WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

YOLANDA MARCHANTE-ORTIZ, *Applicant*

vs.

UNIVERSITY OF CALIFORNIA, BERKELEY, permissibly self-insured, adjusted by SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ11396713
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant has petitioned for reconsideration of the Findings of Fact and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) in this matter on May 20, 2024. In that decision, the WCJ found that applicant, while employed on March 13, 2016 as a science specialist by defendant, University of California, Berkeley, sustained injury arising out of and in the course of her employment to her head, back, neck and in the form of tinnitus, post-concussive syndrome and traumatic brain injury, causing permanent disability of 95%. Applicant was awarded permanent disability less reasonable attorney fees, and future medical care.

Petitioner contends that the WCJ erred in failing to find that the evidence supports a finding of permanent total disability, based upon the qualified medical evaluator (QME) Wayne Anderson, M.D.'s findings of traumatic brain injury, the conclusions of vocational evaluator (VE) Jeff Malmuth, and in accordance with Labor Code[1] section 4662(a)(4).

Petitioner requests a finding and award of 100% permanent total disability without apportionment, or that the matter be returned to the trial judge to reconsider whether the 5% apportionment remains applicable in light of the opinions of the PQME and vocational evaluator.

Defendant filed an answer to the Petition, requesting denial on the merits or dismissal for untimeliness.

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

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

We have considered the Petition for Reconsideration (Petition), the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant 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 Labor Code section 5950 et seq.

I.

With respect to the timeliness of the Petition, we note the following:

WCAB Rule 10628 states, in pertinent part:

> (a) The Workers' Compensation Appeals Board shall serve the injured employee or any dependent(s) of a deceased employee, whether or not the employee or dependent is represented, and all parties of record with any final order, decision or award issued by it on a disputed issue after submission The Workers' Compensation Appeals Board shall not designate a party, or their attorney or agent of record, to serve any final order, decision or award relating to a submitted issue.
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> ***
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> (d) If the Workers' Compensation Appeals Board electronically serves a document, the proof of electronic service shall be made by endorsement on the document, setting forth the fact of electronic service on the persons or entities listed on the official address record as required by rules 10400 and 10401 and the date of electronic service.
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> (Cal. Code Regs., tit. 8 § 10628.)

Thus service of a final order, decision or award of a disputed issue after submission, is to be effected on all parties of record by the WCAB, including the injured employee or any dependent(s), whether or not represented, and not by designated service.

As stated by the WCJ in his Report:

> With respect to the timeliness of the petition, this depends on when applicant received the petition.[2] This was served electronically on both attorneys on May 20, 204 as a courtesy, with defendant designated to serve all parties. That designated service did not take place until June 19, 2024, the day the instant petition was filed. While I believe the electronic service on May 20 was sufficient to "start the clock" on reconsideration, the petition is verified and states that counsel did not receive the decision until June 19. I believe it best that the matter be decided on its merits."

(Report, p.1, fn.1.)

Here, the WCJ indicates that the findings and award were served electronically by the WCAB on both the applicant and defense attorney on May 20, 2024, as a courtesy only. The applicant was apparently not served at that time, which is required for a final order, decision, or award on a disputed issue, per section 10628(a). Further, the record lacks documentation of the required endorsement as to the date of service of the document as set forth section 10628(d). The F&A lists the attorneys as the only parties having been served and further, does not indicate the date of the electronic service. Additionally, proof of service by the WCAB as set forth in the electronic file indicates service by mail on May 20, 2024 solely on defendant's attorneys of record.

Additionally, while WCAB Rule 10629 permits designated service, this section states:

> (a) The Workers' Compensation Appeals Board may, in its discretion, designate a party or their attorney or agent of record to serve any order that is not required to be served by the Workers' Compensation Appeals Board in accordance with rule 10628.
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> (b) When a party or their attorney or agent of record is designated to serve an order, the workers' compensation judge shall indicate which parties to serve.
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> …
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> (d) Within 10 days from the date on which designated service is ordered, the person designated to make service shall serve the document and shall file the proof of service.

(Cal. Code Regs., tit. 8 § 10629.)

[2] We presume the WCJ meant when applicant received the Findings and Award, and not the Petition.

Here, the May 20, 2024 Findings and Award of the WCJ was served by defendant on the parties by designated service on June 19, 2024, over ten days from the date service was ordered by the Workers' Compensation Appeals Board.

There are 20 days allowed within which to file a petition for reconsideration from a "final" decision. (Lab. Code, §§ 5900(a), 5903.) This time is extended by 10 calendar days if service is made to an address outside of California but within the United States. (Cal. Code Regs., tit. 8, § 10605(a)(1).) Thus, when a party is served at an address outside of California, in order to observe due process for all parties, we interpret Rule 10605 as extending the time to file for all parties being served.

The F&A was served by defendant on the parties on June 19, 2024, which is over 10 days from the date on which designated service was ordered. Service at that time included defendant, who was served at an address outside of California but within the United States. Thus, even if electronic service of the F&A on applicant's counsel and defendant's counsel on May 20, 2024 constituted proper service, the applicant had 30 days in which to file her petition for reconsideration from that date, or until June 19, 2024, in order to provide equal due process to all parties. [3]

In this case, the petition was filed by applicant on June 19, 2024. Further, we accept the statement in applicant's verified petition for reconsideration (Petition) that she first obtained a copy of the F&A after searching the electronic adjudication management system (EAMS) on June 19, 2024, after having been contacted by defendant regarding a petition for attorney fees.

Thus, we deem applicant's Petition to be timely filed.

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[3] WCAB Rule 10605(a)states in pertinent part:

"When any document is served by mail, fax, e-mail or any method other than personal service, the period of time for exercising or performing any right or duty to act or respond shall be extended by

(1) Five calendar days from the date of service, if the place of address and the place of mailing of the party, attorney or other agent of record being served is within California ;

(2)Ten calendar days from the date of service, if the place of address and the place of mailing of the party, attorney or other agent of record being served is outside of California but within the United States…"

II.

Labor Code §4662, states, in pertinent part:

> (a) Any of the following permanent disabilities shall be conclusively presumed to be total in character:
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> ... (4) An injury to the brain resulting in permanent mental incapacity.
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> (Cal. Lab. Code § 4662(a)(4).)

Here, applicant is alleging a traumatic brain injury resulting in permanent mental incapacity under section 4662(a)(4) based upon the existing medical and vocational evidence. If the evidence justifies same, that presumption is conclusive, and the determination of whether the existing medical opinions on the issue of apportionment were made in accordance with established legal principles would be unnecessary.

Where the injury is conclusively presumed to have caused permanent total disability under Section 4662(a), apportionment will not be applied to reduce the award. (See, *Hirschberger v. Stockwell Harris Woolverton & Muehl* (2018) 84 Cal. Comp. Cases 229 (Bd. panel decision); *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Dragomir-Tremoureux)* 71 Cal. Comp. Cases 538 (writ denied).)

Conversely, given the assertion of permanent total disability and findings of the WCJ as stated, if permanent mental incapacity per section 4662(a)(4) is not found, the issue of apportionment is germane to the consideration at hand.

The WCJ stated in his Opinion on Decision (Opinion) the following:

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> Applicant was the only witness to testify at trial. I found her testimony to be credible and understated throughout, and in certain salient respects compelling. Quite apart from her physical symptoms and limitations, which themselves are significant (see Exhs. 3, 4), she finds herself at sea when conversing with others. Burdened as well by daily headaches, she believes that she is incapable of performing in any sort of job. Dr. Anderson agrees.
>
> *Permanent partial versus total disability*
>
> As stated, the QME has concluded, from his medical vantage point, that Ms. Marchante-Ortiz is incapable of gainful employment. There is no contrary medical opinion. It is further supported by applicant's credible testimony. I find no fault with Dr. Anderson's recitation of the relevant history, his findings on examination, his medical reasoning or his application of the relevant legal principles. The award herein reflects his conclusions.

As will be seen, I have likewise found no fault in the QME's assessment of apportionment, by which I mean the extensive analysis by which he arrives at the conclusion that a small percentage of the impairment resulting from applicant's head injury should be attributed to pre-existing causes.

Because of that apportionment, and the involvement of other parts of the body, the end result is partial rather than total disability.

The WCJ goes on to quote the QME in his reporting of July 16, 2019, and states:

Exhibit B, pages 24-25. The QME goes on at some length before concluding, at pages 30- 31:

"The fact that the applicant has a potential tendency toward headache does increase the duration of this postconcussive state and its symptoms.

However, the applicant does not appear to have a strong headache disorder, and to avoid speculation, the applicant's tendency toward headache would be afforded only 5% of residual disability. This 5% indicates that the applicant has having [sic] an extended duration of impact [on] activities of daily living, and extended residual disability, because of a tendency toward headache.

The tendency toward headache remains present even in a person who does not have ongoing headaches for several years as it essentially is a genetic component.

* * *

Thus, to avoid speculation, the only apportionable factor is a genetic tendency toward headache which is a 5% apportionment. 95% of the residual disability is from the subject injury.

The idea of this apportionment is further supported by the concept that a concussion and its consequences should gradually improve. It is not medically probably that there would be worsening, and if there is worsening, it is reasonable to consider the underlying cause of the worsening as being something in addition to the underlying problem of concussion. She indicates that the headache is recently starting to worsen, and to a medical probability, that would not be on the basis of the subject injury."

(Opinion, pp. 5-6.)

Petitioner asserts the following:

In his opinion awarding 95% permanent disability, Judge Miller does not refer to the January 2, 2024 report of Dr. Anderson, or the deposition from Dr. Anderson that followed.

It is clear that before 2024 Dr. Anderson discussed the applicant's propensity for headaches during college and found that that supported 5% apportionment - however, after receiving additional documents following his November 2022

evaluation, he concluded that the applicant had sustained a traumatic brain injury and that the effects of the TBI alone precluded her from the labor market medically.

It is also clear that Judge Miller found Dr. Anderson's opinions to be substantial medical evidence throughout his opinion and decision.

(Petition, p. 16.)

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As reported by Dr. Anderson the injury involving Yolanda Marcahnte-Ortiz (sic) is very complex. Although her TBI was reported on the scale as mild the diagnosis of post-concussive syndrome and the sequel was sufficient for the QME to find her permanently precluded from the labor market.

Dr. Anderson first made this determination in 2020 after reviewing the FCE reports and concluded that the combination of the orthopedic injury and the TBI precluded her from the labor market. However, after re-evaluation in November 2022 coupled with the report of the Center for Brain Injury, he concluded in his report of January 2, 2024, that the applicant's TBI was sufficient to find her precluded from the open labor market industrially independent of the orthopedic injuries and despite apportionment for headaches.

Judge Miller's opinion does not reference his review of reports from Dr. Anderson after 2019. However, it is clear the opinion of Dr. Anderson evolved over time as did the evidence supporting the diagnosis and damage caused by traumatic brain injury. The reading of the medical evidence through 2024 establishes total disability without apportionment to headaches.

As discussed the PDRS can be rebutted. Here the applicant through the unrebutted medical evidence has proven that medically she is precluded from the open labor market which suggests she has a total loss in earning capacity which is sufficient to rebut the schedule.

The report of Jeff Malmuth is additive to this opinion in that the applicant is nonameable to vocational rehabilitation based on the medical evidence. Conversely, the reports of the defense VR expert attempt to challenge the findings despite the overwhelming and consistent medical evidence of the effects of the TBI injury. Not one medical or other professional evaluator has agreed with defendant vocational expert Ms. Tincher or provided information from which she could argue a position counter to the opinion of Dr. Anderson and Mr. Malmuth.

(Petition, pp. 17-18.)

III.

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

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

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

Here, it is unclear from our preliminary review whether the existing record is sufficient to support the decision, order, award, and legal conclusions of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above.

IV.

Finally, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal. 2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [62 Cal.Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000)

81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra,* at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code section 5901 states in relevant part that:

> "No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …"

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

V.

Accordingly, we grant applicant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Orders issued on May 20, 2024 by a workers' compensation administrative law judge is **GRANTED**.

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

While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
August 16, 2024

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

YOLANDA MARCHANTE-ORTIZ
LAW OFFICES OF ROBERT E. WOOD
LAUGHLIN, FALBO, LEVY & MORESI

LAS/abs

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