WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARCO VILLA, ***Applicant***

vs.

SHULTZ STEEL COMPANY INC;
TRAVELERS DIAMOND BAR,
Defendants

Adjudication Number: ADJ8716925
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings and Award (F&A) issued by the workers compensation administrative law judge (WCJ) on February 19, 2025. Therein and as relevant here, the WCJ found that applicant sustained injury to his back, head, bilateral shoulders, neck, bilateral hernia, psyche, right arm, bilateral wrists and hands, and fingers during the period November 17, 1997 through January 8, 2013. The WCJ found that applicant's injury caused permanent disability of 61%.

Applicant alleges that applicant has suffered a catastrophic injury and is entitled to additional impairment for psychiatric injury; and that applicant has met their burden rebutting the 2005 Schedule for Rating Permanent Disabilities.

We have received an answer from defendant.

The WCJ issued a Report and Recommendation recommending that we deny reconsideration.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting applicant's 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 Labor Code[1] 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."

Here, according to Events, the case was transmitted to the Appeals Board on March 25, 2025 and 60 days from the date of transmission is Saturday, May 24, 2025. The next business day that is 60 days from the date of transmission is Tuesday, May 27, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Tuesday, May 27, 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

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

[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.

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 March 25, 2025, and the case was transmitted to the Appeals Board on March 25, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on March 25, 2025.

II.

The WCJ provides the following factual background in the Report:

> On August 18, 2023, Applicant filed a Declaration of Readiness to Proceed to a Mandatory Settlement Conference on the issues of compensation rate, temporary disability, permanent disability, AOE/COE, future medical care, and settlement. The matter proceeded to a Mandatory Settlement Conference on October 4, 2023 and was set for Trial over Defendant's objection.
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> On October 25, 2023, parties appeared for Trial. Per the notation in the minutes of hearing, the Court began review of the pretrial conference statement with parties, and continued the matter to a new trial date given there was insufficient time to begin proceedings on the record. It is noted that "DEF MAINTAINS OBJECTION TO TRIAL PROCEEDING FORWARD DUE TO REQUEST FOR ADDITIONAL DISCOVERY." The trial was continued to a new date.
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> On January 22, 2024, parties appeared for the continued trial date. Trial proceedings began, the stipulations and issues were read into the record, and Applicant's counsel began their direct examination of Applicant. The matter was continued to March 6, 2024.
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> On March 6, 2024, parties appeared for trial. Applicant's attorney completed their direct examination of Applicant and Defendant began and completed their cross examination of Applicant. Trial concluded and the matter was submitted.
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> On March 26, 2024, an Order Vacating and Setting Aside the Order Submitting the Case for a Decision was issued for purposes of further developing the record pursuant to McDuffie vs. Los Angeles Metropolitan Transportation Authority, 67

Cal. Comp. Cases 138 (EN BANC). The matter was placed back on the trial calendar.

At the May 1, 2024 trial date, it is noted in the minutes of hearing "MATTER VACATED FOR FURTHER DEVELOPMENT OF THE RECORD. PARTIES ARE TO RETURN TO DR. MAIBAUM TO GET CLARIFICATION ON CAUSATION AND APPORTIONMENT. ONCE THE SUPPLEMENTAL REPORT IS RECEIVED, PARTIES ARE TO SEND THE REPORT TO VOC EXPERT WILKINSON FOR REVIEW AND COMMENT. PARTIES ARE ALSO TO SEND THE MINS OF HEARING/SUMMARY OF EVIDENCE FROM BOTH DATES OF TRIAL TO DR. MAIBAUM AND MR. WILKINSON FOR REVIEW. IF PARTIES WISH TO CONDUCT A DEPO OF EITHER DR. MAIBAUM OR MR. WILKINSON, OR CONDUCT ANY OTHER DISCOVERY, PARTIES MUST MAKE A MOTION TO THE COURT FIRST. ALL OTHER DISCOVERY REMAINS CLOSED. IT IS SO ORDERED." The matter was continued to a Status Conference to allow the Court to monitor discovery. Defendant filed a Petition For Removal from this order, which was denied. The matter proceeded to an MSC on November 12, 2024, and was placed back on the trial calendar as parties confirmed they had received the supplemental reporting from Dr. Maibaum and Mr. Wilkinson. Defendant motioned the Court to conduct the cross examination of Mr. Wilkinson to which Applicant objected (Minutes of Hearing, November 12, 2024). Trial was held on December 17, 2024 at which time the matter was submitted. On January 7, 2025, the matter was vacated for the limited purpose of obtaining a DEU Rating.

The Rating Instructions and Formal Rating were served on parties, and Defendant filed an objection seeking to cross examine the DEU rater. A trial was held on February 12, 2025 to allow parties an opportunity to cross examine the DEU rater. It is noted on the minutes of hearing that DA withdrew their request to cross examine the rater and that the matter was submitted (Minutes of Hearing, February 12, 2025). A Findings and Award issued on February 19, 2025 in which it was found that Applicant's injury was not catastrophic and Applicant's permanent disability was 61% based on the reporting of AME Richard Rosenberg. It is from these findings that Applicant seeks reconsideration.

(Report, p.p. 2-3.)

III.

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

It is 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]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627

[35 Cal. Comp. Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion … It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) To constitute substantial evidence "… a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Based on our review, we are not persuaded that the record is properly developed. Where the medical evidence or opinion on an issue is incomplete, stale, and no longer germane, or is based on an inaccurate history, or speculation, it does not constitute substantial evidence. (*Place v. Workers' Comp. Appeals Bd*. (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 621.)

The determination of whether an injury is catastrophic for purposes of section 4660.1(c)(2)(B) focuses on the nature of the injury and is a fact-driven inquiry. *Wilson v. State of California; Cal Fire* (2019) 84 Cal.Comp.Cases 393 (Appeals Board En Banc) The trier of fact may consider the following factors in determining whether an injury is catastrophic:

> 1. The intensity and seriousness of treatment received by the employee that was reasonably required to cure or relieve from the effects of the injury.
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> 2. The ultimate outcome when the employee's physical injury is permanent and stationary.
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> 3. The severity of the physical injury and its impact on the employee's ability to perform ADLs.
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> 4. Whether the physical injury is closely analogous to one of the injuries specified in the statute: loss of a limb, paralysis, severe burn, or severe head injury.
>
> 5. If the physical injury is an incurable and progressive disease.

(*Wilson*, s*upra*, at p. 415 (footnote omitted).)

"Not all of these factors may be relevant in every case and the employee need not prove all of these factors apply in order to prove a "catastrophic injury." This list is also not exhaustive, and the trier of fact may consider other relevant factors regarding the physical injury. In determining whether an injury is catastrophic, the trier of fact should be mindful of the legislative intent behind section 4660.1(c)." *(Ibid.)*

Specifically, applicant's attorney appears to improperly rely on the psychiatric reporting of Dr. Maibaum in regard to activities of daily living (ADLs) as the impact on applicant's psyche is not part of the consideration of whether an injury is catastrophic. Applicant properly refers to the reporting of orthopedist AME Dr. Rosenberg, but we note that there is no record of a request of Dr. Rosenberg to provide an opinion on ADLs. It also appears that by the time defendant produced the sub-rosa videos in 2023, Dr. Rosenberg was retired. Moreover, the parties never obtained a new AME or expert pursuant to section 5701 to comment on ADLs or to look at the sub-rosa videos. The parties did not request that an evaluator review any medical conclusions reached in light of the activities seen in the video. Because this did not occur, and because it appears that subrosa video is being used as medical evidence to establish the nature and extent of disability, there does not appear to be substantial medical opinion on ADLs with respect to the analysis regarding whether applicant suffered catastrophic injury.

Without a medical opinion, the vocational reporting is insufficient to support the award. Additionally, the WCJ cannot make a finding regarding how the sub-rosa video impacts a finding to ADLs without medical reporting. (*Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 30I] (Appeals Board en banc) (*Nunes I*) and *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 (Appeals Board en banc) (*Nunes II*).) In order for a decision as to whether applicant's injury was catastrophic to be based on substantial evidence, a newly appointed AME or regular doctor should be provided with applicant's trial testimony and the sub-rosa videos in order to provide substantial medical reporting. Finally, we note that the WCJ did not admit the sub-rosa videos into evidence.

Thus, it is unclear from our preliminary review that there is substantial medical evidence to support the WCJ's decision.

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

V.

Accordingly, we grant applicant's Petition for Reconsideration, and 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. While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award issued by the workers compensation administrative law judge on February 19, 2025 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/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 27, 2025

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

MARCO VILLA
DIMACULANGAN ASSOCIATES
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LN/md

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