

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

DANIEL DORIS, *Applicant*

vs.

**DBI BEVERAGES;
ZURICH AMERICAN INSURANCE COMPANY; Administered by GALLAGHER
BASSETT SERVICES, *Defendants***

**Adjudication Number: ADJ10908468
Sacramento District Office**

**OPINION AND DECISION
DENYING PETITION FOR
RECONSIDERATION**

Defendant filed a Petition for Reconsideration (Petition) of the Findings and Award (Findings) issued March 24, 2025, wherein the workers' compensation administrative law judge (WCJ) found the applicant sustained injury arising out of and in the course of employment to the cervical spine, lumbar spine, psych, upper extremities, lower extremities, bowel, and bladder. The WCJ deferred other issues and ordered the parties to develop the record on the issues of apportionment, work restrictions, and vocational feasibility.

Defendant asserts error in deferring issues of 1) catastrophic injury relative to permanent disability for psychiatric injury and 2) applicant's petition for reimbursement of vocational expert fees.

The WCJ's Report and Recommendation (Report) recommends the Petition be denied. We did not receive an answer from applicant.

We have considered the allegations of the Petition and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, and for the reasons discussed below, we will deny reconsideration.

DISCUSSION

I.

A.

Former Labor Code section 5909¹ 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. (Former 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.

(Lab. Code, § 5909.)

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 May 1, 2025, and 60 days from the date of transmission is Monday, June 30, 2025. This decision issued by or on June 30, 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

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

act on a petition. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

According to the proof of service, the Report was served on May 1, 2025, and the case was transmitted to the Appeals Board on May 1, 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 May 1, 2025.

B.

As found by the WCJ in the Findings, while employed during the cumulative period through December 20, 2016, by defendant as a warehouse associate, applicant sustained injury to the cervical spine, lumbar spine, psych, upper extremities, lower extremities, bowel, and bladder.

The WCJ found *inter alia* that Panel Qualified Medical Examiner (PQME) Dr. Shorr's reporting is not substantial evidence and that there is no substantial evidence for vocational feasibility. These findings resulted in the order "to develop the record on the issues of apportionment, work restrictions, and vocational feasibility." Issues not determined were deferred.

Defendant in the timely filed Petition objects to deferring issues of catastrophic injury and applicant's petition for reimbursement of vocational expert fees.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the

petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

The WCJ's decision here includes findings of injury and employment, threshold issues. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal. Thus, we treat defendant's Petition as one for reconsideration. Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory order in the decision. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra.*) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

In his most recent deposition, PQME Dr. Shorr states that "from a strictly physical standpoint, [applicant] could potentially be able to sit and do something with his hands." PQME Dr. Shorr agreed that a current evaluation would be reasonable to evaluate upper extremity restrictions noting applicant had upper extremity findings including "mild claw hand deformity on the left." (Joint Exhibit LL, Deposition of PQME Dr. Shorr, July 2, 2024, page 16, line 25 to page 17, line 2; page 18, line 13, to page 19, line 9.)

PQME Dr. Shorr re-evaluated the applicant on September 30, 2024, stating under discussion it "remains my opinion that the claimant is 100% permanently disabled" and under work restrictions that he "will not be able to return to his prior occupation and is permanently totally disabled." PQME Dr. Shorr does not otherwise assess work restrictions or disability. (Joint Exhibit JJ, PQME Dr. Shorr, September 30, 2024, pages 11 and 12.)

The current record is incomplete as PQME Dr. Shorr does not fully develop the extent of applicant's work restrictions or disabilities before reaching the conclusion applicant is "permanently totally disabled." This deficiency precludes a meaningful assessment of applicant's ability to benefit from vocational rehabilitation. (See *LeBoeuf v. Workers' Comp. Appeals Bd.*

(1983) 34 Cal.3d 234, 246 [48 Cal.Comp.Cases 587], and progeny.) We agree with the WCJ that the record requires development.

The WCJ 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] ["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 (citations)"]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) The WCJ, ". . . may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 404 [65 Cal.Comp.Cases 264].)

Here, based upon the WCJ's analysis of petitioner's arguments, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

As noted by the WCJ "the evidence anticipated in the issues to be developed also affects the analysis of the issues that were deferred." Evaluation of catastrophic injury pursuant to section 4660.1(c)(2)(B) requires consideration of the nature of applicant's physical injuries. (See *Wilson v. State Cal Fire* (2019) 84 Cal. Comp. Cases 393, 414 (Appeals Board en banc).) Similarly evaluating applicant's Petition for Reimbursement concerns review of vocational evidence. Both deferred issues would benefit from the development of the record.

Defendant has not established substantial prejudice or irreparable harm from the order deferring issues and completing additional discovery. Defendant is a participant in discovery and may prepare a record supporting reconsideration if warranted should the matter ultimately proceed to a final decision adverse to petitioner.

We also note defendant's Petition provides its primary authority for argument is "[b]ased on Sullivan on Comp." (Petition, page 4, lines 24 to 25; page 5, lines 8 to 9.) In the Report the WCJ stated "[t]here is no citation to where this information is within Sullivan on Comp and the WCJ was unable to locate it." (Report, page 3.) "A petition for reconsideration, removal or

disqualification may be denied or dismissed if it is unsupported by specific references to the record and to the principles of law involved." (Cal. Code Regs., tit. 8, § 10972, emphasis added.) Defendant is cautioned that the Petition on its face appears skeletal and independently may have been denied or dismissed as unsupported by specific references to the principles of law involved. (Lab. Code, § 5902.)

Accordingly, we deny the Petition as one seeking reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 30, 2025

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

**DANIEL DORIS
MARCUS & PULLEY
D'ANDRE LAW**

PS/oo

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