WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ESHAK ABDELMALAK, *Applicant*

vs.

HANI, INC.; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION FOR CASUALTY RECIPROCAL EXCHANGE in liquidation, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES; and R.K. CHEVRON; AMERICAN ALL-RISK LOSS ADMINISTRATORS, administered by CLARENDON/ENSTAR, *Defendants*

Adjudication Numbers: ADJ1556152 (MON 0293809); ADJ1424684 (MON 0246435); ADJ11379405
Marina del Rey District Office

OPINION AND ORDER GRANTING PETITIONS FOR RECONSIDERATION

Applicant and defendant California Insurance Guarantee Association by its servicing facility Intercare for Casualty Reciprocal Exchange, in liquidation (CIGA) both seek reconsideration of the November 14, 2024 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that in ADJ1556152, in relevant part, applicant is entitled to 90 percent permanent disability after the application of apportionment pursuant to Labor Code[1] sections 4663 and 4664.

Applicant contends that his totally diminished future earning capacity and inability to return to the open labor market are the sole result of his injury in ADJ1556152, entitling him to an unapportioned award of l00 percent permanent total disability.

CIGA contends the WCJ erred by not deducting the apportionment identified by the orthopedic Agreed Medical Evaluator (AME) in a prior cumulative trauma claim against Chevron in case ADJ11379405. CIGA contends that although the CT claim against Chevron was found to be barred by the statute of limitations, CIGA cannot be held liable for disability caused by that injury under section 4664.

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

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that both applicant's and CIGA's petitions be denied.

We have considered both Petitions for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter.[2] Based upon our preliminary review of the record, we will grant both Petitions for Reconsideration. Our order granting the Petitions 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 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 Labor Code section 5950 et seq.

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.

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."

[2] Deputy Commissioner Schmitz, who was on the panel that issued a prior decision in this matter is unavailable to participate further in this decision. Another panel member was assigned in her place.

Here, according to Events, the case was transmitted to the Appeals Board on December 18, 2024, and 60 days from the date of transmission is Sunday, February 16, 2025. The next business day that is 60 days from the date of transmission is Tuesday, February 18, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[3] This decision is issued by or on Tuesday, February 18, 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 December 11, 2024, and the case was transmitted to the Appeals Board on December 18, 2024. Service of the Report and transmission of the case to the Appeals Board did not occur on the same day. Thus, we conclude that service of the Report did not provide accurate notice of transmission under Labor Code section 5909(b)(2) because service of the Report did not provide actual notice to the parties as to the commencement of the 60-day period on December 18, 2024.

No other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with accurate notice of transmission as required by Labor Code section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on December 18, 2024.

II.

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

These proceedings originate from three applications filed by applicant. In ADJ1556152, applicant claimed injury to his back/lumbar, internal organs, head, hearing, psyche, cognitive,

[3] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

bladder, bowel, vertigo, heart, diabetes, neuropathy, and hypertension while employed by Hani, Inc., from December 3, 2001 to February 5, 2002 as a general manager. Hani, Inc. was insured at the time by Casualty Reciprocal Exchange, now in liquidation, and administered by CIGA.

In ADJ1424684, applicant claimed injury to his lumbar [spine] and right leg, left leg, psyche, neck, internal organs, pulmonary, cognitive, neuropathy, bowel, bladder, diabetes, gastro/stomach, hypertension, and heart, while employed by R.K. Chevron, on July 2, 1998, as a general manager. At the time of injury, the employer's workers' compensation carrier was American All-Risk Loss Administrators; Clarendon National Insurance Company as successor in interest, administered by Enstar. The parties therein settled the claim by way of Stipulated Award at 52 percent permanent disability, commencing August 30, 2000. Thereafter, applicant filed a Petition for New and Further disability.

In ADJ11379405, applicant claimed injury to his lumbar [spine], neck, and psyche, while employed by R.K. Chevron from January 1, 1991 to July 2, 1998, as a general manager. At the time of injury, the employer's workers' compensation carrier was American All-Risk Loss Administrators; Clarendon National Insurance Company as successor in interest, administered by Enstar.

On May 8, 2024, the WCJ issued his Findings and Award. In ADJ1556152, the WCJ found in relevant part that applicant sustained injury to his lumbar spine, right leg, and internal injuries in the form of upper gastro (GERD), hypertension, hypertensive kidney disease and hypertensive heart disease while employed during the period from December 3, 2001 to February 5, 2002 by defendant Hani, insured by CIGA for Casualty Reciprocal Exchange in liquidation; that applicant sustained injury to his back and right leg while employed by defendant Chevron on July 2, 1998, and the workers' compensation insurance carrier is American All-Risk Loss Administrators, Clarendon National Insurance Company as successor in interest, as administered by Enstar (Clarendon) which was resolved by way of a Stipulated Award of 52%; that applicant is in need of further medical treatment with liability to both Clarendon and CIGA for the body parts of back and right leg, and liability to CIGA for future medical treatment for all other industrially injured body parts; that applicant has a totally diminished future earning capacity and cannot work in the open labor market, entitling the applicant to permanent total disability of 100 percent in ADJ1556152; and that CIGA will have a credit through the "subtraction method" for the prior award of 52 percent, including for the attorney's fees. In the Findings and Order issued in

ADJ1424684, the WCJ found in pertinent part that applicant did not sustain new and further disability; and that Clarendon and CIGA are liable for future medical treatment to applicant's back and leg.

Defendant CIGA sought reconsideration, averring that Clarendon is "other insurance" where Clarendon stipulated to applicant's need for further medical treatment; that the award of compensation should be calculated by subtracting the percentage of permanent disability of 52% for the original Clarendon stipulated award instead of subtracting dollars from the award of 100% permanent disability; that the opinions of Dr. Gillis were not substantial evidence; that the claim in ADJ11379405 was not barred by the statute of limitations; and that the threshold for predominant cause of an injury to psyche was met based on "the combined effects of applicant's injuries."

On August 2, 2024, we granted defendant's Petition and affirmed the WCJ's decision, except that, in relevant part, in ADJ1556152 we amended the decision to reflect that "[a]pplicant has a totally diminished future earning capacity and cannot work in the open labor market, entitling the applicant to permanent total disability of 100%. The issue of calculation of the award is deferred." (Opinion and Decision After Reconsideration (ODAR), dated August 2, 2024, at p. 4; Amended Finding of Fact No. 11.) We also deferred the issue of attorney's fees.

On October 9, 2024, the WCJ conducted additional trial proceedings, framing for decision the issue of the how to calculate the award in ADJ1556152, and specifically, whether the award would be reduced by the dollar value of applicant's prior award in the amount of $47,982.50, or whether the award would be reduced by the percentage of disability previously awarded, thus reducing the current award to 48 percent disability. The WCJ afforded the parties additional time in which to file responsive arguments, and ordered the matter submitted for decision on October 31, 2024.

On November 14, 2024, the WCJ issued the F&A, determining that in ADJ1556152, applicant was entitled to 90 percent permanent disability. (F&A, Finding of Fact No. 1.) The WCJ also calculated and awarded corresponding attorney's fees. The WCJ's Opinion on Decision discussed the caselaw relevant to the issue of apportionment under sections 4663 and 4664 and determined that the residual permanent disability attributable to the cumulative injury in ADJ1556152 was 90 percent, after combining the scheduled permanent disability percentages identified by internist Dr. Gillis with the residual disability identified by orthopedic AME Dr.

Angerman after accounting for applicant's prior award of 52 percent permanent partial disability. (Opinion on Decision, at p. 9.)

Applicant's Petition contends that his totally diminished future earning capacity and inability to return to the open labor market as the sole result of his injury in ADJ1556152 entitles him to an unapportioned award of l00 percent permanent total disability. Applicant asserts that defendant has not met its burden of establishing apportionment to prior industrial or nonindustrial factors, and as such, applicant is entitled to an unapportioned award.

CIGA contends the WCJ erred by not deducting the apportionment identified by the orthopedic Agreed Medical Evaluator (AME) in a prior cumulative trauma claim against Chevron in case ADJ11379405. CIGA contends that although the CT claim against Chevron was found barred by the statute of limitations, CIGA cannot be held liable for disability caused by that injury under section 4664.

The WCJ's Report recommends we deny applicant's Petition because the lost wage analysis advanced in applicant's Petition is incompatible with the analysis required under section 4664. The WCJ also observes that the disability identified in the reporting of internal medicine physician Dr. Gillis standing alone does not yield 100 percent disability, and that applicant's vocational expert relies on a combination of the disability identified in the orthopedic and internal medicine reporting. The WCJ's Report further recommends we deny defendant's Petition because the apportionment identified by the medical-legal evaluator in a claim that was previously dismissed without a finding of injury is not a legally sustainable basis for reducing applicant's award.

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).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on

decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id.* at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]).)

Additionally, the WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board 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, based on our preliminary review, it appears that further development of the record may be appropriate.

Section 4664(a) states that, "The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." Section 4664(b) states that, "If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury." However, in *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099 [71 Cal.Comp.Cases 1229], the Court of Appeal held that in order to apportion permanent disability pursuant to Labor Code section 4664, a defendant must show that (1) there was a prior award of permanent disability, and that (2) there is overlap between the prior disability and the subsequent disability. In the instant matter, we must determine whether defendant has met its burden of establishing apportionment pursuant to sections 4663 and 4664, and pursuant to the analysis described in *Kopping, supra*.

III.

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 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 [32 Cal.Comp.Cases 431]; *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.

IV.

Accordingly, we grant both applicant's and CIGA's Petitions for Reconsideration, and 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.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award issued by a workers' compensation administrative law judge on November 14, 2024 is **GRANTED**.

IT IS FURTHER ORDERED that the Petition for Reconsideration of the Findings and Award issued by a workers' compensation administrative law judge on November 14, 2024 filed by California Insurance Guarantee Association by its servicing facility Intercare for Casualty Reciprocal Exchange, in liquidation, 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/ JOSE H. RAZO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 18, 2025

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

ESHAK ABDELMALAK
BERKOWITZ & COHEN
NEWHOUSE AND CREAGER, LLP
GUILFORD, SARVAS & CARBONARA

SAR/bp

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