WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DANNY REGALADO, *Applicant*

vs.

COUNTY OF LOS ANGELES, permissibly self-insured, adjusted by SEDGWICK CMS, *Defendants*

Adjudication Numbers: ADJ14346787, ADJ9216939, ADJ10470278
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Both applicant and defendant seek reconsideration of the "Findings, Award, and Order" (F&A) issued on December 3, 2024, by the workers' compensation administrative law judge (WCJ).

The WCJ found in case number ADJ14346787, in pertinent part, that applicant sustained industrial injury to his lumbar spine via a cumulative trauma ending on January 15, 2016. The WCJ awarded temporary disability benefits for the period of July 21, 2016 through September 22, 2016. The WCJ found that applicant's injury caused 32% permanent partial disability. The WCJ did not award apportionment of disability under Labor Code[1] section 4663 as applicant qualified for the anti-attribution clause. The WCJ did not make any finding as to apportionment under section 4664.

The WCJ found in case number ADJ9216939, in pertinent part, that applicant sustained a specific industrial injury to his right upper extremity, right shoulder, right elbow, and right wrist on September 20, 2013, which resulted in applicant sustaining 36% permanent partial disability.

Applicant alleges that pursuant to the opinions of the primary treating physician (PTP) and the agreed medical evaluator (AME), he was temporarily totally disabled from February 18, 2016 through September 22, 2016, and thus the period of temporary disability was awarded in error.

[1] All future references are to the Labor Code unless noted.

Defendant argues that the WCJ incorrectly found applicant's date of injury under section 5412 because applicant sustained a single cumulative trauma over the course of his career, and thus, the date of injury should be July 24, 2003, which was the date the parties stipulated to the existence of permanent disability in a prior claim. Defendant next argues that the WCJ erred in calculating the amount of temporary disability overpayment and the amount of temporary disability benefits due. Defendant next argues that the WCJ found an incorrect rate of permanent disability for the 2013 award. Finally, defendant argues that the WCJ erred in applying the non-attribution clause of 4663(e) and thus, it is entitled to apportionment.

We received an answer from defendant.

The WCJ filed a Report recommending that the Petition for Reconsideration be granted to correct the period of temporary disability in ADJ14346787 to February 18, 2016 through September 22, 2016. The WCJ further recommends correcting the rate of permanent disability in the 2013 award (ADJ9216939) to $230.00 per week.

We have considered the allegations in the Petitions for Reconsideration, the Answer, the contents of the Report, and we have reviewed the record. Based upon our review of the record, we will grant both applicant and defendant's Petitions for Reconsideration.

Our orders granting the Petitions are not final orders, and we will order that a final Decision After Reconsideration is deferred pending further review of the merits of the Petitions 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 section 5950 et seq.

FACTS

In ADJ14346787, the parties stipulated that applicant sustained a cumulative industrial injury during the period ending on January 15, 2016 to the lumbar spine. (Minutes of Hearing and Summary of Evidence, (MOH/SOE, February 6, 2024, p. 2, lines 11-14.) The primary issues submitted in that case were the dates of temporary disability, permanent disability and apportionment thereof, and the date of injury pursuant to section 5412. (*Id*. at p. 3, lines 3-12.)

In ADJ9216939, the parties stipulated that applicant sustained a specific industrial injury during the period ending on September 20, 2013 to the right upper extremity, right shoulder, right elbow, and right wrist. (*Id*. at p. 3, lines 14-17.) The primary issues submitted in that case were

permanent disability and apportionment thereof, applicant's petition to reopen for new and further disability, and defendant's request for credit for an alleged overpayment of temporary disability. (*Id*. at p. 4, lines 9-11.)

Applicant was evaluated by AME Jon Greenfield, M.D., who authored seven reports in evidence and was deposed. (Joint Exhibits Z1 through Z8.) Dr. Greenfield diagnosed applicant with the following:

1. Degenerative arthritis of the right shoulder, acromioclavicular joint.

2. Status post right shoulder surgery including rotator cuff repair,

subacromial decompression and distal clavicle resection.

3. Olecranon bursitis, right elbow.

4. Large lumbar disc herniation, L5-Sl.

(Joint Exhibit Z4, Report of AME Jon Greenfield, M.D., October 17, 2019, p. 11.)

Dr. Greenfield assigned 13% whole-person impairment (WPI) to the lumbar spine using range of motion method. (*Id*. at p. 13.) He assigned 11% WPI to the right shoulder for lost range of motion and 6% WPI to the right hand for lost grip strength. (*Ibid*.)

Dr. Greenfield opined on causation and apportionment as follows:

> The patient had a specific injury to his right shoulder and right wrist and hand on 9/20/13. One hundred percent of his current impairment in the right shoulder, right wrist and right hand is a result of this specific injury.
>
> With regard to the lumbar spine, he had an injury in 12/95. I do not have any medical records from that injury. The patient clearly has a large disc herniation in the lumbar spine on MRI scan. I do not find a subsequent injury after 1995.
>
> Based upon the review of the limited medical records, I would apportion 40% of the patient's lumbar spine impairment to the specific injury of 1995. I would apportion 40% of the patient's lumbar spine impairment to continuous trauma during the time that he worked for the County of Los Angeles Sherriff's Department, and I would apportion 20% to degenerative arthritis and causation, not work related.

(*Id*. at p. 15.)

DISCUSSION
I.

Former 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, 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.

(§ 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 January 2, 2025, and 60 days from the date of transmission is Monday, March 3, 2025. This decision is issued by or on March 3, 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.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on January 2, 2025, and the case was transmitted to the Appeals Board on

January 2, 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 2, 2025.

II.

In his Report, the WCJ admitted error, and recommended that reconsideration be granted. As to applicant's Petition for Reconsideration, the WCJ noted the following in his Report:

> There is no dispute regarding the end date of the temporary disability period. In the agreed medical examiner Jon Greenfield, M.D.'s report dated August 15, 2022, in the discussion section it states "Dr. Chon, in his note of 7/21/2016, indicated that Mr. Regalado was totally temporarily disabled." The undersigned WCJ incorrectly believed that was the first time Dr. Chon placed Applicant on temporary disability. However, in the record review section of the report it states "on 2/18/2016, Mr. Regalado was placed on temporary disability as of 2/18/2016." Applicant's petition for reconsideration it is correct and should be granted. The undersigned WCJ's award should be modified by the recon unit or returned to the trial court, to correct: the period of temporary disability; period where Labor Code § 4850 benefits should be paid; and the period and rate at which temporary disability should be paid.

(Report, p. 2.)

As to defendant's Petition for Reconsideration, the WCJ noted the following:

> Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury. (Cal Lab Code § 4656(c)(2).) The undersigned WCJ erred in finding the last date temporary disability indemnity shall be paid was January 27, 2019. The date of specific injury is September 20, 2013. Five years from the date of injury is September 20, 2018. Pursuant to Labor Code § 4656, the last day of temporary disability indemnity can be paid is September 20, 2018 and permanent disability indemnity should have started on September 21, 2018. The recon unit should modify the award or return the matter to the trial level to modify the award in the specific injury as follows:
>
> > The injury caused permanent partial disability of thirty-six percent (36%), equivalent to 173 weeks of indemnity

> payable at the rate of $230.00 in the total sum of $39,790.00, payable commencing on September 21, 2018, less credit for amounts paid by defendant on account thereof heretofore, and less reasonable attorney fees in the amount of $5,968.50. Any temporary disability indemnity paid after the September 20, 2018 is hereby reclassified as permanent disability advances.
>
> The above modification corrects the weekly permanent disability indemnity rate, which should by $230.00, not $290 as stated in the formal rating.

(Report, p. 6.)

Section 5412 states: "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."

As used in section 5412, "disability" means either compensable temporary disability or permanent disability. (*Chavira v. Workers' Comp. Appeals Bd*. (1991) 235 Cal. App. 3d 463 [56 Cal.Comp.Cases 631]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal. App. 4th 998 [69 Cal.Comp.Cases 579].) Medical treatment alone is not "disability" for purposes of determining the date of a cumulative injury pursuant to section 5412, but it may be evidence of compensable permanent disability. (*Rodarte*, *supra*, 119 Cal. App. 4th 998, 1005.) Likewise, modified work is not a sufficient basis for finding compensable temporary disability, but it may be indicative of a compensable permanent disability, especially if the worker is permanently precluded from returning to his usual and customary job duties. (*Id*.) The existence of disability is a medical question beyond the bounds of ordinary knowledge, and, as such, will typically require medical evidence. (*City & County of San Francisco v. Industrial Acc. Com*. (*Murdock*) (1953) 117 Cal. App. 2d 455 [18 Cal.Comp.Cases 103]; *Bstandig v. Workers' Comp. Appeals Bd*. (1977) 68 Cal. App. 3d 988 [42 Cal.Comp.Cases 114].) Knowledge requires more than an uninformed belief. Because the existence of disability typically requires medical evidence, an "applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability." (*City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal. App. 3d 467, 473 [50 Cal.Comp.Cases 53].)

Section 4663 requires that any report addressing permanent disability must also address apportionment of disability. Defendant carries the burden of proof on apportionment. (§ 5705.) Apportionment of permanent disability must address causation of disability and must constitute substantial evidence. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611, 620-621 (Appeals Board en banc).) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Id*. at 621.) Causation of disability is not to be confused with causation of injury. (*Id*. at 611.)

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd*. (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is ". . . one of 'the rudiments of fair play' assured to every litigant . . ." (*Id*. at 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, [The] commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law. (*Id*. at 577.)

When deciding reconsideration, the Appeals Board is required "to achieve a substantial understanding of the record[.]" (*Allied Compensation Ins. Co. v. Industrial Acc. Com*. (1961) 57 Cal.2d 115, 120.)

We further 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 therefore.].)

"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"].)

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. …

Here, and because the WCJ admits error, we will grant reconsideration. However, and to achieve uniformity of decisions, we require additional time to review the specific arguments raised,

particularly as to apportionment. Accordingly, we do not issue a Decision After Reconsideration at this time.

Thus, this is not a final decision on the merits of the Petitions 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.

Accordingly, and to allow all parties due process and to further our obligation to achieve a substantial understanding of the record when deciding reconsideration, we will grant reconsideration to study the issues presented.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the F&A issued on December 3, 2024, is **GRANTED**.

IT IS FURTHER ORDERED that defendant's Petition for Reconsideration of the F&A issued on December 3, 2024, is **GRANTED**.

IT IS FURTHER ORDERED that a final Decision After Reconsideration is **DEFERRED** pending further review of the merits of the Petitions 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/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 3, 2025

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

DANNY REGALADO
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE
ROBINSON DI LANDO

EDL/oo

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