WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SHALANSKI LOWE, ***Applicant***

vs.

CSU EAST BAY, PERMISSIBLY SELF-INSURED, administered by SEDGWICK CMS, ***Defendants***

Adjudication Number: ADJ14330494
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings & Orders issued by the Workers' Compensation Administrative Law Judge (WCJ) on December 19, 2023. Therein, the WCJ determined that applicant, while employed by the California State University East Bay on March 4, 2020, sustained injury to the thoracic spine, lumbar spine, bilateral hips, left hand, left wrist, and left shoulder. The WCJ further determined that applicant did not hit or strike her head at the time of the March 4, 2020 injury; that applicant did not sustain a compensable psychiatric injury; and that applicant is not entitled to psychiatric medical treatment.

Applicant contends her claim is presumptively compensable, that the record supports a finding of injury to her head and vision, and that even if her claimed psychiatric injury is deemed non-industrial, medical treatment in the form of psychiatric treatment is necessary to cure or relieve from the effects of her industrial condition.

Defendant has filed an Answer. We have received a Report and Recommendation in Response to Applicant's Petition for Reconsideration (Report) from the WCJ, recommending we deny applicant's petition.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto.

Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, amend the WCJ's decision to defer the issue of psychiatric injury and treatment, and otherwise affirm the decision of December 19, 2023.

FACTS

Applicant claims to have sustained injury to her thoracic spine, lumbar spine, bilateral hips, left hand, left wrist and left shoulder, head, concussion, eyes and vision, and psyche, while employed as a student assistant by California State University East Bay, on March 4, 2020. Defendant admits injury to her thoracic spine, lumbar spine, bilateral hips, left hand, left wrist and left shoulder, and disputes injury to the head, concussion, eyes, vision, and psyche.

The parties have selected Philip Edington, M.D., as the Qualified Medical Evaluator (QME) in ophthalmology, and Victor Kerenyi, D.C., as the QME in chiropractic medicine.

On September 21, 2023, the parties proceeded to trial and stipulated that applicant had sustained injury arising out of and in the course of employment (AOE/COE) to her thoracic spine, lumbar spine, bilateral hips, left hand, left wrist and left shoulder. (Minutes of Hearing and Summary of Evidence (Minutes), dated September 21, 2023, at p. 2.) The parties placed in issue injury to the psyche, eyes, and vision in the form of convergence disorder. The parties also raised the issue of whether applicant required psychiatric treatment on an industrial basis to cure or relieve from the effects of her industrial injuries, irrespective of whether applicant's claim of psychiatric injury itself was compensable. (*Id.* at p. 3.) Finally, the parties placed in issue whether all the body parts referenced in the applicant's two DWC-1 claim forms were presumed to be compensable pursuant to Labor Code section 5402. (*Ibid.*) The WCJ heard the testimony of applicant, and ordered the matter submitted for decision the same day.

On December 19, 2023, the WCJ issued the F&O, finding in relevant part that applicant's trial testimony was not credible, and that applicant did not hit or strike her head on the date of injury. (Finding of Fact No. 3.) The WCJ further determined that to the extent the reporting of QME Dr. Edington relied on applicant's account of her injury, the reporting was not substantial medical evidence, and that evidence responsive to the issue of causation of injury to the eyes and "traumatic convergence insufficiency" required further development. (Finding of Fact No. 4.) The WCJ further determined that applicant was employed by defendant for less than the six months required under section 3208.3(d), and that applicant had "failed to prove she is entitled to medical

treatment for the psyche claim as a non-industrial condition that requires defendant provide treatment to enable the Applicant to reach P&S status on the accepted body parts." (Finding of Fact No. 5.)

Applicant's Petition for Reconsideration (Petition) characterizes the WCJ's decision as a "lay opinion" and disputes the determination that applicant's account of the injury was not credible. The Petition emphasizes applicant's trial testimony that she first experienced concussion-like symptoms a few days after the injury and reported the symptoms to the industrial clinic on March 9, 2020. Applicant characterizes her account of the injury as "entirely consistent with the medical evidence," and as "stand[ing] without rebuttal." (Petition, at p. 6:26.) Applicant further acknowledges the trial stipulation that she did not work six months for the employer. However, applicant avers that irrespective of the issue of whether the psychiatric claim itself is compensable, "an employer is required to treat a nonindustrial condition if its treatment is necessary to cure or relieve an employee from the effects of the industrial injury." (Petition, at p. 8:19.)

Defendant's Answer responds that the WCJ's decision is appropriately sourced in the evidentiary record, and specifically that applicant had not established that psychiatric treatment was necessary to cure or relieve from the effects of her industrial injuries. (Answer, at p. 11:15.) Defendant further observes that section 5402 creates a presumption as to the claim of injury, but that the presumption does not extend to subsequently pleaded body parts. (*Id.* at p. 12:18.)

DISCUSSION

Section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493] (*Shipley*); *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635 fn. 22 [70 Cal.Comp.Cases 312] ["irregularity which deprives reconsideration under the statutory scheme denies due process"].) In *Shipley,* applicant sought a writ of review of a decision of the Appeals Board denying his petition for reconsideration by operation of law (Lab. Code, § 5909). The Court there granted a writ of review, stating that while the "language [of section 5909] appears mandatory and jurisdictional, the time periods must be based on a presumption that a claimant's file will be available to the board; *any other result deprives a claimant of due process*

and the right to a review by the board." (*Shipley, supra,* 7 Cal.App.4th at pp. 1107-1108, italics added.)

In *Shipley,* the Court of Appeal reversed the Appeals Board, holding that the time to act on the petition was tolled during the period the file was misplaced and unavailable to the Appeals Board. (*Shipley, supra,* 7 Cal.App.4th at p. 1007.) The Court emphasized that "Shipley's file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control." (*Shipley, supra,* 7 Cal.App.4th at p. 1007.) "Shipley's right to reconsideration by the board is likewise statutorily provided and *cannot be denied him without due process*. Any other result offends not only elementary due process principles but common sensibilities. Shipley is entitled to the board's review of his petition and its decision on its merits." (*Id.*, at p. 1108, italics added.) The Court stated that its finding was also compelled by the fundamental principle that the Appeals Board "accomplish substantial justice in all cases..." (Cal. Const., art. XIV, § 4), and the policies enunciated by section 3202 "to construe the act liberally 'with the purpose of extending their benefits for the protection of person injured in the course of their employment.'" (*Id*., at p. 1107.) The Court in *Shipley* properly recognized that in workers' compensation, deprivation of reconsideration without due process – without this full de novo review of the record in the case – "offends" the fundamental right of due process, as well as the Appeals Board's mandate to "accomplish substantial justice in all cases..." (*Shipley, supra,* 7 Cal.App.4th at p. 1107-1108.)

We note that all timely petitions for reconsideration filed *and received* by the Appeals Board are "acted upon within 60 days from the date of filing" pursuant to section 5909, by either denying or granting the petition.[1] The exception to this rule are those petitions *not received* by the Appeals Board within 60 days due to irregularities outside the petitioner's control. (See *Rea, supra,* 127 Cal.App.4th at p. 635, fn. 22.) Pursuant to the holding in *Shipley* allowing tolling of the 60-day time period in section 5909, the Appeals Board acts to grant or deny such petitions for reconsideration within 60 days of receipt of any such petition, and thereafter to issue a decision on the merits. By doing so, the Appeals Board also preserves the parties' ability to seek meaningful

[1] The Appeals Board does not deny petitions for reconsideration by operation of law pursuant to section 5909 based on the Supreme Court's holdings that summary denial of reconsideration is no longer sufficient after the enactment of section 5908.5. (*Evans, supra*, 68 Cal.2d at pp. 754-755, *Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16] ["We hold that if the appeals board denies a petition for reconsideration its order may incorporate and include within it the report of the referee, provided that the referee's report states the evidence relied upon and specifies in detail the reasons for the decision." (See Lab. Code, § 5908.5.)"]; *Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 893.)

appellate review. (Lab. Code, §§ 5901, 5950, 5952; see *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753 [33 Cal.Comp.Cases 350].) This approach is consistent with *Rea* and other California appellate courts,[2] which have consistently followed *Shipley's* lead when weighing the statutory mandate of 60 days against the parties' constitutional due process right to a true and complete judicial review by the Appeals Board.[3]

In this case, the WCJ issued the Findings and Order on December 19, 2023, and applicant filed a timely petition on January 8, 2024. When a Petition is filed, a task is sent to the WCJ through EAMS so that the WCJ receives notice that a Report is required. (See Cal. Code Regs., tit. 8, §10206; 10962.) No such notice is provided to the Appeals Board. Thereafter, the district office electronically transmits the case to the Appeals Board through EAMS. Here, according to Events

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[2] See e.g., *Hubbard v. Workers Compensation Appeals Bd. of California* (1993) 58 Cal.Comp.Cases 739 [writ of review granted to annul Appeals Board's denial of petition for reconsideration by operation of law (Lab. Code, § 5909)]; see also, *Frontline Medical Associates, Inc. v. W.C.A.B. (Lopez, Leonel; Sablan, Yolanda)* (2022) 87 Cal.Comp.Cases 314 (writ den.); *Entertainment by J & J, Inc. v. Workers' Comp. Appeals Bd. (Bernstein)* (2017) 82 Cal.Comp.Cases 384 (writ den.); *Bailey v. Workers Compensation Appeals Bd. of California* (1994) 59 Cal.Comp.Cases 350 (writ den.). Recent denials in all District Courts of Appeal include: First District, Div. 1 (*Scaffold Solutions v. Workers' Compensation Appeals Board and Angelo Paredes* (2023) (A166655)); First District, Div. 4 (*Kaiser Foundation Health Plan v. Workers' Compensation Appeals Board and Julie Santucci* (2021) (A163107)); Second District, Div. 3 (*Farhed Hafezi and Fred F. Hafezi, M.D., Inc. v. Workers' Comp. Appeals Bd.* (2020) (B300261)(SAU8706806)); Third District (*Reach Air Medical Services, LLC et al. v.Workers' Compensation Appeals Board. et al. (Lomeli)* (2022) (C095051)); Third District (*Ace American Insurance Company v. Workers' Compensation Appeals Board and David Valdez* (C094627) (2021)); Fourth District, Div. 2 (*Carlos Piro v. Workers' Compensation Appeals Board and County of San Bernardino* (2021) 86 Cal.Comp.Cases 599); Fourth District, Div. 3 (*Patricia Lazcano v. Workers' Comp. Appeals Bd*. (2022) 88 Cal.Comp.Cases 54); Fifth District (*Great Divide Insurance Company v. Workers' Compensation Appeals Board et al. (MelendezBanegas)* (2021) 86 Cal.Comp.Cases 1046); Sixth District (*Rebar International, Inc., et al. v. Workers' Comp. Appeals Board et al. (Hay*nes) (2022) 87 Cal.Comp.Cases 905).

[3] The holding in *Zurich American Ins. Co. v. Workers' Comp. Appeals Bd.* (2023) 97 Cal.App.5th 1213 (*Zurich*) is not inconsistent with *Shipley* and other California Appellate Court precedent concurring and/or affirming the finding in *Shipley* that equitable considerations may exist to toll the 60-day time limit of Labor Code section 5909. Indeed, the *Zurich* Court expressly declined to "resolve" the question of whether Labor Code section 5909 was intended to be "mandatory and jurisdictional." (*Zurich, supra,* 97 Cal.App.5th at p. 1236, fn. 17.) Under *Zurich*, as in *Shipley*, "equitable considerations" may provide grounds to excuse an action by the Appeals Board outside the 60 days provided for in section 5909. (*Zurich, supra,* 97 Cal.App.5th at p. 1238.) The *Zurich* Court found that the Appeals Board acted "in excess of its jurisdiction," *and* that there were no equitable considerations sufficient enough to toll the time limit in section 5909 beyond 60 days. (*Id.* at p. 1239.)

We note that the *Zurich* Court failed to consider that Labor Code section 5803 provides for continuing jurisdiction by the Appeals Board over all of its "orders, decisions, and awards," and that section 5301 provides for "full power, authority and jurisdiction" by the Appeals Board for all proceedings under section 5300. Additionally, jurisdiction is conferred on the Appeals Board when a petition is timely filed under Labor Code section 5900(a), and the Appeals Board may review the entire record, even with respect to issues not raised in the petition for reconsideration before it. 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].)

in EAMS, which functions as the "docket," the district office transmitted the case to the Appeals Board on April 16, 2024. Thus, the first notice to the Appeals Board of the Petition was on April 16, 2024. Due to this lack of notice *by the district office*, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties.[4] Therefore, considering that applicant filed a timely petition and that the Appeals Board's failure to act on that petition was in error, we find that our time to act on applicant's petition was tolled until 60 days after April 16, 2024.

Turning to the merits of applicant's Petition, applicant asserts the WCJ erred in determining she "did not hit or strike her head at the time of her March 4, 2020 slip and fall." (Finding of Fact No. 3.) Applicant contends the unrebutted reporting of QME Dr. Edington supports a finding of injury to the head, and that whether the applicant immediately reported striking her head on the ground is not dispositive of the facts of the injury. (Petition, at p. 4:10.) Applicant characterizes the WCJ's decision as a "lay opinion," unsupported in the medical record, and that further discovery on admitted body parts will result in needless delay. (Petition, at p. 7:9.)

The WCJ's Report observes:

> It is clear from Dr. Edington's deposition testimony that he took Applicant's history of the injury at face value, namely that she struck her head in the fall, in the course of formulating his diagnosis and causation opinions. It is also clear he initially misread the DFR, to the effect he believed the fall was much more violent than it actually was, and was of the belief that the Applicant had suffered an open/compound fracture of the left wrist, which was not the case. Dr. Edington testified that he takes a patient's history of the injury at face value, absent reason not to, which is understandable and reasonable. However, on this record, we have reason to believe otherwise, which includes the failure to report it at the initial evaluation at Concentra and her failure to advise Dr. Edington of her prior vision complaints, similar to the current ones, after an earlier motor vehicle accident in 2017, which came to light only through subpoenaed records, and which she later claimed resolved following chiropractic treatment with Dr. Oranje.
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> In sum, on this issue, I do not find Ms. Lowe to be credible. It is also evident from Dr. Edington's testimony that his diagnosis of traumatic convergence disorder and his related finding that it was industrial, was and is premised on his belief, based on her history, that the Applicant had struck her head, and sufficiently so that she sustained what he believed to be a concussion, or at least

[4] Contrary to the Court's speculation in *Zurich, supra,* given the tremendous volume of documents that the district offices must process, the vast number of cases in the system, and the limitations of the EAMS system, the parties' ability to inquire at the district office as to the status of a petition for reconsideration is limited; in fact, there is simply no mechanism to do so. Instead, the parties must rely on a verification of timely filing from the EAMS system. (Cal. Code Regs., tit. 8, § 10206.3.)

> concussion like symptoms. He indicated that if the history was not correct, his opinion on industrial causation might well change, although he also said that a whiplash effect alone, without a blow to the head, might be sufficiently causal, even if she did not hit her head. (Applicant's 5, at p. 28, lines 22-25 and p. 29, lines 1-8., and he also expressed the same opinion in his second report dated January 13, 2022 at p. 3, Applicant's 2.) That last opinion is why I felt it necessary to order development of the record, specifically in the form of either supplemental reporting and/or a new deposition of the QME to provide an explicit and final opinion if he still believed the convergence disorder was industrial if she did not strike her head.
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> (Report, at pp. 14-15.)

The WCJ thus reaches his factual determination based on a review of the evidence submitted in the record, including the medical-legal reporting of QME Dr. Edington, the DWC-1 claim notices, and contemporaneous treating physician reports. The WCJ further predicates his determination on his assessment of the credibility of the applicant as a witness at trial.

While it is true that the Board is the ultimate finder of fact, and we are entitled to make our own credibility determinations (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Granco Steel, Inc. v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 191 [33 Cal.Comp.Cases 50]; *Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901 [55 Cal.Comp.Cases 196]; *Alexander v. Workmen's Comp. Appeals Bd.* (1968) 262 Cal.App.2d 756 [33 Cal.Comp.Cases 341]; *Wilhelm v. Workers' Comp. Appeals Bd.* (1967) 255 Cal.App.2d 30 [32 Cal.Comp.Cases 424]), and upon reconsideration, reject the findings of the WCJ and enter instead our own findings on the basis of our own review of the record (Lab. Code, § 5907; *Garza, supra*; *Rubalcava, supra*; *Buescher v. Workmen's Comp. Appeals Bd.* (1968) 265 Cal.App.2d 520 [33 Cal.Comp.Cases 537]; *Wilhelm, supra*; *Montyk v. Workmen's Comp. Appeals Bd.* (1966) 245 Cal.App.2d 334 [31 Cal.Comp.Cases 321]), when the WCJ's findings are supported by solid, credible evidence, they are to be accorded great weight by the Board, and we should only reject them on the basis of contrary evidence of considerable substantiality. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza, supra*; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [54 Cal.Comp.Cases 349].)

Here, following our independent review of the evidentiary record, the pleadings of the parties, and the WCJ's Report, we are not persuaded that "evidence of considerable substantiality" warrants disturbing the WCJ's factual determination that applicant did not strike or hit her head at

the time of injury. (*Lamb, supra*, 11 Cal.3d at p. 281; *Garza, supra*, 37 Cal.App.3d at pp. 798-799.) We further concur with the WCJ's assessment that further development of the record with the ophthalmology QME is necessary to determine if, in light of the WCJ's factual determination coupled with the medical evidence in the record, applicant may have nonetheless sustained industrial injury to her head, eyes, or vision. (Finding of Fact No. 4; Order No. "a".)

Accordingly, we decline to disturb the WCJ's factual determination that applicant did not strike her head on the date of injury (Finding of Fact No. 3), and that further development of the record is necessary to determine if applicant nonetheless sustained the diagnosed traumatic convergence insufficiency as a result of her industrial injuries. (Finding of Fact No. 4.)

Applicant further contests the WCJ's determination she did not sustain a compensable psychiatric injury and is not entitled to psychiatric medical treatment on an industrial basis. (Finding of Fact No. 5; Order No. "c".)

Section 3208.3 governs compensability of psychiatric claims, and subdivision (d) provides in relevant part:

> Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition. Nothing in this subdivision shall be construed to authorize an employee, or the employee's dependents, to bring an action at law or equity for damages against the employer for a psychiatric injury, where those rights would not exist pursuant to the exclusive remedy doctrine set forth in Section 3602 in the absence of the amendment of this section by the act adding this subdivision.
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> (Lab. Code, § 3208.3(d).)

Accordingly, a compensable claim for psychiatric injury requires six months of non-continuous employment, unless the injury was caused by a sudden and extraordinary employment condition.

Here, the parties have stipulated that "[a]pplicant was employed for less than six months with this employer at the time of injury." (Minutes, at p. 2, Stipulation No. 6.) The WCJ's Opinion on Decision also finds "there is insufficient evidence in the record to establish … that the Applicant's alleged psychiatric injury was caused by a sudden and extraordinary employment

condition." (Opinion on Decision, at p. 12.) However, applicant's Petition avers she "made no argument regarding the nature of the circumstances that led to her injury because those points do not bear on the applicant's entitlement to treatment on the evidence presented." (Petition, at p. 8:12.) Rather, applicant avers entitlement to psychiatric medical treatment because "an employer is required to treat a nonindustrial condition if its treatment is necessary to cure or relieve an employee from the effects of the industrial injury." (Petition, at p. 8:22, citing *Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1982) 34 Cal.3d 159 [48 Cal.Comp.Cases 566] (*Bolton*).)

Indeed, our Supreme Court has observed in *Bolton, supra*, 34 Cal.3d 159:

> [A]n employee who suffers from a preexisting condition and is thereafter disabled by an industrial injury is entitled to compensation and reimbursement of medical expense, even though a healthy person would not have been injured by the event. (*Ibid*.) This is so even though the specific treatment is for a nonindustrial condition which must be treated in order to cure or relieve the effects of the industrial injury. (*Granado v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 399, 405-406 [71 Cal.Rptr. 678, 445 P.2d 294]; *Dorman v. Workers' Comp. Appeals Bd.* (1978) 78 Cal.App.3d 1009, 1020 [144 Cal.Rptr. 573]; *McGlinn v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 527, 535 [137 Cal.Rptr. 326]; 2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation, § 16.03.) While such expenses, in order to be compensable, must be reasonably necessary to cure or relieve the effects of an industrial injury, the statutes do not require any finding of disability, temporary or permanent, as a condition to such recovery.
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> (*Bolton,* at pp. 165-166)

We therefore agree with the applicant's position that she need not have suffered a compensable psychiatric injury to obtain psychiatric treatment, so long as the nonindustrial condition "must be treated in order to cure or relieve the effects of the industrial injury." (*Bolton, supra*, at p. 165.)

Here, applicant relies on the reporting of David L. Green, Ph.D., acting in the capacity of a consulting treating physician, who has authored a single report in evidence. Therein, Dr. Green describes applicant as suffering from chronic pain with psychiatric sequelae, and opines that applicant requires a "trial of combined biofeedback and cognitive therapy," to address her chronic

pain and psychosocial stress. (Ex. 10, Report of David Green, Ph.D., dated December 28, 2022, at pp. 10-11.)

The WCJ correctly observes that the report is a consultative treatment report, rather than a comprehensive medical-legal report, and that Dr. Green does not appear to have been provided with the applicant's complete medical history or treatment records. Accordingly, the WCJ concludes that the reporting of Dr. Green is not substantial evidence. However, to the extent that the reporting of Dr. Green is not currently substantial evidence on the issue of the need for medical treatment, the record discloses no other substantial evidence addressing the need for psychiatric medical treatment to cure or relieve from the effects of applicant's admitted industrial injuries.

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. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [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 [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, we are persuaded that it is premature to determine applicant's entitlement to psychiatric treatment based on an incomplete medical record and a single treating report that does not constitute substantial medical evidence. We therefore conclude that the record should be developed with respect to the requested treatment, and its relationship to the admitted orthopedic injuries herein. Accordingly, we will rescind Finding of Fact No. 5 and Order No. "c", and we will return this matter to the trial level for development of the record.

Finally, we note applicant's contention that her head injury is presumptively compensable because the defendant failed to timely deny her amended claim of "concussion" received on June 25, 2020. (Petition, at p. 3:1.) While the presumption of section 5402 would attach to a

dilatory denial of an initial claim of injury, the presumption would not otherwise attach to the amendment of a claim to include additional body parts.

In *Clark v. Workers' Comp. Appeals Bd.* (2001) 66 Cal.Comp.Cases 269, 270 [2001 Cal. Wrk. Comp. LEXIS 4865] (writ denied), we concluded that "[s]ection 5402 applies to claims of injury, not to parts of the body claimed to be injured as a result of an industrial injury." We explained that "[j]ust as a claim which is amended after the passing of the statute of limitations to include injury to a new part of the body relates back to the date of the original filing, so does an amendment adding a new part of the body to the claim form relate back for purposes of Section 5402." (*Id*. at 270-271 (citation omitted).) Therefore, we "concluded that Applicant's amended claim form to allege new parts of the body did not trigger a new period for rejecting a claim of injury." (*Id*. at 270.)

Similarly, in *Puc-Perez v. Workers' Comp. Appeals Bd.* (1999) 64 Cal.Comp.Cases 595 [1999 Cal. Wrk. Comp. LEXIS 5361], we concluded that the presumption of compensability under Labor Code section 5402 "only applies when a defendant seeks to deny industrial injury entirely and has failed to deny liability within the relevant time period." However, if the original claim of injury has been accepted as industrial, the presumption of compensability does not apply. (See also *Burmaster v. Workers Comp. Appeals Bd.* (1997) 62 Cal.Comp.Cases 792, 793 [1997 Cal. Wrk. Comp. LEXIS 4581].)

Here, it is not disputed that defendant issued a "partial denial of claim" notice on June 29, 2020, which admitted injury to various body parts, and denied injury in the form of a concussion. (Ex. 101, Notice of Partial Denial of Claim, dated June 29, 2020.) As the Opinion on Decision observes, however, the body part of "concussion" appears to have been claimed for the first time in applicant's June 22, 2020 claim form. Accordingly, we agree with the WCJ that the presumptions of section 5402 would not attach to the amendment of a claim to include an additional body part as it relates back to the original March 4, 2020 injury.

In summary, our independent review of the record does not disclose evidence of considerable substantiality that warrants disturbing the WCJ's determination of witness credibility, or the factual determination as to whether applicant struck her head as part the admitted injury herein. Nor do we discern error in the WCJ's determination that the amended body part of "concussion" does not invoke the presumptions of section 5402. However, we are persuaded that the current record does not adequately address the issue of whether applicant is entitled to

psychiatric medical treatment, either directly or as necessary to cure or relieve from the effects of an industrial injury. We will therefore grant applicant's Petition, and affirm the WCJ's F&O, except that we will amend the decision to defer the issue psychiatric injury and/or applicant's entitlement to psychiatric medical treatment.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of December 19, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of December 19, 2023 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

…

5. The issues of psychiatric injury and/or whether applicant requires psychiatric medical treatment to cure or relieve from the effects of her industrial injury are deferred.

ORDERS

…

c. [Deleted.]

IT IS FURTHER ORDERED that this matter is returned to the trial level for development of the record.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 11, 2024

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

SHALANSKI LOWE
LAW OFFICES OF BRIAN C. ITO
LLARENA, MURDOCK, LOPEZ & AZIZAD

SAR/abs

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