WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ROSE MARIE NUNO, *Applicant*

vs.

COUNTY OF LOS ANGELES DEPARTMENT OF SOCIAL SERVICES, permissibly self-insured, *Defendants*

Adjudication Number: ADJ10974991
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant has petitioned for reconsideration of the Partial Findings of Fact, Award and Order to develop the Record (F, A, &O) issued by the workers' compensation administrative law judge (WCJ) on August 26, 2024. In that F, A, &O, the WCJ found, in pertinent part, that applicant sustained injury arising out of and occurring in the course of employment to her neck, bilateral hands and wrists, lungs/asthma and psyche, and did not sustain injury to her bilateral shoulders, bilateral upper extremities (with the exception of bilateral hands and wrists), right hip, lumbar spine, or in the form of IBS, GERD, or hypertension. The WCJ further found that the record requires further development relating to applicant's claim of injury in the form of sleep, as well as on the additional issues, including compensability of claimed injury in the form of sleep (and further medical treatment if found compensable), temporary disability permanent disability/impairment, apportionment, and attorney fees.

Petitioner contends the WCJ's findings and order are in error with respect to multiple issues, including, but not limited to, the exclusion of a medical report from Robert Tomaszewski, Ph.D., dated 10/8/20, the WCJ's failure to find applicant 100% permanently totally disabled, and the failure to find industrial injury to applicant's low back, right hip, upper extremities, hypertension, irritable bowel syndrome, and gastrointestinal.

Defendant did not file a response to applicant's petition.

The presiding workers' compensation judge (PWCJ) filed a Report and Recommendation on Petition for Reconsideration (Report) pursuant to WCAB Rule 10962(c) recommending denial of the Petition. (Cal. Code Regs., tit. 8, § 10962(c).)

We have considered the Petition for Reconsideration (Petition), 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 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 December 6, 2024 and 60 days from the date of transmission is February 4, 2025. This decision is issued by or on February 4, 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 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 presiding workers' compensation administrative law judge, the Report was served on December 6, 2024, and the case was transmitted to the Appeals Board on December 6, 2024. 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 December 6, 2024.

II.

Preliminarily, we note the following in our review:

This matter was initially set for hearing on October 23, 2023. At that time, the parties went on the record and stipulated that applicant was employed during the period from September 9, 2009 to October 21, 2016 as an eligibility worker, occupational group No. 111 by the defendants and sustained injury arising out of and in the course of employment to her cervical spine, bilateral hands, bilateral wrists, lungs, asthma, and psyche.

Applicant additionally claimed industrial injury to her bilateral shoulders, bilateral upper extremities (other than admitted bilateral hands and wrists), lumbar spine, right hip, in the form of IBS, GERD, hypertension, and sleep disorder.

The parties stipulated to earnings rate, the date that applicant reached maximum medical improvement per the Agreed Medical Evaluator (AME) Alexander Angerman, M.D., and that prior findings and opinions and award issued on August 28, 2015 in cases ADJ1684492, ADJ2570937, and ADJ1117539. (Minutes of Hearing, Summary of Evidence, October 23 2023, pp. 2-3.)

Issues to be determined included parts of body, temporary disability, permanent disability, apportionment, need for further medical treatment, liability for self-procured treatment, as well as attorney fees. Also raised were issues relating to alleged penalties, a cost of living adjustment (COLA), and the level of permanent disability and impairment. (MOH/SOE, 10/23/23, pp. 3.4.)

Both applicant and defendant objected to each other's medical reporting subject to motions to strike, applicant testified, and the matter stood submitted for decision.

Further proceedings were held on May 13, 2024, and on August 26, 2024, the WCJ issued a Partial Findings of Fact, Award, and Order to develop the record. The F, A & O found, in pertinent part that:

1. The applicant, Rose Marie Nuno, born [], while employed during the period from 9/9/09 through 10/21/16, as an eligibility worker, occupational group number 111, at Los Angeles, California, by the County of Los Angeles, Department of Social Services, sustain[ed] injury arising out of and occurring in the course of employment to her neck, bilateral hands and wrists, lungs/asthma and psyche, and did not sustain injury to her bilateral shoulders, bilateral upper extremities (with the exception of bilateral hands and wrists), right hip, lumbar spine, or in the form of IBS, GERD, or hypertension. The record requires further development relating to applicant's claim of injury in the form of sleep.

2. Applicant's earnings at the time of injury were $1,002.44, sufficient to produce a temporary disability rate of $668.29 per week and a permanent partial disability rate at the statutory rate.

3. Defendant's motion to strike the reporting from Robert Tomaszewski, Ph.D. (Applicant Exhibit 12), is granted. Said exhibit will be marked for identification only.

4. Court Exhibit 3, a report by Alexander Angerman, M.D. dated 10/21/20 is missing purported attached addendum. The parties are ordered to file a complete copy with all addenda forthwith for updating/correction of the EAMS exhibit.

5. Further medical treatment is required to cure or relieve from the effects of this injury. Further medical treatment related to a claimed injury in the form of sleep is deferred with the Court retaining jurisdiction, pending further development of the record.

6. The record requires further development on all additional issues including compensability of claimed injury in the form of sleep (and further medical

> treatment if found compensable), temporary disability, permanent disability/impairment, apportionment, and attorney fees.

(F, A & O, 8/26/24, pp. 1-2.)

The WCJ Awarded further medical treatment as set forth in Finding 5, and the WCJ issued an Order that stated:

IT IS ORDERED that the record requires further development on all remaining issues detailed in Finding 6, above.

(F, A & O, 8/26/24, p. 2.)

The WCJ also set the matter for a Status Conference scheduled for October 9, 2024, relating to the issue of record development

On September 18, 2024, applicant filed her petition for reconsideration of the WCJ's F, A & O. Applicant also requested in her petition that the matter be returned to the PWCJ for reassignment to another WCJ.

III.

In our initial review we note that the findings of the WCJ include determinations relating to parts of body claimed to have been industrially injured, as well as to a medical report which the WCJ excluded from evidence, and deferred other issues pending development of the record.

Petitioner has raised eleven issues in the petition for reconsideration. Eight of these issues relate to either temporary disability, permanent disability, apportionment, and the substantiality of the medical evidence.

Those issues have not yet been adjudicated by the WCJ, and, in fact, the WCJ advised that the record needed further development, specifically with respect to applicant's claim for sleep disorder as well as "all additional issues including compensability of claimed injury in the form of sleep (and further medical treatment if found compensable), temporary disability, permanent disability/impairment, apportionment, and attorney fees". (F, A & O, p. 2-3.)

Given these findings, it is unclear why applicant is raising issues that have not yet been decided.

As to those issues raised and actually determined in the findings of the WCJ, specifically parts of body found industrially injured, as well as admissibility of medical reporting, we note that the PWCJ, stated in her Report:

The judge did not err in finding that the applicant did not sustain injury to the low back, right hip, both upper extremities, hypertension, irritable bowel syndrome, and gastroesophageal reflux disease (contention 5) in this case. Applicant asserts that it was error to not find injury in this case as defendant admitted injury to the same body parts in ADJl11539, a different case not part of the trial from which this decision issued. This argument is completely without merit. The same issue was apparently raised at trial by applicant's attorney and is more fully addressed in the Opinion on Decision. In summary, the finding by the trial judge that the applicant did not sustain it1jury to the low back, right hip, both upper extremities, hypertension, irritable bowel syndrome, and gastroesophageal reflux disease was based on the AME reports of Dr. Angerman, AME Dr Silbart and the AME report of Dr. Hirsch.

The trial judge found that the applicant did not sustain a compensable injury to her bilateral shoulders, bilateral upper extremities (with the exception of bilateral hands and wrists), right hip, or lumbar spine arising out of and in the course of employment during the continuous trauma period from 9/9/09 to and including 10/21/16 based on the medical reporting and deposition testimony of agreed medical evaluator (AME) in orthopedics, Alexander Angerman, M.D. (Court Exhibit 1-3), and upon the medical reporting and deposition testimony of replacement orthopedic AME, Steven Silbart, M.D. (Court Exhibits 4-9). At trial applicant's attorney raised the same or similar issue asserting that they were required to find injury was apparently raised at trial by applicant's attorney and is more fully addressed in the Opinion on Decision.

Based upon the medical reporting of agreed medical evaluator in internal medicine, Jeffrey Hirsch, M.D. (Court Exhibit 10), which the trial judge found the reporting to be the most credible and persuasive reporting relating to applicant's internal medicine complaints, and found that applicant sustained a compensable injury to her lungs in the form of asthma, and did not sustain a new compensable injury in the form IBS, GERD, and hypertension.

The applicant asserts in contention 6 that it was error to exclude Dr. Tomaszewski's l0/8/2020 report from evidence. The trial judge ruled that the 10/8/2020 report of Dr. Tomaszewski (Applicant Exhibit 12) was not admissible as the report was not listed in the Pre- Trial Conference Statement. The parties were unable to resolve the claim at the mandatory settlement conference and in accordance with LC 5502 they completed a pre-trial conference trial statement. The report of Dr. Tomaszewski was not listed by either party on the pre-trial conference statement (See EAMS ID 48098103). At trial the defendant objected to the admissibility of the report. In accordance with LC 5502 the report was excluded from evidence as it was not disclosed on the pre-trial conference statement and there was no showing that the report was not available prior to the MSC. In fact, the evidence showed that the report had been reviewed by the AME, and therefore, was clearly available at the time of the MSC. Based on the failure to disclose the report, the defendant’s motion to exclude Applicant’s Exhibit 12, was granted and Exhibit 12, was excluded and marked for identification only.

***

> In the last contention (11) raised by the applicant the applicant asks "Does the evidence justify that Dr. Bassett's medical conclusions are erroneous based on her failure to review all records and reports?" The trial judge found that with respect to the psychiatric component of applicant's claim, the reporting requires further development of the record. Both parties have an obligation to complete the agreed medical evaluator's analysis and reporting. The psychiatric AME, Kathleen Bassett, M.D. repeatedly requested (in reporting and at her deposition) to be provided with specific records, to complete her analysis. Neither party fully complied with Dr. Bassett's reasonable requests, particularly relating to medical reporting contemporaneous with applicant's retirement in late 2016. The trial judge makes the reasonable assumption that the requested records were in applicant's position (and possibly some in defendant's possession), as applicant's treating physician reports contain summaries of the records in question.
>
> Applicant's last contention actually supports the trial judges conclusion that the record requires further development.

(Report, pp. 6-9.)

IV.

The WCAB has a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) evidence on an issue. The WCAB also 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].)

In accordance with that mandate, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level for further proceedings and decision.

We express no opinion on the ultimate resolution of any matter in this case.

Additionally, any decision of the WCAB must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [520 P.2d 978, 113 Cal. Rptr. 162] [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [475 P.2d 451, 90 Cal. Rptr. 355] [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [463 P.2d 432, 83 Cal. Rptr. 208] [35 Cal.Comp.Cases 16].)

In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [445 P.2d 313, 71 Cal. Rptr. 697]

[33 Cal.Comp.Cases 660]; *Travelers Ins. Co. v. Industrial Acc. Com. (Odello)* (1949) 33 Cal.2d 685, 687-688 [203 P.2d 747] [14 Cal.Comp.Cases 54]; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [20 Cal. Rptr. 2d 778] [58 Cal.Comp.Cases 313].)

Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399, 407 [445 P.2d 294, 71 Cal. Rptr. 678] (a mere legal conclusion does not furnish a basis for a finding); *Zemke v. Workmen's Comp. Appeals Bd., supra,* 68 Cal.2d at |pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence); see also *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 [443 P.2d 777, 70 Cal. Rptr. 193] (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based). (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, given our preliminary review, it is unclear as to whether the existing record is sufficient to support the order and decision of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above.

V.

Finally, we observe that 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 [62 Cal.Rptr. 757, 432 P.2d 365]; *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.

VI.

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, Award and Order issued on August 26, 2024 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition 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/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 4, 2025

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

ROSE MARIE NUNO
LAW OFFICES OF DENNIS J. HERSHEWE
GREENUP, HARTSTON & ROSENFELD

LAS/*bp*

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