WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROGELIO MALDONADO, *Applicant*

vs.

AL LOWE CONSTRUCTION, INC.; EVEREST NATIONAL INSURANCE COMPANY, administered by AMERICAN CLAIMS MANAGEMENT, INC., *Defendants*

Adjudication Number: ADJ11198598
Oxnard District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the April 25, 2025 Findings and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a laborer on February 20, 2017, sustained industrial injury to his left knee and low back, and that the matter previously settled by way of Stipulated Award at 42 percent permanent partial disability. The WCJ denied applicant's Petition to Reopen for New and Further Disability because the record did not establish that applicant sustained increased disability.

Applicant has filed a Declaration in Rebuttal to Presumption of Service (Declaration), which contends that neither applicant nor his attorney received timely notice of the F&O until June 10, 2025.

Applicant's Petition for Reconsideration (Petition) contends the F&O attributes all new and further disability to a collateral June 8, 2020 specific injury to the right knee while working for the same employer which resolved by Compromise and Release on April 12, 2024. Applicant contends the second injury is not the sole cause of his increased disability and that defendant has not met the burden of proof for post-injury apportionment.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered applicant's Declaration, applicant's Petition, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record including applicant's Declaration, we will accept applicant's Petition as timely filed. We will further grant applicant's Petition and order that this matter be referred to a workers' compensation administrative law judge or designated hearing officer of the Appeals Board for a status conference. 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[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."

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

Here, according to Events, the case was transmitted to the Appeals Board on July 1, 2025, and 60 days from the date of transmission is Saturday, August 30, 2025. The next business day that is 60 days from the date of transmission is Tuesday, September 2, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on September 2, 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 July 1, 2025, and the case was transmitted to the Appeals Board on July 1, 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 July 1, 2025.

II.

We first address the issue of the timeliness of applicant's petition. Ordinarily, an "aggrieved" party must file a petition for reconsideration of a final order, "within 20 days after the service" of the order or the Appeals Board will have no jurisdiction. (Lab. Code, § 5903; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182 [260 Cal.Rptr. 76]; *Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com.* (*Hinojoza*) (1962) 201 Cal.App.2d 545, 548 [27 Cal.Comp.Cases 73, 75-76].) However, when a party entitled to service is not served with a final WCAB order, the party has 20 days from actual receipt of the order within which to file a petition for reconsideration of

[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.

it. (*Hartford Accident & Indemnity Co. v. Workers' Comp. Appeals Bd.* (*Phillips*) (1978) 86 Cal.App.3d 1 [43 Cal.Comp.Cases 1193]; *Garcia v. The Vons Company, Inc.* (2001) 66 Cal.Comp.Cases 362 (Appeals Board en banc); cf. *State Farm Fire & Casualty Co. v. Workers' Comp. Appeals Bd.* (*Felts*) (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622]; *Camper v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.4th 679 [57 Cal.Comp.Cases 644].)

Here, the June 16, 2025 Declaration filed by applicant's counsel avers non-receipt of F&O prior to June 10, 2025, when a member of applicant's counsel's staff located a copy of the decision in the Electronic Adjudication Management System (EAMS). (Declaration, at p. 2:20.) Because the decision was not actually received until June 10, 2025, applicant contends the Petition filed on June 18, 2025 was timely.

The WCJ's Report notes that technical difficulties with the address for applicant's counsel in the EAMS system may have contributed to dilatory service of the F&O. (Report, at pp. 4-5.) Accordingly, the WCJ recommends we treat applicant's petition as timely.

We concur with the WCJ's recommendation and accept applicant's assertion that the F&O was first received by applicant's counsel as of June 10, 2025. Because applicant's Petition was filed within 20 days of actual receipt of the WCJ's Findings of Fact and Order, we conclude that the Petition is timely. (Lab. Code, § 5903; *Rymer v. Hagler, supra,* 211 Cal.App.3d 1171, 1182.)

III.

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

The instant dispute involves a pending Petition to Reopen for New and Further Disability filed in Case No. ADJ11198598. Therein, applicant received a September 18, 2019 Award for 42 percent permanent partial disability arising out of a February 20, 2017 injury to the left knee and low back. (Minutes of Hearing and Summary of Evidence (Minutes), dated May 31, 2024, at p. 2:12.) Applicant filed a Petition to Reopen the claim for new and further disability on October 7, 2021.

Applicant has also filed Case No. ADJ15299369 involving a specific injury on June 8, 2020 to the right knee. The matter settled by Compromise and Release approved on April 12, 2024.

The parties to the present case have selected Peter Newton, M.D., as the Qualified Medical Evaluator (QME) in orthopedic medicine. Dr. Newton has evaluated applicant with respect to both

the original injury as well as applicant's pending Petition to Reopen for New and Further Disability.

Dr. Newton's report of October 17, 2023 reflects a reevaluation of applicant including a clinical evaluation and record review. (Ex. B, Report of Peter Newton, M.D., dated October 17, 2023, at p. 1.) Dr. Newton finds increased whole person impairment as compared to applicant's prior evaluations, but also finds apportionment as follows:

> To a reasonable degree of medical probability, 75% of this applicant's current lumbar spine and left knee condition/disability/impairment is apportioned to the 02/20/17 injury and 25% as a sequela of the 2020 injury which has caused a significantly abnormal gait aggravating both his low back and left knee.
>
> To a reasonable degree of medical probability, l00% of this applicant's current right knee condition/disability/impairment is apportioned to the 2020 injury.

(*Id.* at p. 16.)

The WCJ's decision applied the apportionment described by QME Dr. Newton and based thereon, determined that "[a]pplicant's disability for the left knee and low back arising out of this injury is not greater than it was at the time of the stipulated award dated [September 18, 2019]." (Finding of Fact No. 5.)

Applicant's Petition contends that Dr. Newton's apportionment opinion is conclusory and unsupported in the evidentiary record. (Petition, at p. 7:3.) Applicant further contends that the QME is proceeding from an incorrect legal premise because applicant has received a prior award of permanent disability that is conclusively presumed to exist at the time of any subsequent industrial injury. (Lab. Code, § 4664(b).)

In *Vargas v. Atascadero State Hosp.* (2006) 71 Cal.Comp.Cases 500 [2006 Cal. Wrk. Comp. LEXIS 116] (Appeals Bd. en banc) (*Vargas*), we addressed the extent to which the changes made under SB899 would apply to applicant's pending Petition to Reopen for New and Further Disability. We wrote:

> In *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906 [30 Cal. Rptr. 3d 598] [70 Cal.Comp.Cases 787], wherein a petition to reopen was pending on the date of SB 899's enactment, the Court held that the apportionment provisions of SB 899 must be applied to all cases not yet final at the time of the legislative enactment on April 19, 2004, regardless of the earlier dates of injury and any interim decision. (See also, *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274 [25 Cal. Rptr. 3d 448] [70

> Cal.Comp.Cases 133] (in which the Court reached a similar conclusion wherein a petition to reopen was pending on the date of SB 899's enactment); cf., *Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd.* (*Scheftner*) (2005) 131 Cal.App.4th 517 [31 Cal. Rptr. 3d 789] [70 Cal.Comp.Cases 999].)
>
> Accordingly, and consistent with the principles stated in *Marsh*, we conclude that the new apportionment provisions of SB 899 apply to the issue of increased permanent disability alleged in any petition to reopen (see sections 5803, 5804, 5410) that was pending at the time of the legislative enactment on April 19, 2004, regardless of date of injury.

(*Id.* at p. 505-506.)

However, notwithstanding the applicability of the new apportionment standards described in the reform legislation of SB899, we nonetheless noted that, "in applying the new apportionment provisions to the issue of increased permanent disability, the issue must be determined without reference to how, or if, apportionment was determined in the original award." (*Id.* at p. 507.) We acknowledged that "to the extent that applicant's neck and upper extremity injury may have resulted in increased permanent disability, any such increased disability will be subject to apportionment under the new law, provided there is substantial medical evidence establishing that these other factors have caused increased permanent disability." However, because the prior award was finalized, "the new apportionment statutes cannot be used to revisit or recalculate the level of permanent disability, or the presence or absence of apportionment, determined under a final order, decision, or award issued before April 19, 2004." (*Id.* at p. 508.)

Accordingly, any increased permanent disability alleged in a petition to reopen for new and further disability must be determined without reference to how or if apportionment was determined in the original award. (*Vargas, supra*, at p. 502; see also *Wilson-Marshall v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1431 [2007 Cal. Wrk. Comp. LEXIS 304] (writ den.); *Ortiz v. Orange County Transp. Auth.* (August 16, 2012, ADJ2033351 (ANA 0389567)) [2012 Cal. Wrk. Comp. P.D. LEXIS 429]; *Balderas v. GTE Corp.* (July 1, 2010, ADJ2405891 (GRO 0022758)) [2010 Cal. Wrk. Comp. P.D. LEXIS 270]; *Hartfield v. Los Angeles Unif. School Dist.* (September 24, 2009, ADJ1687053 (MON 0281584)) [2009 Cal. Wrk. Comp. P.D. LEXIS 453].)

Here, it is not clear whether the QME has adequately described the basis for his apportionment opinions or applied a correct legal theory of apportionment that comports with applicable decisional and statutory authority. "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." (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358, 363].) A medical opinion may not be based on surmise, speculation, conjecture, or guess, and it is not substantial evidence if it is based on facts no longer germane, based on an incorrect legal theory, or based on an inadequate medical history and examination. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 (36 Cal.Comp.Cases 93, 97); *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 (35 Cal.Comp.Cases 525, 529).)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id.* at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]).)

Additionally, 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].) 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.) Here, based on our preliminary review, it appears that further development of the record may be appropriate.

III.

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.

IV.

Accordingly, we grant applicant's Petition for Reconsideration, order that this matter be set for a status conference, 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 applicant's Petition for Reconsideration of the Findings and Order issued by a workers' compensation administrative law judge on April 25, 2025 is **GRANTED**.

IT IS FURTHER ORDERED that this matter will be set for a Status Conference with a workers' compensation administrative law judge or designated hearing officer of the Appeals Board. Notice of date, time, and format of the conference will be served separately, to be heard on the Courtcall electronic platform, in lieu of an in-person appearance at the San Francisco office of the Appeals Board.

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/ KATHERINE WILLIAMS DODD, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 2, 2025

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

ROGELIO MALDONADO
LAW OFFICE OF JOHN SUGDEN
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK

SAR/abs

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