WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ARGELIA DE LUNA, *Applicant*

vs.

VALLEYWIDE NEWSPAPER, LLC;
TWIN CITY FIRE INSURANCE COMPANY, administered by
THE HARTFORD, *Defendants*

Adjudication Numbers: ADJ11369088, ADJ11369087
Van Nuys District Office

OPINION AND ORDERS
GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the First Amended Findings, Award and Orders (FA&O) issued by the workers' compensation administrative law judge (WCJ) on December 16, 2024, in case number ADJ11369088. The WCJ found, in relevant part, that applicant, while employed by defendant during the period August 21, 2007 to June 11, 2018, sustained injury arising out of and in the course of employment (AOE/COE) to her lumbar spine and right upper extremity; that applicant was permanent and stationary on August 29, 2023; that applicant is entitled to 104 weeks of temporary partial disability payments; that there are legal grounds for apportionment; that applicant is entitled to an award of permanent partial disability of fifteen percent; and, that there is need for further medical treatment. The WCJ issued an award, granting applicant temporary disability indemnity, permanent partial disability indemnity, future medical treatment and attorney fees. The WCJ ordered, in relevant part, that attorney fees be deducted from applicant's temporary and permanent disability payments, and if insufficient funds for attorney fees have been withheld from any advances paid to applicant, defendants are to pay the fees.

Applicant contends in the Petition for Reconsideration (Petition) that the WCJ's decision should have been based on the unrebutted reports filed on behalf of applicant; that the matter must be returned for further development of the medical record to allow the primary treatment provider (PTP) to review a medical-legal report of a different specialty; that defendant did not meet its

burden to prove apportionment; that it was sufficient for the PTP to have reviewed the PQME's report, when the PQME reviewed additional medical-legal reports; and, that the WCJ erred in issuing the amended F&O, in response to defendant's petition for reconsideration, rather than waiting for the WCAB to issue an opinion on defendant's petition.

We received an Answer from Defendant.

The WCJ filed a Joint Report and Recommendation on Petition for Reconsideration (Report) recommending that applicant's petition be denied.

We have considered the 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 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.

Preliminarily, we note that former Labor Code section 5909[1] 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, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

[1] All section references are to the Labor Code, unless otherwise indicated.

Under 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 January 27, 2025, and 60 days from the date of transmission is March 28, 2025. This decision is issued by or on March 28, 2025, so that we have timely acted on the petition as required by section 5909(a).

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. 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 January 27, 2025, and the case was transmitted to the Appeals Board on January 27, 2025. 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on January 27, 2025.

II.

The WCJ provided the following factual background in the Report:

> Applicant filed an Application for Adjudication of Claim [in case number ADJ11369088] alleging injuries to her cervical, thoracic and lumbar spine, hypertension, alopecia, cephalgia, sleep impairment, vertigo, psyche, bruxism, right shoulder, upper extremities, right elbow, and wrist as the result of a Cumulative Trauma sustained in the course of employment with Valleywide Newspapers, LLC from August 21, 2007 through June 11, 2018.
>
> The Applicant also filed an Application for Adjudication of Claim [in case number ADJ11369087] alleging a specific injury occurring on June 1, 2013, to her cervical, thoracic and lumbar spine, TMJ/bruxism, right shoulder, wrist, upper extremities, psyche, hypertension, alopecia, cephalalgia, and in the form of sleep impairment.

> On September 4, 2024, the matter was tried and submitted. On November 19, 2024, the undersigned WCJ issued a Findings and Award wherein it was found, based on the testimony of Applicant, that there was no industrial specific injury and the continuous trauma rated 68%.
>
> On December 4, 2024, Defendant filed a petition for reconsideration of the finding of 68%. The defendant pointed out that the medical reporting of Dr. Schames was not substantial medical evidence. After review of the reporting, the undersigned WCJ agreed and issued an amended Findings and Award finding the continuous trauma rated 15%. It is from this finding that Applicant is aggrieved.

(WCJ's Report, at pp. 1-2.)

III.

We highlight the following legal principles that may be relevant to our review of this matter:

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).) The Appeals Board has a constitutional mandate to "accomplish 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 has "a duty to develop an adequate record" and "it is well established that the WCJ or the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence." (*Id.,* at pp. 403-404.)

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].) To constitute substantial evidence "a medical opinion must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd*., (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687], citing *McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 413, 416–417, 419.) A medical opinion "is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess." (*Id*.,

citing *Hegglin v. Workmen's Comp. App. Bd.* (1971) 4 Cal.3d 162, 169.) "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." (*Id*., citing *Granado v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 399, 407.)

Section 4663, regarding apportionment of permanent disability, provides, in relevant part:

> (a) Apportionment of permanent disability shall be based on causation.
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> (b) A physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address… the issue of causation of the permanent disability.
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> (c) In order for a physician's report to be considered complete on the issue of permanent disability, it must include an apportionment determination. A physician shall 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…

(Lab. Code, § 4663.)

To comply with section 4663, a physician's report in which permanent disability is addressed must also address apportionment of that permanent disability. (*Escobedo v. Marshalls* (*Escobedo*) (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Bd. en banc).) However, the mere fact that a physician's report addresses the issue of causation of permanent disability and makes an apportionment determination by finding the approximate respective percentages of industrial and non-industrial causation does not necessarily render the report substantial evidence upon which we may rely. Rather, the report must "disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles." (*Id*. at p. 621.)

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) Sections 5701 and 5906 "authorize the WCJ and the Board to obtain additional evidence, including medical

evidence, at any time during the proceedings. Before directing augmentation of the medical record, however, the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie v. L.A. County Metro. Transit Auth.* (2002) 67 Cal.Comp.Cases 138, 141 (Appeals Board en banc).)

Here, based on our review, we are not persuaded that the record is properly developed. Where the medical evidence or opinion on an issue is incomplete, stale, and no longer germane, or is based on an inaccurate history, or speculation, it does not constitute substantial evidence. (*Place v. Workers' Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 377-379 [35 Cal.Comp.Cases 525]; *Escobedo, supra,* 70 Cal.Comp.Cases at p. 621 (Appeals Board en banc).)

It is unclear from our preliminary review that there is substantial medical evidence to support the WCJ's decision. Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

IV.

In addition, 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 appeals board has

continuing jurisdiction over all 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 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593.) 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, 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"].)

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. …

(Lab. Code, § 5901.)

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

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration 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/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 24, 2025

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

ARGELIA DE LUNA
LAW OFFICE OF RON NOLAN
LAW OFFICES OF LYDIA B. NEWCOMB

MB/*ara*

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