WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

KARINA MORA, ***Applicant***

vs.

FRONTIER COMMUNICATIONS,
AMERICAN ZURICH INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ12630887
San Bernardino District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the November 15, 2024 Amended Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a BDL Specialist from December 2, 1996 to September 12, 2019, sustained industrial injury to her cervical spine and right shoulder. The WCJ found that applicant did not sustain her burden of proving injury to her right arm, circulatory system, diabetes and psyche.

Applicant contends the evidentiary record is incomplete, that the WCJ erred in ordering the closure of discovery at Mandatory Settlement Conference (MSC), and that development of the evidentiary record is necessary.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant applicant's Petition, rescind the F&A, and return this matter to the trial level for development of the record.

FACTS

Applicant claimed injury to her right shoulder, cervical spine, right arm, circulatory system, diabetes, and psyche, while employed as a BDL Specialist by defendant Frontier Communications from December 2, 1996 to September 12, 2019. Defendant admits injury to the right shoulder and cervical spine but disputes injury to the right arm, circulatory system, diabetes and psyche.

The parties have selected Qualified Medical Evaluator (QME) Alexander Latteri, M.D., in orthopedic medicine. Applicant has further selected treating and evaluating physicians Babak Samimi, M.D., Gary Baker, M.D., and Koruon Daldalyan, M.D.

On December 22, 2023, applicant amended the Application for Adjudication to include injury to the psyche and in the form of diabetes.

On January 16, 2024, defendant filed an Answer, denying injury to the amended body parts of psyche and in the form of diabetes.

On February 1, 2024, defendant filed a Declaration of Readiness to Proceed (DOR) requesting a Mandatory Settlement Conference, stating that "there is no further discovery required." (Declaration of Readiness to Proceed, dated February 1, 2024, at p. 2.)

On February 6, 2024, applicant objected to defendant's DOR, stating in relevant part that "a PQME in a different specialty is necessary." (Applicant's Objection to Filing of Declaration of Readiness to Proceed, dated February 6, 2024, at p. 2:9.)

On March 18, 2024, the WCJ conducted a Mandatory Settlement Conference. Defendant requested a trial setting and closure of discovery. Applicant objected to the closure of discovery on the grounds that she had recently amended her application to include additional body parts and the resulting need for additional discovery. The WCJ set the matter for trial over applicant's objection, noting the "trial judge to determine if matter is ready to proceed to trial or not," and that "trial judge to determine if there is good cause for further development of the record." (Minutes of Hearing, dated March 18, 2024.) The parties completed a pre-trial conference statement (PTCS) in which applicant again objected to the closure of discovery and averred the need for additional discovery in internal medicine and psychiatry to address the recently amended body parts. (PTCS, dated March 18, 2024, p. 4.)

On April 5, 2024, applicant's treating physician Gary Baker, M.D., submitted a Request for Authorization requesting, in relevant part, an internal medicine evaluation. (Ex. 102-M, RFAs from Gary Baker, M.D., various dates.)

On April 16, 2024, defendant's Utilization Review determination noted that defendant's request for medical review was withdrawn in part because "Type 2 Diabetes Mellitus is not accepted." (Ex. 108, Utilization Review Determination, dated April 16, 2024.)

On May 17, 2024, applicant filed a petition requesting the issuance of an additional panel of QMEs in internal medicine, noting the December 22, 2023 amendment of the application for adjudication to include diabetes and psyche, and defendant's denial of Dr. Baker's April 5, 2024 RFA for internal medicine consult. (Petition for Order Compelling Medical Unit to Issue Additional Panel QME List in Internal Medicine (MMM), dated May 17, 2024, at p. 1:23.)

On July 1, 2024, the parties appeared for trial before WCJ Van Kolken, wherein it was determined that the trial proceedings would be conducted by WCJ Petty, who had previously acted as the trial judge.

On August 1, 2024, the parties appeared for trial and framed issues including, in relevant part, whether applicant sustained injury to her right arm, circulatory system, diabetes and psyche as a result of her admitted industrial cumulative injury. (Minutes of Hearing and Summary of Evidence (Minutes), dated August 1, 2024, at p. 2:22.) Applicant renewed her objection to the matter proceeding, asserting "the current record is not complete and contains defective and/or inadequate medical reporting and is thus not supported by substantial evidence as is necessary …." (*Id.* at p. 3:10.) The parties identified the documentary evidence, including the transcript of applicant's deposition. (*Id.* at p. 5:20; Ex. 104, Marked for Identification Only.) The WCJ declined to admit the deposition transcript into evidence, however, noting that the transcript could only be "used for rebuttal or impeachment and not in lieu of live testimony of the applicant." (*Id.* at p. 6:4.) The parties submitted the matter for decision without testimony.

On November 15, 2024, the WCJ issued her F&A, determining in relevant part that "[a]pplicant did not sustain her burden of proving injury to her right arm, circulatory system, diabetes and psyche." (Finding of Fact No. 2.) The WCJ also determined that "[t]he stipulations in the Minutes of Hearing of 8/1/2024 are true and are incorporated herein by reference," and that "[t]he record does not require further development." (Findings of Fact Nos. 2 & 8.) The F&A awarded permanent disability and future medical care based on applicant's orthopedic injuries only.

The Opinion on Decision observed that the transcript of applicant's deposition was not admitted into evidence because "this judge made it clear to the parties that it would only be allowed

for rebuttal or impeachment of the applicant, but the applicant did not appear for trial, and no explanation was provided to the court for her absence." (Opinion on Decision, at p. 2.)

Regarding the issue of what body parts were injured, the WCJ opined:

> The applicant did not appear for trial. The applicant's representative and defense counsel both stipulated that the matter may be submitted on the record without need for the testimony of the applicant. While the parties may have stipulated to the lack of applicant's testimony at trial, the court finds that without applicant's testimony, a determination as to the disputed parts of body cannot be made, as applicant's credibility could not be ascertained by the court per *Garza*. There is no credible testimony from the applicant to support the contention of additional parts of body that are now being claimed as injured (right arm, circulatory system, diabetes and psyche).
>
> While a judge has a duty to develop the record where the entire record is inadequate to enable a decision, this duty does not permit a judge to rescue a party from their obligation of developing their own case and obtaining substantial evidence see *San Bernardino Community Hospital v. WCAB* (*McKernan*) (1999) 64 CCC 986). When parts of the body are disputed it is usually necessary to hear testimony from the applicant to explain how she believes these complaints were caused by her work. I did not get this testimony, as applicant did not appear for trial, and further the parties stipulated that the matter may be submitted for decision without the applicant's testimony. Without that testimony applicant could not sustain her burden of proof as to the disputed parts of the body.

(Opinion on Decision, at pp. 2-3.)

In addition, the WCJ's Opinion explained that development of the record regarding the disputed body parts was unnecessary because "applicant did not appear at trial to testify as to the disputed parts of body raised," and that "[w]ithout the applicant's testimony, the burden of proof of injury to the disputed parts of body cannot be sustained." (Opinion on Decision, at p. 5.)

Applicant's Petition asserts that because she "made it clear in a timely manner that discovery was ongoing, discovery should not be cut off at [the MSC]," and that the discovery cutoff resulted in her being "deprived of the Panel process to assist in proving these injuries" arose out of and in the course of employment. (Petition, at p. 6:18.) Applicant further contends that the matter should not have been set for hearing on disputed issues relating to permanent disability without corresponding QME evaluations in internal medicine and psychiatry/psychology. (*Id.* at p. 7:7.) In the alternative, applicant avers that if the record did not adequately address the contested body parts, the WCJ should have ordered development of the record. (*Id.* at p. 8:21.)

Defendant's Answer observes that applicant was initially determined to be maximally medically improved on November 6, 2020 by orthopedic treating physician Dr. Samimi. Thereafter, applicant failed to seek additional treatment within defendant's Medical Provider Network in other specialties and further failed to request a QME panel in other specialties prior to the close of discovery. (Answer, at p. 3:9.) Defendant asserts that development of the record is unnecessary because applicant did not testify at trial. (*Id.* at p. 4:1.)

I.

Former Labor Code[1] 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 5, 2024, and 60 days from the date of transmission is February 3, 2025. This decision is issued by or on February 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

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

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 5, 2024, and the case was transmitted to the Appeals Board on December 5, 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 5, 2024.

II.

Applicant has sustained an admitted cumulative injury to her cervical spine and right shoulder. Among the issues submitted for decision at trial held on August 1, 2024 was the nature and extent of the injury, including whether applicant sustained injury to her right arm, circulatory system, psyche, and in the form of diabetes. (Minutes, at p. 2:22.) Applicant did not testify at trial.

The WCJ's F&A concluded that "applicant did not sustain her burden of proving injury to her right arm, circulatory system, diabetes and psyche," and that "the record does not require further development." (Findings of Fact Nos. 2 & 8.) The WCJ explained that "without applicant's testimony, a determination as to the disputed parts of body cannot be made, as applicant's credibility could not be ascertained by the court per *Garza* [*v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]." (Opinion on Decision, at p. 2.) The WCJ's Report further observes that the reporting in evidence addressing the body parts alleged by applicant did not constitute substantial medical evidence because the evaluating physician failed to "explain the rationale for his conclusions and does not definitively find injury to the additional parts of body currently being asserted." (Report, at p. 4.) Because applicant offered no substantial medical reporting to establish injury to the claimed body parts, and because applicant "did not testify at trial in regard to the disputed parts of body alleged and how she believes she sustained injury to her right arm, circulatory system, diabetes and psyche," the WCJ concluded that applicant did not meet the burden of establishing injury to the claimed body parts.

We agree with the WCJ that the employee bears the burden of proving injury arising out of and in the course of employment (AOE/COE) by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298 [80 Cal.Comp.Cases 489]; *McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 416 [33 Cal.Comp.Cases 660]; Lab. Code, §§ 3202.5, 3600(a).) In addition, the employee has the burden of proving, by a preponderance of the evidence, both the overall level of permanent disability and that at least some of this permanent disability was industrially-caused. (Lab. Code, §§3202.5, 5705; see *Peter Kiewit Sons v. Industrial Acc. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188; *Sweeney v. Industrial Acc. Com.* (1951) 107 Cal.App.2d 155, 158-159 [16 Cal.Comp.Cases 264].)

However, we do not agree with the WCJ that applicant failed to "exercise due diligence in … developing [her] case and obtaining substantial evidence." (Report, at p. 5.) Rather, our review of the record demonstrates that applicant reasonably sought authorization to receive medical treatment to the amended body parts from the employer/insurer, and thereafter, a medical-legal evaluation responsive to the issue of industrial causation of those body parts.

Applicant amended her application for adjudication on December 22, 2023, to include claimed body parts of psyche and in the form of diabetes. The sole QME at the time specialized in orthopedic medicine. Defendant filed its answer to the amended claim on January 16, 2024, denying injury to the psyche and in the form of diabetes.

Section 4061(i) provides, in relevant part, that "[n]o issue relating to a dispute over the existence or extent of permanent impairment and limitations resulting from the injury may be the subject of a declaration of readiness to proceed unless there has first been a medical evaluation by a treating physician and by either an agreed or qualified medical evaluator." (Lab. Code, § 4061(i).)

However, notwithstanding the requirements of section 4061(i), or its denial of the additional body parts *just two weeks earlier*, defendant filed a Declaration of Readiness to Proceed on February 1, 2024. Therein, defendant raised issues including permanent disability and averred "no further discovery is required." (Declaration of Readiness to Proceed, dated February 1, 2024, at p. 2.) Applicant filed a timely objection to the DOR, averring "a PQME in a different specialty is necessary." (Applicant's Objection to Filing of Declaration of Readiness to Proceed, dated February 6, 2024, at p. 2:9.) When the parties appeared at MSC on March 18, 2024, applicant again noted the recent claim amendment and need for additional panels of QMEs. (Minutes of

Hearing, dated March 18, 2024.) The WCJ set the matter for trial over applicant's objection, noting that the trial judge would need to determine if the case was ready for trial. The parties completed a Pre-Trial Conference Statement in which the applicant again objected to the close of discovery and asserted a need for additional panels in internal medicine and psychiatry/psychology. (Pre-Trial Conference Statement, dated March 18, 2024, at p. 5.)

On April 5, 2024, treating physician Gary Baker, M.D., issued a report diagnosing, inter alia, Type II diabetes mellitus. (Ex. 102-M, RFAs from Gary Baker, M.D., various dates.)

On April 14, 2024, Dr. Baker issued an RFA seeking an internal medicine evaluation, noting applicant's Type II diabetes and evidence of hyperglycemia. (Ex. 102-L, RFAs from Gary Baker, M.D., various dates.)

On April 16, 2024, defendant's Utilization Review determination noted that defendant's request for medical review was withdrawn in part because "Type 2 Diabetes Mellitus is not accepted." (Ex. 108, Utilization Review Determination, dated April 16, 2024.)

On May 17, 2024, applicant filed a petition requesting the issuance of an additional panel of QMEs in internal medicine, noting the December 22, 2023 amendment of claims for diabetes and psyche to her application, and defendant's denial of Dr. Baker's April 5, 2024 RFA for internal medicine consult. (Petition for Order Compelling Medical Unit to Issue Additional Panel QME List in Internal Medicine (MMM), dated May 17, 2024.)

Administrative Director Rule (AD) 31.7(b) (Cal. Code Regs., tit. 8, § 31.7(b)) provides that, "[u]pon a showing of good cause that a panel of QME physicians in a different specialty is needed to assist the parties reach an expeditious and just resolution of disputed medical issues in the case, the Medical Director shall issue an additional panel of QME physicians selected at random in the specialty requested," and that good cause includes, "[a]n order by a Workers' Compensation Administrative Law Judge for a panel of QME physicians …." Here, however, it does not appear that *any action* was taken on applicant's Petition by the trial WCJ or any other WCJ. When the matter came on for trial, applicant again objected to the closure of discovery, averring the record to be incomplete. (Minutes, at p. 3:10.)

The record thus establishes that applicant amended her application prior to the defendant's filing of a DOR and thereafter requested a consultation with an internist through her treating physician. Defendant denied liability for the amended body parts and declined to authorize the consultation. When applicant petitioned for an additional panel to address the medical dispute

regarding the recently amended body parts, no action was taken by any WCJ in response to the petition. Applicant timely objected to defendant's DOR, objected to the closure of discovery at the MSC, reiterated her objection in the PTCS, and objected again at the time of trial. (Minutes, at p. 3:10.)

In each instance, applicant averred a need for additional medical-legal evaluations to address the amended body parts of psyche and diabetes. Thus, applicant timely amended her application for adjudication, sought a medical and later a medical-legal evaluation in accordance with our statutory and regulatory framework, and renewed her objection to the adjudication of her claim without a corresponding medical-legal evaluation at every subsequent step in the adjudication process.

Given applicant's claim amendment, defendant's denial of liability and refusal to authorize the treating physician's request for referral for medical treatment, and applicant's subsequent attempts to engage in the medical-legal dispute resolution process required by section 4062.2 in the manner authorized under AD Rule 31.7, we are persuaded that applicant established good cause for the issuance of additional panels of QMEs in internal medicine and psychology. We therefore disagree with the WCJ's determination that applicant failed to exercise reasonable diligence in attempting to meet her burden of proof.

We also observe that applicant's objection to the closure of discovery was premised on the assertion that "the current record is not complete and contains defective and/or inadequate medical reporting and is thus not supported by substantial evidence as is necessary under Labor Code 5952(d) and Labor Code 5953," and that "there is not substantial medical evidence … and further development of the record is needed." (Minutes, at p. 3:10.) Applicant thus requested at trial that the WCJ "further develop the record…." (Minutes, at p. 3:15.)

The law has long recognized that where the WCAB cannot reach a just and reasoned decision on the existing record because the evidence is insufficient, unclear or conflicting, the WCAB has the power and even the duty to further develop the record under Labor Code sections 5701 and 5906. In *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924] (*Tyler*), the applicant alleged an industrial psychiatric injury. The WCJ felt that the defense psychiatrist's report "was not credible," but nevertheless found no psychiatric injury because applicant had presented only the report of a neurologist, not a psychiatrist, and because the WCJ concluded he did not have the authority to appoint an Independent Medical

Examiner (IME) after the 1989 reform legislation. (*Id.* at p. 394.) The Court of Appeal annulled the WCAB's decision, stating that "Labor Code sections 5701 and 5906 authorize the WCJ and WCAB to obtain additional evidence, including medical, at any time during the proceedings"; that "Labor Code sections 5701 and 5906 were not affected by the reform legislation and they remain available for use in the original proceeding or upon reconsideration"; and that "[t]he 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." (*Ibid*.)

Similarly, in *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261] (*McClune*), a truck driver claimed a cumulative industrial injury to his left leg and hip; yet, the WCJ found that applicant had not carried his burden of proving his injury was industrial. In finding no injury, the WCJ acknowledged that the opinions of both medical experts were inadequate because neither expert discussed the effect of work-related trauma on the applicant's existing left hip condition. (*Id.* at p. 1119.) Moreover, although the WCJ felt that the appointment of an IME under section 5701 "would be appropriate because the finding that the injury was nonindustrial was based upon inadequate medical evidence." The WCJ decided that a regular physician could not be appointed because the WCAB rules at the time did not permit the appointment of an IME. (*Ibid*.) The Court of Appeal, however, concluded that applicant was correct in contending that "the WCJ and WCAB have the authority to order the taking of additional evidence when the record lacks substantial evidence to support a finding of industrial causation; and the failure to do so violated his due process rights." (*Id.* at p. 1120.) The Court then relied on Labor Code sections 5701 and 5906 and *Tyler* to annul the WCAB's decision and direct it to consider the taking of additional medical evidence. (*Id.* at pp. 1120-1122.) The Court said it "fail[ed] to appreciate the distinction" between the case before it, where neither doctor's opinion constituted substantial evidence, and *Tyler*, where the WCJ found neither doctor credible. (*Id.* at p. 1121.)

Here, as was the case in both *Tyler* and *McClune,* the record does not adequately address the issue specifically raised and submitted for decision by the parties. When the record is inadequate to address the issues framed by the parties, "the WCJ has a *duty* to develop an adequate record." (*Kuykendall, supra,* 79 Cal.App.4th at p. 403, *italics added*; *McClune, supra,* 62 Cal.App.4th at p. 1120.) The duty arises out of the Board's obligation to completely adjudicate the issues submitted for decision by the parties, consistent with principles of due process. (*Telles*

Transport v. Workers' Comp. Appeals Bd. (*Zuniga*) (2001) 92 Cal.App.4th 1159, 1165 [66 Cal.Comp.Cases 1290].) Here, as the WCJ has observed, there is neither substantial medical reporting nor witness testimony in evidence that addresses the issues framed and submitted for decision by the parties. (Report, at p. 5.)

The WCJ's report observes, however, that "applicant did not appear and there was no credible testimony to support how the applicant believed she sustained industrial injuries to the circulatory system, diabetes and psyche." (Report, at p. 5.) Relying on the decision in *San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986] (*McKernan*)), the WCJ concluded that "[w]hile a judge has a duty to develop the record where the entire record is inadequate to enable a decision, this duty does not permit a judge to rescue a party from their obligation of developing their own case and obtaining substantial evidence." (Report, at p. 5.) Accordingly, the WCJ entered a finding of fact that "the record does not require further development." (Finding of Fact No. 8.)

In *McKernan, supra*, 74 Cal.App.4th 928, applicant did not list any witnesses at the MSC but she listed various reports of her psychologist. At trial, however, the WCAB allowed applicant to present a report from her psychologist obtained six months after the MSC and to offer the testimony of a medical witness not disclosed at the MSC. The Court of Appeal concluded that applicant did not have "any sufficient excuse" for the supplemental report or the medical testimony because (1) the supplemental report of her psychologist was "not just an update" but instead it was "far more detailed in its analysis and explanation of Applicant's condition and its origin than the [psychologist's] brief earlier letters," i.e., "it is the type of report which Applicant should have obtained before the MSC"; and (2) the medical witness did not merely offer rebuttal testimony, but instead "was called by Applicant as her first witness as part of her case-in-chief." (*Id.* at p. 933.) The Court distinguished *McClune* because, there, the WCAB found that none of the medical reports adequately discussed the crucial issue of whether the employee's job duties could have had an impact on his preexisting injury and thus contributed to his eventual disability. The Court also distinguished *M/A Com-Phi v. Workers' Comp. Appeals Bd.* (*Sevadjian*) (1998) 74 Cal.App.4th 928 [63 Cal.Comp.Cases 821] because, there, the decision to permit the employer's doctors to reconsider their opinions in light of the surveillance films arguably changed the playing field so as to justify allowing the employee to make a new showing as well. Thus, the *McKernan* Court said: "Neither case, therefore, controls the situation where the [WCAB] ruled in favor of

admissibility at the original hearing and neither clearly involves negligence or dereliction on the part of the employee." (*Id.* at p. 935.)

Here, we disagree with the WCJ's assertion that additional discovery is precluded under *McKernan* because, as we have discussed above, we are persuaded that applicant demonstrated reasonable diligence in seeking medical and medical-legal reporting following her amendment of her claim to include psychiatric and diabetic conditions.

Moreover, the court in *McKernan* was clear that "the Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee." (*McKernan, supra*, at pp. 937-938.) Here, the WCJ has concluded that there is no competent evidence in the record to address the issue framed by the parties. The WCJ has discounted the reporting of secondary treating physician Dr. Daldalyan as conclusory and not substantial evidence and has identified no other evidence in the record responsive to the issue of the claimed additional body parts. (Opinion on Decision, at p. 3.) As such, "neither side has presented substantial evidence on which a decision could be based." (*McKernan, supra*, at p. 938.) In the absence of substantial evidence responsive to the issues submitted for decision, development of the record is both reasonable and necessary.

We also observe that all parties to a workers' compensation proceeding retain the fundamental right to due process, including notice and an opportunity to be heard, 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; see *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710; *Fox v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196, 1204-1206; *Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1454.) Here, the WCJ has indicated that applicant's deposition transcript would only be used for "for rebuttal or impeachment" purposes. (Minutes, at p. 6:4.) However, neither the Minutes nor the F&A cite specific statutory or other authority for the exclusion of the transcript of applicant's deposition for use in the case in chief. The WCJ also excluded from evidence applicant's medical records from Concentra and Kaiser Permanente (Exhibits 105 & 106), ostensibly because applicant failed to designate excerpts from those records. (Minutes, at p. 6:7.) Again, there is no authority cited by the WCJ for the exclusion of such records from evidence.

It is well established that any award, order, or decision of the Board be supported by substantial evidence *in the light of the entire record*. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Accordingly, our inquiry cannot rely solely on isolated evidence which supports a particular conclusion. Our review must include all "other relevant facts of record which rebut or explain that evidence." (*Lamb, supra*, at p. 281.) Moreover, and pursuant to section 5708, the WCJ is not bound by the common law or statutory rules of evidence and procedures, but may make inquiry in the manner, through oral testimony and records, which is *best calculated to ascertain the substantial rights of the parties*.

Here, the WCJ has the authority to issue directives to the parties designed to facilitate the review of relevant evidence, and to admonish the parties, impose sanctions, or take other appropriate action in response to a party's failure to follow the court's directives and our Rules. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, §10421; see also *Hardesty v. McCord & Holdren, Inc.* (1976) 41 Cal.Comp.Cases 111 [1976 Cal. Wrk. Comp. LEXIS 2406].) However, we believe that the parties' due process right to present evidence relevant to the issues being decided is paramount, and that a review of the entire record is necessary to a decision that effectuates substantial justice based on substantial evidence. (Cal. Const., Art. XIV, § 4.)

We also observe that Finding of Fact No. 3 purports to incorporate by reference the parties' stipulations as set forth in the August 1, 2024 Minutes of Hearing. (Finding of Fact No. 3.) While our decision after reconsideration rescinds the entirety of the F&A, including Finding of Fact No. 3, we note the following. Labor Code sections 5806 and 5807 provide for the enforcement of an Award issued by the WCAB through the entry of a judgment in Superior Court. (Lab. Code, §§ 5806 & 5807; see also *Vickich v. Superior Court of Los Angeles County* (1930) 105 Cal.App. 587, 592 [288 P. 127] ["The execution on a judgment entered upon an award of the Industrial Accident Commission, although in the form of an execution upon a judgment of the superior court, is in reality an execution upon the award of the commission."].) However, in order for a party to avail themselves of this statutorily authorized mechanism for enforcement of an Award issued by the WCAB, the Award itself must be sufficiently clear and specific as to allow for its reduction to a judgment. Accordingly, the WCJ must enter specific findings of fact responsive to the issues submitted for decision. And while section 5702 permits the WCJ to make findings of fact based

on the stipulation of the parties, it is improper to do so by incorporating a separate document. A decision that includes all the Findings of Fact necessary to address the issues submitted for decision will enable the WCJ to issue an award of sufficient clarity that it can be enforced as a judgment, should the need arise. (Lab. Code, §§ 5313; 5806; 5807.)

In summary, we are persuaded that applicant exercised reasonable diligence in seeking both medical and medical-legal evaluations to address the body parts amended to her claim of injury. Given applicant's request for authorization for medical treatment to the disputed body parts and her subsequent request for the issuance of an additional panel of QMEs, we conclude that applicant should have been permitted to obtain the QME evaluations necessary to address disputed body parts. We further conclude that in the absence of any competent evidence addressing the amended body parts at trial, the WCJ should have ordered development of the record in the form of additional panels of QMEs in appropriate specialties. Accordingly, we will grant applicant's Petition, rescind the F&A, and return the matter to the trial level for development of the record.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of November 15, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the November 15, 2024 Findings and Award is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I DISSENT (See Dissenting Opinion),

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 3, 2025

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

KARINA MORA
PÉREZ LAW
FLOYD SKEREN MANUKIAN LANGEVIN

SAR/abs

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

DISSENTING OPINION OF COMMISSIONER RAZO

I dissent. As comprehensively set forth in the WCJ's Report, which I incorporate by reference, applicant has not met her burden of establishing industrial injury to her psyche or in the form of diabetes. Accordingly, I would affirm the Findings and Award (F&A).

As is noted by my colleagues in the majority, the employee bears the burden of proving injury arising out of and in the course of employment (AOE/COE) by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal. 4th 291, 297-298 [80 Cal.Comp.Cases 489]; *McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 416 [33 Cal.Comp.Cases 660]; Lab. Code, §§ 3202.5, 3600(a).)

Here, however, applicant failed to offer competent evidence to establish injury to the body parts amended to her claim on December 22, 2023. With respect to the claimed psychiatric injury, applicant offers no treating physician reports that establish the existence of a psychiatric injury, or that such injury has an industrial nexus. With respect to applicant's claim of industrial injury in the form of diabetes mellitus, the reporting of secondary treating physician Dr. Daldalyan was obtained only after the close of discovery and offers no substantive discussion of the etiology of applicant's claimed diabetic condition. Rather, the physician offers 22 separate diagnoses and a blanket assertion that "the various diagnoses listed appear to be consistent with the type of work that would typically cause such abnormalities." (Ex. 107, Report of Koruon Daldalyan, M.D., dated May 2, 2024, at p. 10.) Because the report offers vague assertions of work-relatedness without any substantial discussion of causation, the report falls well short of applicable standards for substantial evidence in workers' compensation proceedings. "A medical report predicated upon an incorrect legal theory and devoid of relevant factual basis, as well as a medical opinion extended beyond the range of the physician's expertise, cannot rise to a higher level than its own inadequate premises. Such reports do not constitute evidence to support a denial of full compensation for an industrially caused disability." (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358].)

Compounding the lack of medical evidence in this matter is applicant's decision not to testify. The record does not reflect any compelling rationale for applicant's decision not to offer narrative support for her claimed injuries. The WCJ's Report observes that the WCJ would have considered the testimony of the applicant in the assessment of the nature and extent of the claimed

injury, and certainly applicant's testimony would have been germane to the issue of whether to develop the evidentiary record. (Report, at p. 2.) However, given the lack of medical evidence addressing the claimed body parts of psyche and applicant's diabetic condition, the deficiencies in the medical record were clearly evident. Applicant's decision not to testify resulted in a record devoid of evidence establishing injury to the psyche and in the form of diabetes, or that applicant's industrial exposures contributed to these body parts/conditions.

The WCAB does not have a duty to develop the record where a party who has the burden of proof recognizes the insufficiency of the record and does not take appropriate action. (*Lozano v. Workers' Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 970 [2002 Cal. Wrk. Comp. LEXIS 1420] (writ den.).)

Following my review of the record, I conclude that applicant has not met her burden of establishing injury to the amended body parts of psyche and diabetes by a preponderance of the evidence. I would affirm the Findings and Award, accordingly.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

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