WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SAMUEL HOWARD, *Applicant*

vs.

SAN DIEGO JEEP/SUNROAD HOLDING CORPORATION;
PACIFIC COMPENSATION INSURNCE COMPANY,
dba COPPERPOINT INSURANCE COMPANIES, *Defendants*

Adjudication Number: ADJ13368607
San Diego District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the November 27, 2024 Findings and Award issued by the workers' compensation administrative law judge (WCJ). Therein and as relevant here, the WCJ found that applicant sustained industrial injury to his left ring and left middle finger, neck, right upper extremity including shoulder, forearm, hand, in the form of a diagnosis of CRPS, and psyche in the form of PTSD while employed as a lube technician on May 16, 2020. The WCJ further found that the Petition to Replace Panel QME Reiss is denied and that applicant is permanently totally disabled.

Defendant contends that the WCJ erred in failing to remove panel qualified medical evaluator (PQME) NAME Reiss, M.D., on the basis of bias, in failing to allow the medical-legal evaluators to review sub rosa video, and in finding applicant permanently totally disability.

Applicant filed an Answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration 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 defendant'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 Code[1] 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 December 26, 2024, and 60 days from the date of transmission is February 24, 2025. This decision is issued by or on February 24, 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

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

notified of the accurate date for the commencement of the 60-day period for the Appeals Board to 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 December 26, 2024, and the case was transmitted to the Appeals Board on December 26, 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 26, 2024.

II.

The WCJ provided the following discussion in the Report:

> BACKGROUND
>
> Applicant, Samuel Howard, while working for San Diego Jeep, suffered a partial amputation of two of his fingers. On the date of the injury, applicant was taken to UCSD for emergency treatment. Applicant was treated on the date of the injury and released from the hospital on the same day. Through the next approximately 100 days, applicant received what amounted to as "subpar" treatment such that applicant developed a psychological condition as well as Chronic Regional Pain Syndrome verified through medical testing and diagnosis by multiple doctors.
>
> The parties presented to trial in this matter for the first time on May 29, 2024. During such time, multiple defendant exhibits as well as joint and applicant exhibits were presented and entered into evidence. However, once the matter stood submitted, and this WCJ had an opportunity to review the admitted exhibits, it became clear that the exhibits presented were not correct and the matter was vacated to have the parties clean up the exhibits; including those that the parties failed to identify properly as joint. After the parties presented to the undersigned again, the exhibits were "cleaned up" and the matter again was submitted, including the requested supplemental report from QME Reiss. However, despite being given the opportunity to review the exhibits, once again it was noted that the exhibits were still not correct; specifically, the courtesy hard copy given to the undersigned, did not match those uploaded in EAMS. For example, in one exhibit pages were missing. This WCJ has requested that the parties file a declaration under penalty of perjury that they have now reviewed each and every page of the uploaded exhibits in EAMS to ensure that they are complete and accurate. This is brought to the attention of the Board as it was the undersigned's understanding that someone

would file a Petition for Reconsideration and the Board would need a complete copy of all the exhibits. This WCJ respectfully requests that if any of the exhibits in this case are still not correct, the Board will inform this WCJ.

However, despite these mishaps with the evidence in this matter, this case did proceed and conclude the trial and the undersigned issued a Findings and Award/Opinion on Decision on November 27, 2024. Defendant has filed a timely, verified petition for Reconsideration.

DISCUSSION

Defendant contends that QME Reiss should be given an opportunity to review the sub rosa video obtained by defendant. Conveniently enough, defendant has failed to state the date of the sub rosa video anywhere in the Petition for Reconsideration, when it was obtained and why, prior to trial, such video was never sent to QME Reiss to date. In fact, such video had been available and presented to other evaluators in this claim who have commented on its content. In addition, this WCJ reviewed the video at the time of trial. (MOH/SOE, 5/19/2024, pages 19-20) QME Reiss has been the qualified evaluator on the claim since 2020. The sub rosa video has been in existence since 2021 with dates of the video taken from February 19, 2021, July 4, 2022, October 5, 2022, November 16, 2022, and the last date of video being March 6, 2024. There has been no explanation why QME Reiss was not given the opportunity to review the sub rosa video prior to the time of trial, specifically the dates that pre-date this matter being set for trial. There was no good cause to not go forward at the time of trial, four years after the first evaluation occurred with this QME. In addition, QME Reiss' opinion have stayed consistent throughout his reporting.

It should be noted that at the time this matter was set for trial, defendant's objection to the matter being set for trial was solely on the argument that not all the treating physicians or QME's had found applicant permanent and stationary yet, that the QME's had been forwarded the vocational evaluations from Corso vocational counseling which needed to be commented upon, and that apportionment needed to be addressed. Nowhere in their argument regarding setting the matter for trial was the issue of the sub rosa video not being reviewed mentioned. (EAMS DOC ID 49897285) In addition, a review of the proposed evidence to be presented at trial in the pre-trial conference statement, notes that no sub rosa video was being offered, however, the video was allowed during trial to address alleged credibility issues of the applicant. Furthermore, the sub rosa video was presented to other doctors in the case and this WCJ has yet to understand why defendants chose not to send it to QME Reiss at the same time. Finally, a look at defendant's petition to replace QME Reiss reveals that defendant makes no comment on the fact that QME Reiss did not review the sub rosa video. (EAMS DOC ID 51841306) It appears that this argument to have QME Reiss review the sub rosa does not come to light until after the Findings and Award and defendant's petition for Reconsideration. This WCJ finds

this argument without merit and the ruling to allow QME Reiss to remain the QME on this matter stand.

Defendant next contends that this WCJ should have determined that QME Reiss should be replaced in this matter based on bias towards the defendant. This issue has thoroughly been addressed in the Findings and Award. In addition to the original Opinion on Decision, this WCJ would just like it to be noted that at no time has QME Reiss waivered in his opinions on the case. From the original reporting, QME Reiss had been abundantly clear that applicant needed much more aggressive treatment from the beginning of the case to the last reporting in order to see any improvement in applicant's condition. He noted that without the necessary treatment, applicant's condition would not change, and, in fact, would become worse. This was exactly what occurred throughout this claim to date. QME Reiss has been given an opportunity to review all medical reports as well as the vocational reports from both experts. Considering that applicant's treatment to date has been status quo, and the records substantiate the treatment to date has not changed, it is not surprising that QME Reiss' position in this matter has remained steadfast. There is nothing to indicate that QME Reiss was biased against defendant in their report based on the issue with the "bounced check". Rather, QME Reiss' opinions stem from the fact that applicant's treatment failed to address his serious psychological issues in a matter that could potentially see an improvement in applicant's condition. QME Reiss has continued to report in this case since 2021 and to allow the parties to start over again would do further harm to the applicant. Therefore, this WCJ finds a correct ruling has already been made on the issue of a replacement QME in psychiatry.

Finally, defendant contends that the determination of 100% permanent, total disability was in error when each QME provided permanent work restrictions and defendant's VR expert indicated that applicant could benefit from vocational rehabilitation if he was willing to participate in it. This WCJ disagrees with this assessment. In fact, applicant had attempted to go back to school and become a drone pilot. However, without consistent and appropriate treatment and support during the process, applicant failed to complete the testing needed. This WCJ would note that defendant's VR expert acknowledged that in order for applicant to successfully complete any vocational rehabilitation it must be accompanied by appropriate and supportive psychotherapy. (Defendant's Exhibit X, page 2) Based on the premise that applicant must have this support at the same time he is being re-trained, this WCJ found that the conclusions defendant's expert reached were, at best, speculative. In other words, Mr. Corso, the expert, is stating that applicant may be successful with retraining if he has supportive psychotherapy and other treatment coinciding with his rehabilitation training. The history of this claim makes it clear that applicant is not receiving the necessary treatment in the workers' compensation arena to make him amenable to retraining. Applicant has made no progress in his treatment in the last four years such that the concept of putting the applicant back into the workforce is, at best, speculative. Therefore, this WCJ still finds the rationale of Mr. Mark Remas, the applicant's vocational rehabilitation

expert much more persuasive and gave great weight to his findings. Therefore, this WCJ again reiterates that the Findings and Award were correct and requests that the Board uphold the determination that applicant is 100% permanently, totally disabled.

(Report at pp 1-5.)

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 WCJ's decision. There is also no formal permanent disability rating. 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 A. ZALEWSKI, CHAIR

I CONCUR,

/s/ PAUL F. KELLY, COMMISSIONER

JOSEPH V. CAPURRO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 24, 2025

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

SAMUEL HOWARD
LAW OFFICES OF THOMAS DEBENETTO
ENGLAND PONTICELLO & ST. CLAIR

PAG/oo

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