

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

MARIO HERNANDEZ, *Applicant*

vs.

**FRESH QUALITY PRODUCE, INC.;
STATE COMPENSATION INSURANCE FUND; CYPRESS INSURANCE C/O
BERKSHIRE HATHAWAY HOMESTATE COMPANY, *Defendants***

**Adjudication Number: ADJ14138672
Marina del Rey District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

Defendant State Compensation Insurance Fund (SCIF) seeks reconsideration of the March 20, 2025 Arbitrator's Decision on Petition for Contribution. Therein, the WCA found that defendant Cypress Insurance is liable for contribution for the period January 25, 2020 to February 1, 2020, equivalent to 1.9%, in an amount to be determined by the parties.

SCIF contends that the WCA should have relied on Labor Code¹ section 5500.5 to find that applicant's last injurious exposure was from March 21, 2019 through March 21, 2020 and that its petition for contribution should be granted and contribution of 87% awarded, in the amount of \$153,507.52.

We received an answer. The Arbitrator issued a Report and Recommendation on Petition for Reconsideration recommending that we deny reconsideration.

We have considered the Petition for Reconsideration, the contents of the Report, and have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant SCIF'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

¹ All further statutory references are to the Labor Code, unless otherwise noted.

record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

Preliminarily, we note that 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 June 6, 2025 and 60 days from the date of transmission is August 5, 2025. This decision is issued by or on August 5, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on April 16, 2025, and the case was transmitted to the Appeals Board on June 6, 2025. Service of the Report and transmission of the case to the Appeals Board did not occur on the same day. Thus, we conclude that service of the Report did not provide accurate notice of transmission under section 5909(b)(2) because service of the Report did not provide actual notice to the parties as to the commencement of the 60-day period on June 6, 2025.

No other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with accurate notice of transmission as required by section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on June 6, 2025.

II.

The WCA stated following in the Report:

I **INTRODUCTION**

Defendant State Compensation Insurance Fund (SCIF) filed its Petition for Contribution against Cypress Insurance in consequence of SCIF's settlement with applicant for cumulative injury for the period 03/01/1996 to 03/21/2020. The language of the Compromise and Release included the following on page 7 of 9:

THERE IS A GENUINE AND BONA FIDE ISSUE WITH RESPECT TO AOE/COE. SETTLEMENT ENTERED MERELY TO BUY PEACE. THIS SETTLEMENT AGREEMENT IS NOT AN ADMISSION OF LIABILITY AND SHALL NOT BE CONSTRUED HEREIN AS SUCH.

The matter proceeded to a formal hearing on the contribution issue on November 15, 2024 and a transcript of the hearing is attached hereto.

Applicant was employed with Fresh Quality Produce Inc. as a Produce Clerk from approximately 03/01/1996 to 03/21/2020. Cypress Insurance had coverage from 02/01/2019 to 02/01/2020 (Exhibit G - WCIRB Report- EAMS Doc #51259367). State Fund has coverage from 02/01/2020 to 03/21/2020 according to its moving document on the contribution issue.

The issue to be determined was contribution and as an integral part of that the necessary elements to establish date of injury and injurious exposure. Once that is determined, it is necessary to apply LC

§5500.5 to establish the liable parties and the liability period of one year look back period "as determined by Section 5412 or the last date in which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, which occurs first."

STIPULATIONS

It was stipulated by the parties that applicant, Mario Hernandez, was employed by Fresh Quality Produce, Inc. from March 1, 1996 to March 21, 2020 (approximately). Thereafter he was employed by Brand Produce from March 30, 2020 to January 16, 2021 and after that self-employed for several weeks.

LEGAL HISTORY

The legal file indicates that applicant filed an Application for Adjudication of Claim on January 19, 2021 naming Quality Produce as the employer with the cumulative trauma period being 03/01/1996 to 03/21/2020. Subsequent to the filing of the application EDD disability benefits were commenced on February 11, 2021.

MEDICAL HISTORY

The applicant was seen by Chiropractor Dr. Eric Gofnung who found industrially related injury and a permanent and stationary (sic) date of March 21, 2022. The medical reports of Dr. Gofnung dated 01/25/2021 (Exhibit J - EAMS ID #45549918, was the first medical record of an association with applicant's medical condition and its relationship to a work genesis.

Applicant was also evaluated by Panel Qualified Medical Examiner Dr. Ralph Steiger who issued a report dated August 10, 2022 (Exhibit H - EAMS ID #44010068) and his deposition was taken on June 1, 2023 (Exhibit I - EAMS ID #51259368).

CONCLUSION OF UNDERLYING CASE

State Fund entered into a Compromise and Release with applicant on November 22, 2022 and an Order Approving the Compromise and Release issued on December 1, 2022.

Thereafter a timely Petition for Contribution was filed dated December 27, 2022 and an amended Petition for Contribution dated September 14, 2023 was filed.

(Report, at pp. 1-3.)

III.

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

Section 3208.1 provides that an injury may be either cumulative or specific. No cumulative injury can occur without disability. (*Van Voorhis v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal.App.3d 81, 86–87 [39 Cal.Comp.Cases 137]; *Aetna Cas. & Surety Co. v. Workmen's Comp. Appeals Bd. (Coltharp)* (1973) 35 Cal.App.3d 329, 342–343 [38 Cal.Comp.Cases 720].) A cumulative injury is one that occurs as “repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment.” (Lab. Code, § 3208.1.)

Section 5500.5(c) addresses the issue of cumulative injury with multiple employers. It provides, in relevant part:

In any case involving a claim of occupational disease or cumulative injury occurring as a result of more than one employment within the appropriate time period set forth in subdivision (a), the employee making the claim, or his or her dependents, may elect to proceed against any one or more of the employers. Where such an election is made, the employee must successfully prove his or her claim against any one of the employers named, and any award which the appeals board shall issue awarding compensation benefits shall be a joint and several award as against any two or more employers who may be held liable for compensation benefits.

(Lab. Code, § 5500(c).)

Pursuant to section 5500(c), then, an “employee may obtain an award for the entire disability against any one or more of successive employers or successive insurance carriers if the disease and disability were contributed to by the employment furnished by the employer chosen or during the period covered by the insurance even though the particular employment is not the sole cause of the disability.” (*Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79, 82 [11 Cal.Comp.Cases 226].) An applicant may also choose not to elect against a particular defendant and proceed against all insurers or employers. (*Industrial Indemnity Co. v. Workers' Comp. Appeals Bd.* (1997) 60 Cal.App.4th 548, 554–556 [62 Cal.Comp.Cases 1661].) However, if an applicant elects to proceed against a single insurer, the insurer is entitled under section 5500.5 to seek contribution for awarded benefits from the remaining insurers in subsequent proceedings.

(See *Schrimpf v. Consolidated Film Industries, Inc.* (1977) 42 Cal.Comp.Cases 602 (Appeals Board en banc).)

The Appeals Board decides the issue of whether a cumulative injury exists, and substantial medical evidence must support the finding of industrial injury. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Moreover, 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]; *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].) “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 Hospital v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Based on our review, we are not persuaded that there is substantial evidence to support the Arbitrator's decision without additional development of the record. 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 Labor Code sections 5950 et seq.

V.

Accordingly, we grant defendant'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.

For the foregoing reasons,

IT IS ORDERED that defendant'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/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ PAUL KELLY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 5, 2025

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

**SAUL ALLWEISS
STATE COMPENSATION INSURANCE FUND**

PAG/bp

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