WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBBIE HURTADO, *Applicant*

vs.

CITY OF RICHMOND, permissibly self-insured, adjusted by ACCLAMATION, *Defendants*

Adjudication Numbers: ADJ11385337, ADJ8045352, ADJ10740499, ADJ17719586
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Joint Findings of Fact and Award issued and served by the workers' compensation administrative law judge (WCJ) in this matter on July 31, 2024. In that decision, the WCJ found that applicant sustained industrial injury arising out of and in the course of employment (AOE/COE) during the period through April 24, 2019 to her bilateral shoulders, neck, bilateral elbows, wrists, hands, and low back. The WCJ further found that her injury caused permanent disability of 100%, because she is precluded from employment in the open labor market, and that this resolves applicant's petition to reopen case number ADJ8045352.

The issues of earnings and permanent disability rate were deferred pending further development of the record, as were the reasonable value of services by applicant's attorney.

On August 20, 2024, the WCJ issued a joint order regarding earnings, stating that based upon the Minutes of Hearing (MOH) of June 17, 2024, and good cause appearing, the applicant's average weekly earnings for the last two dates in injury [of] April 24, 2019 and CT to April 24, 2019 are $1,395.46.

Petitioner contends that the WCJ erred in finding applicant to be 100% permanently totally disabled based upon the reporting of the PQME, as he failed to consider apportionment to applicant's various dates of injury under both Labor Code[1] sections 4663 and 4664.

[1] All further references are to the Labor Code unless otherwise stated.

Petitioner requests the petition be granted, and the record further developed as to apportionment and applicant's petition to reopen case ADJ8045352.

Applicant filed a response recommending 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, 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 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.

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.
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> (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 9, 2024, and 60 days from the date of transmission is November 8, 2024. This decision is issued by or on November 8, 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 9, 2024, and the case was transmitted to the Appeals Board on September 9, 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 9, 2024.

Turning to the merits, preliminarily, we note the following in our review:

The Minutes of Hearing and Summary of Evidence (MOH/SOE) dated June 17, 2024, list four claims for applicant: 1) An admitted cumulative trauma (CT) claim ending April 7, 2010 to the neck, back, shoulder and bilateral carpal tunnel syndrome (CTS) with partial permanent disability per a prior Stipulations and Award (ADJ8045352); 2) A claimed CT injury ending February 27, 2012 to the upper extremities (ADJ10740499); 3) An admitted specific injury dated March 6, 2018 to the bilateral elbows; and 4) A claimed CT injury ending April 24, 2019 to the neck, back, shoulders, upper extremities and elbows (ADJ17719586).

The issues to be determined were injury AOE/COE as to the CT [of] April 24, 2019, earnings, permanent disability, apportionment, and attorney fees. Also listed as issues were the applicant's petition to reopen the Stipulations awarding 65% permanent disability for her CT of 4/7/2010, admissibility and relevancy of the vocational evidence, as well as penalties and sanctions. (MOH/SOE, 6/17/24, p. 2-4.)

The Joint Findings of Fact and Award of the WCJ in this matter found that applicant sustained injury AOE/COE while employed during the period through April 24, 2019, causing permanent total disability, and that this finding resolved applicant's petition to reopen case number ADJ8045352. (Findings, July 31, 2024, p.1.)

In discussing the injuries claimed and relevant to her findings, the WCJ states as follows:

> This decision covers the following injuries:
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> In case number ADJ8045352, she sustained a cumulative trauma injury ending 04-07-2010 to her neck, back, shoulders, and bilateral CTS. In this case, applicant was awarded 65% permanent disability on 02-19-2014. (Ex. A.) This case was reopened for new and further disability on 07-01-2014.
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> In case number ADJ10740499, Applicant claims a cumulative trauma injury ending 02- 27-2012 to the upper extremities.
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> In case number ADJ11385337, Applicant sustained a specific injury on 03-06-2018 and this injury is admitted for the bilateral elbows.
>
> In case number ADJ17719586, Applicant claims a cumulative trauma injury ending 04-24-2019 to the neck, back, shoulders, upper extremities and elbows.

(Opinion, p.3.)

As stated in the WCJ's Opinion, the findings of permanent total disability were based, in part, upon the medical reporting of Qualified Medical Evaluator, Fred Blackwell, M.D.

When discussing the medical reporting, the WCJ opines:

> ***
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> When Dr. Blackwell first saw the applicant in 2020, she was still in need of surgery. (Ex. 101 at 8.) She testified that she had bilateral carpal tunnel surgery on both wrists in 2012, and she lost time from work. (MOH/SOE at 6/ line 36 to 7/line 8.) Dr. Masem is her treating doctor for the upper extremities and in 2017, she had bilateral shoulder surgery. (Id.) In 2019 and 2020, she had bilateral elbow surgery. (Id.) She had back surgery around 2010. (Id.) She testified that she did not have neck surgery despite recommendations by Dr. Blackwell and her treating physician Dr. Strudwick. (Id.)
>
> In case number ADJ10740499, applicant claims a cumulative trauma to the upper extremities and in case number ADJ17719586, only the elbows are not covered by the Award. The elbows are accepted in case number ADJ11385337. For all intents and purposes, the body parts "upper extremities" are included. Dr. Blackwell's response when he was asked whether it is appropriate to combine all of the CT claims into one continuous trauma claim through applicant's last day of work was to answer in the affirmative and list all body parts:
>
> > "Yes, and this would include all parts of the body previously injured, specifically the bilateral shoulders, neck, bilateral elbows, wrists, and hands, and low back." (Ex. 105 at 10.)
>
> Accordingly, these body parts are included in the award.

(Opinion, p.4.)

The medical report of Dr. Blackwell of January 24, 2020 referred to by the WCJ is entitled Supplemental Medical Report and states, in pertinent part:

> After I recently saw Ms. Hurtado for re-evaluation, I received a cover letter from Mr. Riggs indicating that his concerns were not addressed in my report. He referenced a letter that I did not have in my possession at the time I saw the patient for re-evaluation, and I have since responded indicating that the referenced medical records had still not been received, and addressed his concern regarding the absence of electrodiagnostic support for cubital tunnel syndrome.

(Jt. Ex. 101, 1/24/20, p.1.)

This reporting indicates that there was an initial evaluation and a re-evaluation, as well as possible interim reporting prior to January 24, 2020; however, the record lacks this reporting. In fact, the vocational evaluation reporting of Frank Diaz, M.D., upon which the WCJ also relies, indicates there is medical report of June 14, 2018, authored by Dr. Blackwell, which is not part of the record. (Ex. 1, p. 11.)

The October 22, 2021 supplemental report of Dr. Blackwell tries to address issues regarding permanent disability to applicant's bilateral elbows. It states, in pertinent part:

> ***
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> This supplemental report billed as ML 203-95 is submitted in response to your request of October 15, 2021, wherein you noted the patient's case deals with a claim of cumulative trauma to the elbows through March 6, 2018. You noted that the applicant had a prior stipulated agreement of 65% from impairments to her bilateral shoulders, bilateral wrists, neck, and low back related to cumulative trauma. You asked that I update my opinions as it relates to permanent disability for the applicant's bilateral elbows.
>
> Further, you asked that I analyze apportionment to the bilateral elbows and comment on apportionment between day-to-day work affecting the applicant's elbows, the impact of smoking on the applicant's elbows [one pack per day from 2000-2010], and any nonindustrial factors, including day-to-day use outside of work.
>
> **Response**
>
> As you know, I have submitted seven reports on Ms. Hurtado, the most recent of which is dated September 15, 2021, when Mr. Gerson asked that I consider her permanent and stationary because she did not wish to proceed with any additional surgery.

> The injury date you have cited is CT to March 6, 2018, related to the elbows. My reports to Mr. Gerson included that CT period of time. I based my response to Mr. Gerson upon my evaluation of Ms. Hurtado in my report of August 4, 2021.

(Jt. Ex. 102, p.1.)

The Stipulations in the MOH and the WCJ's Opinion both state that the applicant has sustained an admitted specific industrial injury on March 6 2018, and not a continuous trauma. If the evidence indicates that the incident was in fact part of a continuous trauma, there does not appear to be a discussion regarding same. Additionally, the existing record does not contain the August 4, 2021 report referred to by the PQME.

> Dr. Blackwell's September 15, 2021 report, addressed to applicant's counsel, states:
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> ***
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> Your letter acknowledges receipt of my most recent report of August 4, 2021, and you noted in my report that I did not consider her permanent and stationary because I anticipated that the examinee would require two years from the date of surgery before she could be declared to have reached maximum medical improvement and that, even then she would be a candidate for additional surgery for tendon transfers to maximize the functional ability of the right upper extremity.
> In light of the fact that Ms. Hurtado is not receiving compensation benefits because her temporary disability benefits were terminated by the employer in March of 2021, and she has not received any compensation since then you have asked that I reconsider her P&S status.
>
> ***
>
> I had previously addressed apportionment and indicated that 80% of the disability would be due to cumulative trauma through March 6, 2018, and 10% due to subsequent cumulative trauma through the last date worked, which is April 24, 2019.
>
> The question was posed as to whether or not I would agree that we actually have one continuously cumulative trauma up through the last date of employment, 04/29/2019.
>
> In my opinion, there is, in actuality, a continuous cumulative trauma and one would be hard pressed to make a true distinction between the exact factors of disability through the two periods described.
>
> The question was also raised as to the patient's capability of competing in the open labor market.
>
> In my opinion, not only is the patient significantly impaired because of loss of use of the right upper extremity, but the ability to function in a work setting would require that she work at her own pace and in a protected environment. I have been

asked to specifically set forth the patient's limitations, preclusions, and restrictions, including any prophylactic advice.

The examinee is unable to use her right upper extremity for pushing, pulling, carrying or lifting greater than one pound. She cannot engage in repetitive grasping, torquing, gripping, and cannot handle objects greater than one pound. She is unable to use a computer and cannot be around hazardous materials.

Specific characterization of limitations will require a Functional Capacity Examination.

In my opinion, she would not be able to serve as a reliable and predictable employee based on the current medical issues that exist for her.

(Jt. Ex. 103, pp.1, 2-3.)

We note there does not appear to be a functional capacity evaluation in evidence.

Dr. Blackwell's February 10, 2022 reporting addresses a question regarding combining two cumulative trauma injuries, and he states as follows:

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The question arose regarding the matter of the disability associated with the bilateral shoulder condition, the bilateral upper extremity problems including the elbows, wrists, and hands. You inquired as to whether or not the disability associated with the cumulative trauma claim through 04/07/2010 and the bilateral shoulder condition can be logically combined with the disability through the cumulative trauma claim through 04/24/2019 that involved the examinee's bilateral elbows, hands, and wrists?

Response

I am unable to determine with any degree of reasonable medical probability a distinction between those injuries.

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(Jt. Ex. 104, p.1-2.)

In additional reporting on June 4, 2022, Dr. Blackwell further opines:

Concerning Labor Code Section 4664, this code appears to have no application for this specific portion of her anatomy involving the elbow.

For Labor Code Section 4663, I must consider industrial and nonindustrial factors in accordance with their importance and append percentages to those factors as they might account for the patient's impairment/disability. My opinion is as follows:

Percent causation due to cumulative trauma, 03/06/2018	80%
Percent causation due to subsequent specific injury	0%

Percent causation due to subsequent cumulative trauma	10%
Percent causation due to pre-existing underlying pathology	10%
Causation total	100%

***

I want to emphasize the significant impact that this condition has had on the examinee's psychological state. In my opinion, she requires formal psychological counseling to address her overall well-being and physical recovery.

Finally, Mr. Gerson, your letters of May 20, 2022, that precipitated this re-evaluation indicated that you needed clarification regarding my opinion, specifically as you related to the matter of cumulative trauma through the patient's last day of work, April 29, 2019. You stated, "Would you combine all of the CT claims into one continuous trauma claim throughout her last day of work?"

Response

Yes, and this would include all parts of the body previously injured, specifically the bilateral shoulders, neck, bilateral elbows, wrists, and hands, and lower back.

Next, you stated that the CT through April 7, 2010 involved the bilateral shoulders, wrists, neck, and lower back. You further indicated that she received 65% PD award for that matter. You went on to state that her condition worsened and a petition to re-open is pending. You indicated that Ms. Hurtado has a non-functioning right upper extremity and when combined with the left upper extremity, left her noncompetitive and asked if I would agree that she is not a reliable or predictable employee. I have addressed that matter above.

Next, you asked if I would agree that the combined effects of the industrial injuries have resulted in Ms. Hurtado being permanently, totally disabled, medically (orthopedically).

Response

Yes, and the factors of disability involving all the injuries resulting in the total disability cannot be untwined or parsed out among the separate injuries.
Lastly, it is my opinion that an FCE is not a reasonable means of determination for this patient's ability to engage in the open labor market.
(Jt. Ex. 105, p. 10-11.)

Finally, after reviewing the vocational evaluation reporting of Frank Diaz, Dr. Blackwell states:

> I am in complete agreement with his report findings that she is unable to compete in the open labor market because of the multiple injuries sustained at the work place.
> (Jt. Ex. 106, p.2.)

The April 18, 2023 vocational report and findings of Mr. Diaz, however, states that:

> I am of the vocational opinion that Ms. Hurtado's CT industrial injury of March 16, 2018 caused a catastrophic injury. As a result of Ms. Hurtado's CT industrial injury of March 16, 2018 Ms. Hurtado has sustained a total loss of use of her right upper extremity.
>
> ***
>
> In all vocational probability, were it not for the cumulative trauma industrial injury of March 16, 2018, Ms. Hurtado would have continued working in her usual and customary occupation despite any pre-existing non-industrial or pre-existing industrial *impairments.*
>
> ***
>
> Based upon my research with the SSA as well as my review of Ms. Hurtado's medical file, I am of the opinion that Ms. Hurtado's upper extremity limitations alone will eliminate her ability to perform work in the competitive open labor market.
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> ***
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> I am of the vocational opinion that Ms. Hurtado's CT industrial injury of March 16, 2018 caused a catastrophic injury. As a result of Ms. Hurtado's CT industrial injury of March 16, 2018 Ms. Hurtado has sustained a total loss of use of her right upper extremity.
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> ***
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> Therefore, I am of the opinion that zero percent (0%) of Ms. Hurtado's *LeBoeuf* determination is attributable to any pre-existing non-industrial or pre-existing industrial impairments resulting from her prior CT claims of April 7, 2010 and February 27, 2012 as the impairments as a result of these prior CT claims never rose to the level of a disability affecting her ability to perform her usual and customary occupation. Therefore, one hundred percent (100%) of Ms. Hurtado's *LeBoeuf* determination is attributable to her CT industrial injury of March 16, 2018.
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> (Ex. 1, pp. 17, 34, 36, 37, 44.)

In coming to his determinations, the reporting indicates that the vocational evaluator reviewed a June 14, 2018 reporting, as well as three supplemental reports dated August 14, 2021, September 15, 2021, and February 10, 2022 of Dr. Blackwell, but not all medical reports authored in evidence and authored by him.

II.

In *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113, 133] (*Benson*), the Court of Appeal held that pursuant to reform legislation of 2005, sections 4663 and 4664 require apportionment to each distinct industrial injury causing permanent disability. (*Id.* at p. 117.) This is because the "plain language of section 4663, subdivision (c) … calls for a physician to make an apportionment determination 'by finding what approximate percentage of the permanent disability *was caused by the direct result of injury arising out of and occurring in the course of employment* and what approximate percentage of the permanent disability *was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries*.'" (*Id.* at p. 123, italics original.) Thus, based on the legislative history and the Appeals' Board's contemporaneous interpretation of the statute, "apportionment is required for each distinct industrial injury causing a permanent disability, regardless of the temporal occurrence of permanent disability or the injuries themselves." (*Id.* at p. at p. 132.) However, the Court of Appeals in *Benson* also observed that:

> [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. (See § 4663, subd. (c); *Kopping v. Workers' Comp. Appeals Bd.*, supra, 142 Cal.App.4th at p. 1115 ["the burden of proving apportionment falls on the employer because it is the employer that benefits from apportionment"].)

(*Benson, supra*, at p. 133.)

Thus, the court determined that defendant bears the burden of establishing apportionment, and that under certain circumstances an evaluating physician will be unable to parcel out, with reasonable medical probability, the approximate percentages of disability arising out of each claimed injury. In such cases, the defendant has not met its burden of establishing valid apportionment as between the various claimed industrial injuries. (See also *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170].) *Torres v. Automobile Club of So. Cal.* (1997) 15 Cal.4th 771, 779 [937 P.2d 290, 63 Cal.Rptr.2d 859]; *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41 Cal.Comp.Cases 42].)

When there is a prior award of disability, section 4664(b) provides:

> If the applicant has received a prior award of 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.

(Lab. Code, § 4664(b).)

The employer must make the following showing in order to prove apportionment for a prior permanent disability award is warranted under section 4664:

> First, the employer must prove the existence of the prior permanent disability award. Then, having established by this proof that the permanent disability on which that award was based still exists, the employer must prove the extent of the overlap, if any, between the prior disability and the current disability. Under these circumstances, the employer is entitled to avoid liability for the claimant's current permanent disability only to the extent the employer carries its burden of proving that some or all of that disability overlaps with the prior disability and is therefore attributable to the prior industrial injury, for which the employer is not liable.

(*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115.)

Defendant therefore bears the burden of proving the existence of the prior award and that there is overlap between applicant's prior disability and current disability for the cervical spine for there to be apportionment per section 4664 to the previous industrial injury.

In a case such as this, where a prior award has been reopened, the issue includes whether there is new and further disability to this prior claim as well.

Applicant's February 19, 2014 stipulations and award for 65% on case ADJ8045352 is for permanent disability to her bilateral shoulders, bilateral carpal tunnel syndrome, and cervical spine during the period March 1, 199 through April 7, 2010. Page 7 of the stipulations, under paragraph 9, states that "these stipulations settle claims to the listed body parts for the injuries alleged "CT to 4/07/2010" and "CT to 2/27/12" (Stipulations, 2/19/14, p.7.) We further note that one of the injuries at issue in this matter included the CT to 2/27/12. (ADJ10740499.) Applicant's June 30, 2014 petition to reopen was for her CT to April 7, 2010.

Finally, a review of the submitted medical evidence fails to indicate that Dr. Blackwell reviewed the medical reports of John Warbritton, M.D., the agreed medical evaluator (AME) upon whose applicant's prior award was based.

III.

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

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id*. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).)

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

Rucker v. Workers' Comp. Appeals Bd. (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

The Appeals Board also 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 whether the existing record is sufficient to support the decision, order, award, legal conclusions, and/or recommendations of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above, given the multiple injury claims and the prior award of the applicant.

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.

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 defendant's Petition for Reconsideration of the Joint Findings of Fact and Award issued on July 31, 2024 by a workers' compensation administrative law judge is **GRANTED**.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 7, 2024

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

ROBBIE HURTADO
BOXER & GERSON
RTGR LAW

LAS/abs

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