

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

MICHAEL BURGESS *Applicant*

vs.

OLIVER & COMPANY, INC.;
CYPRESS INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY
HOMESTATE COMPANIES, *Defendants*

Adjudication Number: ADJ20199681
Oakland District Office

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

Applicant seeks reconsideration of the November 5, 2024 Findings and Order issued by the workers' compensation arbitrator (WCA). Therein, the WCA found that applicant did not sustain industrial injury to his lungs (sarcoidosis), adrenal gland, gallbladder, or in the form of neuropathy while employed for the cumulative period ending June 8, 2022. Based on this finding, the WCA ordered that applicant take nothing on his claim.

Defendant filed an Answer. The WCA 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 the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

Preliminarily, we note that former Labor Code¹ 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 January 29, 2025 and 60 days from the date of transmission is Sunday, March 30, 2025. The next business day that is 60 days from the date of transmission is Tuesday, April 1, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Tuesday, April 1, 2025, so that we have timely acted on the petition as required by Labor Code 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

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

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.

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 January 29, 2025, and the case was transmitted to the Appeals Board on January 29, 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 January 29, 2025.

II.

The WCA provided the following discussion in the Report:

This matter was arbitrated before Alfonso J Moresi at the Basic Craft Offices in Oakland, California on September 26, 2024. This proceeding was pursuant to the Alternative Dispute Resolution System implemented between the Employers and Basic Crafts. Following testimony and admission of exhibits into evidence the matter was submitted and a Findings and Order issued on November 5, 2024. Applicant timely filed a Petition for Reconsideration on November 22, 2024 and the Defendants filed an answer on December 6, 2024.

In his petition applicant asserts that in the Findings and Order the arbitrator acted in excess of his powers, that the evidence does not justify the Findings and Order and that the Findings of Fact do not support the Order.

The documentary evidence that has been admitted into evidence has been filed by the parties and the transcript of the proceedings is attached to this report.

Petitioner's contention is that the reports of Dr. Noriega, defendant exhibits A and B, are not substantial evidence and do not support the Findings and Order. It is petitioner's position that the reports Dr. Harrison, exhibits 1 and 2, are substantial evidence and that the Findings and Order should be rescinded and that there be a finding that the injury to his lungs did arise out of and in the course of his employment.

It is recommended that the Petition be denied.

The facts in this matter with regard to petitioner's employment are not really in dispute in that he worked for many years as a carpenter and during the period alleged in this cumulative trauma claim he worked for Oliver & Co. During his period of employment with Oliver and Co. he came down with sarcoidosis and the question as to the nature of the condition and its cause is a medical question

that has been addressed by the doctors reporting for the petitioner and the defendant.

As noted above the petitioner alleges that the report of Dr. Harrison is substantial and that the report of Dr. Noriega is not. This allegation that the report of one doctor is more substantial than that of another is not unheard of and the trier of fact must make a determination based on the entire record. Per *Escobedo v Marsha/ls* (2005) 70 Cal. Comp. Cases 605 in order for a report to constitute substantial evidence the physician must arrive at their opinion to a reasonable medical probability and not on surmise, speculation, conjecture or guess. The physician should show the reasoning or basis for his or her conclusion, by providing germane facts discovered from an examination of the applicant, his or her medical history, or other pertinent materials. *Levesque v WCAB* (1970) Supreme Ct En Banc 1 Cal.3d 627, 35 Cal Comp Cases 16.

The conclusion was reached that the report of Dr. Noriega was substantial per the standards set forth in the cases cited above and the report of one physician as long as it is substantial will support a Findings and Order.

In addition to the report of Dr. Noriega there was no evidence, other than the applicant's testimony, as to the nature of the alleged concrete exposure. Dr. Harrison had no specific information as to the type of concrete; the length of the exposure or even if the applicant wore a mask while working with the concrete or the type of mask.

As noted in defendants answer the studies that Dr. Harrison relied upon to support his conclusion that twenty five percent of the cause of applicant's sarcoidosis is not studies of exposure to concrete dust.

The defendants in their answer also rebut the allegation that Dr. Noriega did not review the entire record and point out that he did review extensive materials as well as the report of Dr. Harrison and simply comes to different conclusion.

In conclusion the Petition for Reconsideration should be denied.

(Report at pp 1-2.)

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]; *Garza, supra*; *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 v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Here, it is unclear from our preliminary review that there is substantial medical evidence to support the WCA’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 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. *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 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/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSE H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 1, 2025

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

**MICHAEL BURGESS
HON. ALFONSO J. MORESI
APPEL LAW FIRM
WITKOP LAW GROUP**

PAG/bp

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