WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JORGE MENDOZA, *Applicant*

vs.

BERKELEY CEMENT, INC., insured by INSURANCE CO. OF THE WEST, *Defendants*

Adjudication Number: ADJ18177050
San Jose District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on November 15, 2024, wherein the WCJ found in pertinent part that applicant's psychiatric injury was not caused by a sudden and extraordinary event and is therefore barred per Labor Code section[1] 3208.3(d).

Applicant contends that the WCJ should have found that his injury was caused by a sudden and extraordinary employment condition within the meaning of section 3208.3(d).

We have not received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

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 section 5950 et seq.

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[1] All statutory references are to the Labor Code unless otherwise stated.

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."

Here, according to Events, the case was transmitted to the Appeals Board on December 17, 2024, and 60 days from the date of transmission is Saturday, February 15, 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).)[2] 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 shall be notice of transmission.

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[2] 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.

Here, according to the proof of service for the Report by the WCJ, the Report was served on December 17, 2024, and the case was transmitted to the Appeals Board on December 17, 2024. 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 December 17, 2024.

II.

Preliminarily, we note the following, which may be relevant to our review:

Applicant claimed injury to his right arm, right shoulder, right hip, and psyche while employed by defendant as a laborer on May 11, 2023. Defendant accepted the claim as to applicant's right arm, right shoulder, and right hip.

The WCJ's Report provides the following background:

> Applicant sustained an injury arising out of and in the course of his employment on 5/11/2023 to his right arm, right shoulder, right hip and claimed to have sustained injury to his psyche as compensable consequence. Claim is accepted wherein psyche is denied under LC §3208.3(d) as applicant was employed for less than a month.
>
> The issue at trial was whether applicant's injury was sudden and extraordinary under the LC §3208.3(d) exception; and if so, whether applicant is entitled to seek additional QME Panel in psychiatry.
>
> In lieu of testimony, applicant submitted a written offer of proof at trial.
> ...
> Applicant also offered into evidence CAL/OSHA violation citation.
>
> Upon reviewing all evidence submitted, the undersigned found that applicant's 5/11/2023 injury was not from a sudden and extraordinary employment condition, applicant's psychiatric injury was barred under LC §3208.3(d), and that additional QME panel in psychiatry was moot.
>
> It is from this finding that applicant filed his petition for reconsideration.

(Report, pp. 1-2.)

In lieu of testimony, applicant's offer of proof is as follows:

> 1. Jorge Mendoza was an employee of Berkeley Cement Inc., insured by ICW, when he was injured on 5/11/23. He had been employed for less than six (6) months on that date.

2. On 5/11/23, Mr. Mendoza had been working on a raised scissor lift for more than an hour at a height of approximately 20 feet.

3. At approximately 10am, Mr. Mendoza attempted to lower the scissor lift in order to exit the equipment. Suddenly, the scissor lift tipped over and fell, with Mr. Mendoza still engaged with the lift.

4. Mr. Mendoza had used that lift several previous times without incident. He had used similar scissor lifts at previous jobs without incident.

5. Mr. Mendoza has never seen or heard of another scissor lift tipping over during regular operation. He had no expectation that the lift he was on might tip over.

6. The facts are true to the best of my memory, and if called to testify on these matters, this would constitute my testimony. I swear to this under penalty of perjury.

(Exhibit 5, applicant's offer of proof dated August 27, 2024, pp. 1-2.)

Exhibit 6 consists of subpoenaed records from OSHA, dated November 9, 2023, which state in pertinent part:

Citation 2 Item 1 Type of Violation: Serious Accident-Related

Title 8 CCR Section 3646. Operating Instructions (Elevating Work Platforms).

(a) No employee shall ride, nor tools, materials, or equipment be allowed on a traveling elevated platform unless the following conditions are met:

(3) The surface upon which the unit is being operated is level with no hazardous irregularities or accumulation of debris which might cause a moving platform to overturn.

Violation:

Prior to and during the course of the investigation, the employer failed to ensure that the surface where an employee was operating a scissor lift (Model-JLG 1930 19-ft, #167839) was level with no hazardous irregularities (e.g., extension cord) or accumulation of debris (e.g., plywood) which might cause a moving platform to overturn. As a result, on or about May 11, 2023, an employee suffered a serious injury when the elevated work platform overturned.

Date By Which Violation Must be Abated: Corrected During Inspection
Proposed Penalty: $22500.00

(Exhibit 5, subpoenaed records of OSHA dated November 9, 2023, pp. 000017, 000044.)

III.

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

The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd*. (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a), 3202.5.) With respect to psychiatric injuries, section 3208.3 provides, in relevant part:

> (a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition–Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.
>
> (b) (1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.
> …
> (d) Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition.

(Lab. Code, § 3208.3(a)-(b) and (d).)

Here, it is undisputed that applicant was employed by defendant for less than six months at the time of the injury. Defendant asserts applicant's psyche claim is barred by section 3208.3(d). Therefore, we must consider whether applicant's psyche injury was the result of a "sudden and extraordinary employment condition," within the meaning of section 3208.3(d).

Although the Legislature refers to the term "sudden and extraordinary" employment condition in section 3208.3(d), it does not define "sudden" or "extraordinary" in the statute. In *Matea v. Workers' Comp. Appeals Bd*, the Court of Appeal noted that Webster's Third International Dictionary "defines 'sudden' as 'happening without previous notice or with very brief notice : coming or occurring unexpectedly : not foreseen or prepared for.'" (*Matea v. Workers' Comp. Appeals Bd*. (2006) 144 Cal.App.4th 1435, 1448 [71 Cal.Comp.Cases 1522] (*Matea*).) The Court further observed that "extraordinary" is defined "as 'going beyond what is usual, regular, common, or customary'; and 'having little or no precedent and usu[ally] totally unexpected.'" (*Id*., citations omitted.)

Analysis of the decisions addressing whether a psychiatric injury resulted from a "sudden and extraordinary employment condition" reveal that this is a primarily fact-driven inquiry. "Each case must be considered on its facts in order to determine whether the alleged psychiatric injury occurred as a result of sudden and extraordinary events that would naturally be expected to cause psychic disturbances[.]" (*Matea*, *supra*, at p. 1450.) Consequently, appellate decisions focus heavily on the individual facts in determining whether an employment condition was sudden and extraordinary. By extension, the determination of whether an event is "sudden and extraordinary" within the meaning of section 3208.3(d) also hinges on the evidence in the record, or lack thereof.

In *Matea*, the injured worker sustained an admitted orthopedic injury while working in a Home Depot store when a rack of lumber fell on his left leg and psychiatric injury was claimed as a compensable consequence. (*Matea, supra,* at p. 1438.) The worker had not been employed for six months when the injury occurred and the employer denied that any psychiatric injury was compensable, contending that the injury was not caused by a sudden and extraordinary employment condition. (*Ibid*.) Matea testified that "he injured his foot when a rack of lumber fell on his left leg." (*Matea, supra*, at p. 1449.) The court noted that "[w]hile the record is sparse and the facts are few concerning what caused the lumber to fall, we believe that all the lumber in a rack falling into an aisle and onto an employee's leg causing injury to the employee was in this case such an uncommon, unusual, and totally unexpected event or occurrence ...." (*Matea, supra*, at p. 1450.)

In *Matea*, the Court allowed that while gas main explosions and workplace violence may constitute extraordinary events, the Court found these examples too restrictive, writing as follows:

> We also agree that the sudden and extraordinary employment condition language in Section 3208.3, subdivision (d), could certainly include occurrences such as gas main explosions or workplace violence. However, giving the language of the statute 'its usual, ordinary import' [citation], in light of its legislative history, and liberally construing the statute in the employee's favor (§3202), we believe that the Legislature intended to except from the six-month limitation psychiatric injuries that are caused by 'a sudden and extraordinary employment condition,' and not by a regular or routine employment event….
>
> **Gas main explosions and workplace violence are certainly uncommon and usually totally unexpected events**; thus, they may be sudden and extraordinary employment conditions. **However, we believe that there may also be other 'sudden and extraordinary' occurrences or events within the contemplation of section 3208.3, subdivision (d) that would naturally be expected to cause psychic disturbances** even in diligent and honest employees. Therefore, if an employee carries his or her burden of showing by a preponderance of the evidence that the event or occurrence that caused the alleged psychiatric injury was **something other than a regular and routine employment event or condition, that is, that the event was uncommon, unusual, and occurred unexpectedly**, the injury may be compensable even if the employee was employed for less than six months….

(*Matea, supra,* at pp. 1448-1449, emphasis added.)

In *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (*Garcia*) (2012) 204 Cal.App.4th 766 [77 Cal.Comp.Cases 307], the Court agreed with the view expressed in *Matea* "that an employment event is sudden and extraordinary if it is 'something other than a regular and routine employment event or condition, that is, that the event was uncommon, unusual, and occurred unexpectedly … .' (Citations.) We agree with this more expansive interpretation. Depending upon the circumstances, an accidental injury may be uncommon, unusual and totally unexpected." *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (*Garcia*) (2012) 204 Cal.App.4th 766, 772-773 [77 Cal.Comp.Cases 307].) The Court concluded that an avocado picker did not offer "particularly strong evidence on extraordinariness" to support his claim that his fall from a 24-foot ladder was unusual or extraordinary. (*Garcia*, *supra*, at p. 774.)

In *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Guzman)* (2018) 20 Cal.App.5th 796, the injured worker was the only witness at trial. He was injured when he was operating a compactor on a 45-degree slope, the compacter struck a rock in the soil, and it fell backwards. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Guzman)* (2018) 20 Cal.App.5th 796, 800.) Guzman testified that he had previously only used a compactor on flat surfaces. (*Id*., at p.

810.) The Court focused on the distinction between working on flat surfaces and working on a slope, noting that Guzman did not introduce any evidence regarding what regularly or routinely happens if a compactor hits a rock on a slope, as opposed on a flat surface. (*Id*.) Moreover, because he had previously worked on flat surfaces only, the Court found that his history of maintaining control of a compactor and being accident-free on flat surfaces had little bearing on whether the event that occurred while he was on the slope was uncommon, unusual, and unexpected. (*Id*.)

Here, it is unclear from our preliminary review of the evidence whether applicant's claimed psychiatric injury was caused by a sudden and extraordinary employment condition, within the meaning of section 3208.3(d). 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 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"].)

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 after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

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 WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, 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.

JORGE MENDOZA
MANUEL REYNOSO
TOBIN LUCKS

JB/*pm*

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