prior award of prior permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.
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> In Kopping v. WCAB, ((2006)71 CCC 1229) the Appeals Court held that appeals board incorrectly determined that an employee has the burden of disproving overlap between the current permanent disability and the previous disability. Instead, the court concluded that the employer has the burden of proving overlap between current disability and the previous disability to establish its right to apportionment. That's because the employer bears the overall burden of proving apportionment.
>
> According to Kopping, First: the employer must prove the existence of the prior permanent disability award. 2nd, the employer must prove the extent of the overlap, if any, between the prior disability in the current disability. The employer then is entitled to avoid liability for an applicant's current permanent disability to the extent the employer proves that the disability overlaps with the prior disability. Apportionment would be appropriate if the prior disability overlap[s] with the subsequent injury. If not, apportionment would not be proper. Defendant must prove overlap to justify apportionment. Defendant should be prepared to present not just the prior award, but the medical evidence supporting it so that the board can determine how the earlier award was derived. Defendant has satisfied Kopping's first test: presenting prior awards for ADJ2576517 and ADJ8545914,

but defendant failed to prove that the current disabilities overlapped. There being no persuasive evidence reporting apportionment in accordance with the correct principles, applicant is entitled to an unapportioned award.

Turning to the issue of section 4664(c), subdivision (c) states that:

(c) (1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following:

(A) Hearing.

(B) Vision.

(C) Mental and behavioral disorders.

(D) The spine.

(E) The upper extremities, including the shoulders.

(F) The lower extremities, including the hip joints.

(G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.

When apportionment is proven pursuant to section 4664, the correct method for calculating apportionment was set forth by the Supreme Court in *Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal.4th 1313 [72 Cal.Comp.Cases 565] (*Brodie*). The percentage of disability attributable to the new injury is calculated by subtracting the old rating from the new rating, and then the injured worker is entitled to an award due for this difference based on the Table in section 4659. (*Brodie*, *supra* at 1322.)

In the F&A, the WCJ awarded:

Permanent disability of 100% payable at the rate of $1051.79 per week starting 6/1/17, subject to annual cost of living adjustments pursuant to Labor Code Section 4659 (c), less credit for sums and attorney fees previously paid and less reasonable attorney fees in the amount of 15% which are to be commuted off the side of the applicant's award.

In her Opinion on Decision, with respect to section 4664(c), the WCJ stated that:

Defendant it is entitled to credit for prior awards in the amount of $56,077.29 consisting of 49% PD and 6% PD.

Based on our brief review of the reporting of Dr. Wertheimer and Dr. Hyman, we note that Dr. Wertheimer determined that applicant's injury of 2005, was a cumulative injury up to October 2009, when he found that she had reached maximum medical improvement, and that there was a second period of cumulative trauma from January 2010 to November 2011, for applicant's compensable consequence of injury in the form sepsis, which occurred due to chronic inflammation in applicant's knee, and applicant's need for a knee replacement. It is unclear from the evidence presented why he believed that there was a second period of cumulative injury. Apparently at some point, applicant was off work both for pregnancies and her medical treatment, but as the evaluators had not reviewed a job description, it is not clear if she ever had a change in duties. According to the history taken by Dr. Greils, applicant did not have a change in job duties until 2015.

II.

We observe that the principles of "liberal pleading" have infused California's statutory landscape for more than 150 years. Enacted in 1872, Code of Civil Procedure section 452 requires that, "[i]n the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." Also enacted in 1872, Code of Civil Procedure section 473 provides in pertinent part, "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (Cal. Code Civ. Proc., § 473(b).) Enacted more "recently" in 1963 is Code of Civil Procedure section 576, which provides that, "[a]ny judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading or pretrial conference order." What follows from these statutory pronouncements is more than a century of consistent jurisprudence emphasizing the public policy preference favoring adjudication on the merits, rather than on procedural deficiencies.

In 1890, the California Supreme Court opined:

> The principal purpose of vesting the court with the discretionary power to correct "a mistake in any other respect" is to enable it to mold and direct its proceedings so as to dispose of cases upon their substantial merits, when it can be done without injustice to either party, whether the obstruction to such a disposition of cases be a mistake of fact or a mistake as to the law, although it may be that the court should require a stronger showing to justify relief from the effect of a mistake of law than of a mistake of fact. (*Ward v. Clay* (1890) 82 Cal. 502, 23 P. 50, 1890 Cal. LEXIS 591.)

In *Dunzweiler v. Superior Court of Alameda County* (1968) 267 Cal. App. 2d 569, 577 [73 Cal. Rptr. 331], the Court of Appeal observed:

> If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and **where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion**. [Citations.] And as stated in *Jepsen v. Sherry* (1950) 99 Cal. App. 2d 119, 121 [220 P.2d 819], the discretion to be exercised by trial courts is "**one controlled by legal principles and is to be exercised in accordance with the spirit of the law and with a view to subserving, rather than defeating, the ends of substantial justice**." (Bolding added.) (*Dunzweiler v. Superior Court of Alameda County, supra,* 267 Cal. App. 2d at 577.)

The workers' compensation system "was intended to afford a simple and nontechnical path to relief." (*Elkins v. Derby* (1974) 12 Cal. 3d 410, 419 [39 Cal. Comp. Cases 624]; Cf. Cal. Const., art. XX, § 21; § 3201.) Generally, "the informality of pleadings in workers' compensation proceedings before the Board has been recognized. (*Zurich Ins. Co. v. Workmen's Comp. Appeals Bd.* (1973) 9 Cal. 3d 848, 852 [38 Cal. Comp. Cases 500, 512]; *Bland v. Workmen's Comp. App. Bd.* (1970) 3 Cal. 3d 324, 328–334 [35 Cal. Comp. Cases 513].) "[I]t is an often-stated principle that the Act disfavors application of formalistic rules of procedure that would defeat an employee's entitlement to rehabilitation benefits." (*Martino v. Workers' Comp. Appeals Bd.*, (2002) 103 Cal. App. 4th 485, 490 [67 Cal. Comp. Cases 1273].) Courts have repeatedly rejected pleading technicalities as grounds for depriving the Board of jurisdiction. (*Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal. App. 3d 196, 200–01 [50 Cal. Comp. Cases 160]; *Liberty Mutual Ins. Co. v. Workers' Comp. Appeals Bd.* (1980) 109 Cal. App. 3d 148, 152–153 [45 Cal. Comp. Cases 866].) Moreover, section 5709 states that "[n]o informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division …" (Lab. Code, § 5709.) "Necessarily, failure to comply with the rules as to details is not

jurisdictional." (*Rubio, supra*, at pp. 200–201; see Cal. Code Regs., tit. 8, former § 10492, now § 10517.)

Additionally, it is the policy of the law to favor, whenever possible, a hearing on the merits. (*Fox v. Workers' Comp. Appeals Bd.*, (1992) 4 Cal. App. 4th 1196, 1205 [57 Cal.Comp.Cases 149]; see also *Shamblin v. Brattain* (1988) 44 Cal. 3d 474, 478 [243 Cal. Rptr. 902], "when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default.") This is particularly true in workers' compensation cases, where there is a constitutional mandate "to accomplish substantial justice in all cases." (Cal. Const., art. XIV, § 4.)

Therefore, in workers' compensation proceedings, it is settled law that:

(1) *pleadings may be informal* (*Zurich Ins. Co., supra,* 9 Cal. 3d at p. 852; *Bland, supra,* 3 Cal. 3d at pp. 328–334; *Martino, supra,* 103 Cal. App. 4th at p. 491; *Rivera v. Workers' Comp. Appeals Bd.* (1987) 190 Cal. App. 3d 1452, 1456 [52 Cal. Comp. Cases 141]; *Liberty Mutual Ins. Co v. Workers' Comp. Appeals Bd.* (*Aprahamian*) (1980) 109 Cal. App. 3d 148, 152–153 [45 Cal. Comp. Cases 866]; *Blanchard v. Workers' Comp. Appeals Bd.* (1975) 53 Cal. App. 3d 590, 594–595 [40 Cal. Comp. Cases 784]; *Beaida v. Workmen's Comp. Appeals Bd.* (1968) 263 Cal. App. 2d 204, 207– 210 [33 Cal. Comp. Cases 345]);

(2) *claims should be adjudicated based on substance rather than form* (*Bland, supra,* 3 Cal. 3d at pp. 328–334; *Martino, supra,* 103 Cal. App. 4th at p. 491; *Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal. App. 3d 1102, 1116 [53 Cal. Comp. Cases 502]; *Rivera, supra,* 190 Cal. App. 3d at p. 1456; *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal. App. 2d 592, 598 [24 Cal. Comp. Cases 274]);

(3) *pleadings should liberally construed so as not to defeat or undermine an injured employee's right to make a claim* (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal. App. 4th at pp. 925–926 [72 Cal. Comp. Cases 778]); *Martino, supra,* 103 Cal. App. 4th at p., 490; *Rubio, supra,* 165 Cal. App. 3d at pp. 199–201; *Aprahamian, supra,* 109 Cal. App. 3d at pp.152–153; *Blanchard, supra,* 53 Cal. App. 3d at pp. 594–595; *Beaida, supra,* 263 Cal. App. 2d at pp. 208–209); and

(4) *technically deficient pleadings, if they give notice and are timely, normally do not deprive the Board of jurisdiction* (*Bland, supra,* 3 Cal. 3d at pp. 331–332 & see fn. 13; *Rivera, supra,* 190 Cal. App. 3d at p. 1456; *Aprahamian, supra,* 109 Cal. App. 3d at pp. 152–153;

Blanchard, supra, 53 Cal. App. 3d at pp. 594–595; *Beaida, supra,* 263 Cal. App. 2d at pp. 208–210).

Reflecting these principles, current WCAB Rule 10617 provides:

> (a) An Application for Adjudication of Claim, a petition for reconsideration, a petition to reopen or any other petition or other document that is subject to a statute of limitations or a jurisdictional time limitation shall not be rejected for filing solely on the basis that:
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> > (1) The document is not filed in the proper office of the Workers' Compensation Appeals Board;
> > (2) The document has been submitted without the proper form, or it has been submitted with a form that is either incomplete or contains inaccurate information; or
> >
> > (3) The document has not been submitted with the required document cover sheet and/or document separator sheet(s), or it has been submitted with a document cover sheet and/or document separator sheet(s) not containing all of the required information.

(Cal. Code Regs., tit. 8, § 10617.)

The rule thus provides for considerable latitude in accepting nonstandard pleadings, so long as the pleadings contain "a combination of information sufficient to establish the case or cases to which the document relates or, if it is a case opening document, sufficient information to open an adjudication file." (Cal. Code Regs., tit. 8, §10617(b).) Similarly, WCAB Rule 10517 specifies that pleadings are deemed amended to conform to the stipulations agreed to by the parties on the record or may be amended by the Appeals Board to conform to proof. (Cal. Code Regs., tit. 8, §10517.) These rules represent the application of California's public policy in favor of adjudication of claims on their merits, rather than on the technical sufficiency of the pleadings.

These principles of liberal pleading are further reflected in section 5506, which authorizes the Appeals Board to relieve a defendant from default or dismissal due to mistake, inadvertence, surprise, or excusable neglect in accordance with Code of Civil Procedure section 473. And, the Court of Appeal has made it clear that the protections afforded under Code of Civil Procedure section 473(b) are applicable in workers' compensation proceedings. (*Fox, supra,* 4 Cal. App. 4th 1196.)

Here, the medical reporting suggests that applicant sustained compensable consequence injuries in the period that has been designated as from January 2010 to December 2011, and not a

new period of cumulative trauma, and it may well be that applicant sustained one cumulative injury up to December 2009 or December 2011. (See *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323]; see *Aetna Cas. & Surety Co. v. Workmen's Comp. Appeals Bd.* (*Coltharp*) (1973) 35 Cal.App.3d 329, 341 [38 Cal.Comp.Cases 720] [number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB].)

If so, there may not be a legal issue with respect to section 4664, and the WCJ's finding as to subtraction may be correct. As this issue has not been previously raised, we must further review the medical legal reporting taking into consideration the statutory and decisional law regarding liberal interpretation of pleadings and amending pleadings to conform to proof.

Thus, we will issue an order granting the petition for reconsideration and deferring a final decision on the merits.

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 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.

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 and Order issued on June 3, 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 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/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 9, 2024

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

NERISSA WATSON
BURGIS AND ASSOCIATES
RK LAW

AS/oo

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