

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

MARCO GARCIA, *Applicant*

vs.

**AEROSPACE DYNAMICS INTERNATIONAL;
ACE AMERICAN INSURANCE COMPANY, administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ13381754
Van Nuys District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ). By the F&O, as relevant here, the WCJ found that while employed by defendant as a maintenance mechanic, applicant sustained injury arising out of and in the course of employment to his respiratory system and lungs; that the record requires further development; and that defense exhibits C through J were admitted over the stated objections and given the appropriate weight.

Defendant contends the WCJ erred by failing to admit defense exhibits K and L, which were submitted at trial on November 14, 2024.

We received an Answer from applicant, who argues that defense exhibits K and L should be excluded from admission to evidence because they are medical records that existed before the discovery cutoff at the mandatory settlement conference (MSC) but were not procured until after the MSC.¹

¹ Applicant also alleges, "To date, applicant has not received defendant's Petition for Reconsideration. The first knowledge of a Petition for Reconsideration having been filed was when applicant attorney received the WCJ's Report and Recommendation." (Answer, August 27, 2025, p. 1, lines 18-20.) Since applicant was able to file an Answer, and we have reviewed and considered it, it appears that applicant was not prejudiced even if applicant did not timely receive the Petition.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be granted and that the F&O be corrected to include admission of defense exhibits K and L.

We have considered the allegations of the Petition for Reconsideration and Answer and the contents of the Report of the WCJ with respect thereto. Based on our review of the record,² for the reasons stated in the WCJ's Report, and for the reasons discussed below, we will grant the Petition, and, as our Decision After Reconsideration, we will affirm the WCJ's July 15, 2025 F&O, except that we will amend the F&O, Finding of Fact #6, to include admission of defendant's exhibits K and L.

FACTS

On July 8, 2020, applicant filed an application for adjudication alleging cumulative injury to multiple body parts arising out of and during the course of employment as a mechanic from April 4, 2011 to February 26, 2020.

On October 7, 2024, the parties attended the MSC and completed a pre-trial conference statement. Defendant did not identify the records submitted as exhibits K and L on the statement.

The parties proceeded to trial on November 14, 2024 with the following issues identified:

Issue Number 1, whether Defendants are entitled to conduct additional discovery and, if so, whether it is warranted.

Number 2, whether the record requires further development in order to defend the issues.

Number 3, whether there was injury arising out of and in the course of employment causing a continuous trauma from April 4th, 2011 through February 26th, 2020.

[Number] 4, whether there was injury to the applicant's respiratory system, lungs, headaches, sleep, psych, and cervical spine.

[Number] 5, whether there was temporary disability from the period February 26th, 2020 through February 26th, 2022.

² We have reviewed the transcripts of the proceedings for November 14, 2024, December 10, 2024, January 15, 2025, February 5, 2025, and April 3, 2025, and the testimony in the transcripts is generally consistent with summaries prepared by the WCJ. As appropriate, in our discussion, we refer to the WCJ's summary in the Report and to the transcripts.

[Number] 6, whether the applicant is permanent and stationary as of February 27th, 2022, as claimed by the applicant, or not yet permanent and stationary, as claimed by the employer.

Number 7, whether there is permanent disability and the amount thereof.

Number 8, whether the defendant has proven apportionment of permanent disability.

All other issues are deferred.

* * *

After discussion with counsel, any objection or clarification as to Issue 6 is withdrawn, and any issues regarding penalties, interest, costs and sanctions that have been raised by either side are noted and deferred at this time.

(Transcript of Proceedings, November 14, 2024, p. 5, line 17-p. 6, line 13.)

Among the exhibits that defendant submitted at trial were exhibit K, subpoenaed records from Ronald Reagan UCLA, designated pages (584 pages); and exhibit L, a designation of pages from the subpoenaed records of UCLA Medical Center, Los Angeles, from August 19, 2020 to July 29, 2024, stating that the records were filed and served on applicant, with a declaration by defendant dated November 11, 2024. (Transcript of Proceedings, November 14, 2024, p. 9, line 3-p. 10, line 2.)

As relevant here, applicant objected to defense exhibits K and L on the grounds that they were obtained after the MSC and that they were in existence prior to the October 7, 2024, closure of discovery. (Transcript of Proceedings, November 14, 2024, p. 10, lines 6-24.) The exhibits were marked for identification, with rulings as to their admissibility deferred to the time of the decision. (Transcript of Proceedings, November 14, 2024, p. 10, line 25-p. 11, line 5.)

The matter was continued on December 10, 2024, January 15, 2025, February 5, 2025, and April 3, 2025.

The WCJ's Report detailed the following additional facts:

The instant case relates to a continuous trauma claim that involves Aerospace Dynamics International; ACE American Insurance Company, administered by Sedgwick. The undersigned issued a Findings of Fact and Order in addition to an Opinion on Decision dated July 15, [2025]. The court held that, based upon Applicant's credible testimony, the testimony of the defense witnesses, and the medical reporting of Panel Qualified Medical Evaluator (PQME) Dr. Gerald Markovitz, M.D., dated April 20, 2024, December 10, 2022, March 9, 2022, November 29, 2021, July 22, 2021, March 26, 2021, and January 27, 2021 and the deposition testimony of PQME Dr. Gerald Markowitz, M.D. dated September 26,

2024 and March 14, 2024, that Applicant Marco Garcia, born ..., while employed during the period April 4, 2011, through February 26, 2020 as a maintenance mechanic, Occupational Group Number 470, at Valencia, California by Aerospace Dynamics International, sustained injury arising out of and in the course of employment to his respiratory system and lungs. All other body parts were deferred pending further development of the record.

Defendant's filed the instant, timely, Petition for Reconsideration on [August 5], 2025. Defendant's Petition for Reconsideration is based on the following grounds:

1. That by the Order, Decision and Award made and filed by the WCJ, the WCAB acted without or in excess of its powers.
2. The evidence does not justify the findings; and
3. The findings, award or order do not support the order decision or award.

Essentially, Defendant Petitioner argues that the [undersigned] erred in failing to rule on the admissibility of Defense exhibits K & L and therefore the decision is ambiguous at best and at worst impliedly excludes those documents. Petitioner further argues this finding, or lack of a finding, causes confusion as to whether or not those two exhibits can be used while developing the record.

(Report, August 12, 2025, p. 2, ¶ 1-3.)

DISCUSSION

I.

Former Labor Code 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, Labor Code 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 Labor Code 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 August 12, 2025 and 60 days from the date of transmission is Saturday, October 11, 2025. The next business day that is 60 days from the date of transmission is Monday, October 13, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)³ This decision is issued by or on Monday, October 13, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 August 12, 2025, and the case was transmitted to the Appeals Board on August 12, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 12, 2025.

II.

If a decision includes resolution of a “threshold” issue, then it is a “final” decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals

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.

Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes findings regarding threshold issues as to the existence of an employment relationship between applicant and defendant, that applicant suffered injury to his respiratory system and lungs arising out of and in the course of employment by defendant, and that at the time of injury, the employer's workers' compensation carrier was ACE American Insurance Company, administered by Sedgwick. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains findings that are final with respect to the finding of injury to applicant's respiratory system and lungs, petitioner is only challenging the interlocutory finding regarding the admissibility of defense exhibits K and L despite the finding on the admissibility of defense exhibits C through J. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

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

that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

As discussed below, based upon our review of the record and the WCJ's analysis of the merits of defendant's arguments in the Report, we are persuaded that it is appropriate to grant defendant's Petition and admit the exhibits.

First, as acknowledged by the WCJ in the Report:

The undersigned erred in not ruling on those two exhibits. This was a scrivener's and/or clerical error. The court intended to rule, in Finding of Fact #6, that, "Defense exhibits C through L, marked for identification, are admitted over the stated objections and are given the appropriate weight." Unfortunately, the finding of fact #6 currently states, "Defense exhibits C through J, marked for identification, are admitted over the stated objections and are given the appropriate weight."

(Report, p. 2, ¶ 4-p. 3, ¶ 1.)

The WCJ went on to explain in the Report:

The appeals board has held that a report and recommendation may cure the failure by a WCJ to issue a complete opinion on decision with an award. *Haywood v. WCAB* (1996) 61 CCC 509 (writ denied); *City of Maywood v. WCAB (Smith)* (1991) 56 CCC 704 (writ denied); *Boomsliter v. Continental Ins. Co.* (1999) 27 CWC 192 (panel decision); *Smales v. WCAB* (1980) 45 CCC 1026 (writ denied); *Hoag Memorial Hospital Presbyterian v. WCAB (Giannini)* (1997) 62 CCC 1720 (writ denied); *Paula Insurance Co. v. WCAB (Parham, Bracamontes)* (1993) 58 CCC 273 (writ denied).

In the instant case, Petitioner has stated that, "[i]f the WCJ clarifies that his omission of defense exhibits K and L, (previously marked for identification), from Finding of Fact #6 was unintentional, the result clerical error etc...or by any other means clarifies that those two exhibits should in fact be deemed admitted, then defendants, withdraw this Petition for Reconsideration in its entirety" (Pet for Recon, pg. 10, lines 7-10). This is indeed the case herein. The failure of the undersigned WCJ to admit defense exhibits K and L, (marked for identification), in the Finding of Fact #6 was unintentional; the result of a clerical or scrivener's error. Defense exhibits K and L should be admitted and included in Finding of Fact #6.

(Report, p. 3, ¶ 3-4.)

Turning to the actual exhibits in dispute, we note the Appeals Board is accorded generous flexibility by Labor Code sections 5708 and 5709 to achieve substantial justice with relaxed rules of procedure and evidence. (*Barr v. Workers' Compensation Appeals Bd.* (2008) 164 Cal.App.4th

173, 178 [73 Cal.Comp.Cases 763].) In determining whether to admit evidence, we are governed by the principles of Labor Code section 5708, which states that the Appeals Board “shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division.” (Lab. Code, § 5708.) Although the Appeals Board is not bound by it, the Evidence Code defines relevant evidence as “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) This definition has been characterized as “manifestly broad.” (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843.)

We observe that the language of Labor Code section 4062.3(a) is fairly expansive with respect to what medical records may be provided to the qualified medical evaluator. Labor Code section 4062.3 provides in relevant part, as follows:

(a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:

- (1) Records prepared or maintained by the employee’s treating physician or physicians.
- (2) Medical and nonmedical records relevant to determination of the medical issue.

(Lab. Code, § 4062.3 (a).)

In this case, defendant’s exhibit K consists of applicant’s medical records from UCLA Medical Center reflecting pulmonary treatment that included a double lung transplant, and defendant’s exhibit L consists of the designation of the records prepared by defendant’s attorney. The panel qualified medical evaluator (PQME), Gerald Markovitz, M.D., iterated at depositions and in his most recent report that he would like to review applicant’s updated medical records since it had been at least two years since he last saw applicant and he was unaware of applicant’s current clinical status. (Joint Exhs. 1, 8, 9.)

Accordingly, defendant’s exhibits K and L are relevant to outstanding issues to be considered by the PQME consistent with Labor Code section 4062.3(a), and admission of such evidence by the WCJ is not improper.

Lastly, we consider applicant’s assertion that defendant’s exhibits K and L should be excluded from the record. Applicant asserts “the exhibits were procured after discovery cut-off in

violation of Labor Code Section [5502].” (Answer, p. 2, line 15.) For the reasons discussed below, we reject this argument.

Labor Code section 5502, subdivision (d)(3) provides as follows:

If the claim is not resolved at the mandatory settlement conference, the parties shall file a pretrial conference statement noting the specific issues in dispute, each party’s proposed permanent disability rating, and listing the exhibits, and disclosing witnesses. Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference.

(Lab. Code, § 5502 (d)(3).)

It is well established that 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].) Further, 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.) In *Kuykendall*, evidence was permitted to be admitted not only after the MSC, but after trial, when it was necessary to accomplish substantial justice. In *Kuykendall*, the court rejected the arguments that *County of Sacramento v. Workers’ Comp. Appeals Bd. (Estrada)* (1999) 68 Cal.App.4th 1429 [64 Cal.Comp.Cases 26] and *San Bernardino Cmty. Hosp. v. Workers’ Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986] require strict application of the Labor Code section 5502(d)(3) discovery cutoff, even where it would deprive the parties of substantial justice. (*Kuykendall, supra*, 79 Cal.App.4th 396 at p. 406.) The court cited *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924], *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261], and *M/A Com-Phi v. Workers’ Comp. Appeals Bd.* (1998) 65 Cal.App.4th 1020 [63 Cal.Comp.Cases 82] to support its conclusion that a WCJ’s duty to base decisions on substantial evidence makes augmentation of the record necessary, even where the requirements of Labor Code section 5502(d)(3) would otherwise prohibit it. That is, while the parties are bound by the discovery cutoff, of course the WCJ retains discretion to determine how best to proceed.

The discovery cut-off contained in subdivision (d)(3) of Labor Code section 5502 must be applied in a manner consistent with the requirement of the California State Constitution that the administration of all workers' compensation legislation "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., Art. XIV § 4.) The clear purpose of this constitutional mandate is to achieve justice in a timely, resourceful, and efficient manner, and not to permit injustice simply because it would save time, money, and effort. To this end, while all hearings before the Appeals Board or a WCJ are governed by Division 4 of the Labor Code, including Labor Code section 5502, as explained above, Labor Code section 5708 is clear that a WCJ "may make inquiry in the manner . . . which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division." (Lab. Code, § 5708.)

It is also well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Substantial evidence must be based upon an adequate history that includes all germane facts. (*Escobedo v. Marshalls* (2007) 70 Cal.Comp.Cases 604, 620 (Appeals Board en banc); *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd.*, 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].) The Workers' Compensation Appeals Board "may not leave undeveloped matters as which its acquired specialized knowledge should identify requiring further evidence." (*Raymond Plastering v. Workmen's Comp. Appeals Bd.* (1967) 252 Cal.App.2d 748, 753 [32 Cal.Comp.Cases 287, 291].)

In this case, the evidentiary record did not include documents from treating providers detailing applicant's recent pulmonary history and treatment, including a bilateral lung transplant, which were requested by the PQME. Moreover, the WCJ found that development of the record irrespective of any discovery cutoff was appropriate in order to ensure an adequate history and that the record contains substantial evidence.

Accordingly, for the reasons set forth above, we are persuaded that defendant will sustain significant prejudice if there is a delay in ruling that the records are admissible. By a clear finding that the records are admitted, both parties can proceed with further discovery expeditiously.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the July 15, 2024 Findings of Fact and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the July 15, 2024 Findings of Fact and Order is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT:

* * *

6. Defense exhibits C through L, marked for identification, are admitted over the stated objections and are given the appropriate weight.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 13, 2025

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

**MARCO GARCIA
LAW FIRM OF ROWEN, GURVEY & WIN
HARRISON, EICHENBERG AND MURPHY**

DC/cs

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