WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

STEVEN TOFANELLI, ***Applicant***

vs.

SECURITY CONTRACTOR SERVICES INC.;
TRAVELERS SACRAMENTO, ***Defendants***

Adjudication Number: ADJ12511510
Sacramento District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the January 28, 2025 Findings and Award issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained injury arising out of and in the course of employment to the right ear, and claims to have sustained injury arising out of and in the course of employment to the left ear, while employed on June 21, 2019, as a panel installer. The WCJ further found that the injury herein caused 43% permanent disability without apportionment.

Defendant contends that the WCJ erred in failing to find apportionment arguing that the opinion of Ronald Ward, M.D., is substantial medical evidence.

We did not receive an answer. The WCJ issued a Report and Recommendation recommending that we deny reconsideration.

We have considered the Petition for Reconsideration 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.
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> (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 March 6, 2025, 2025 and 60 days from the date of transmission is May 5, 2025. This decision is issued by or on May 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. 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 March 6, 2025, and the case was transmitted to the Appeals Board on March 6, 2025. Service of the Report and transmission of the

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

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 March 6, 2025.

II.

The WCA provided the following discussion regarding permanent disability in the Opinion on Decision:

> Applicant's permanent disability rating, without regard for apportionment, is as follows:
>
> 11.01.01.00 - 35 - 1.4 - 49 - 460(G) - 49 - 43% Permanent Disability.
>
> The question remains whether or not apportionment should apply. Applicant's counsel has raised apportionment as an issue, asserting in their trial brief that the apportionment provided to date by Dr. Ward has not been substantial evidence as it does not adequately explain how or why apportionment should be applied.
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> In review of Dr. Ward's reports, I hereby find that his opinions on apportionment do not amount to substantial medical evidence. Dr. Ward did not state how or why he was issuing such substantial non-industrial apportionment findings in a case where applicant has fully lost his hearing from a specific head injury. His rationale for apportionment is as follows, "Given the available information, I will apportion 98% of the applicant's hearing loss to non-industrial, congenital factors, and 2% to his industrial head injury sustained on 06/21/2019. The pre-existing congenital hearing loss in the claimant's right ear was worsened, per the medical records available, by his industrial head injury on 06/21/2019, not his left ear" (See Defendant's Exhibit A, Page 9).
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> Per Escobedo, "while it was not necessary that the preexisting condition or disease have been symptomatic and disabling at the time of the industrial injury (Duthie v. Workers' Comp. Appeals Bd. (1978) 86 Cal.App.3d 721, 728 [43 Cal.Comp.Cases 1214]; Callahan v. Workers' Comp. Appeals Bd. (1978) 85 Cal.App.3d 621, 629 [43 Cal.Comp.Cases 1097]; Franklin v. Workers' Comp. Appeals Bd., supra, 79 Cal.App.3d at p. 245), it was necessary that the non-industrial disability would have developed by the time that the injured worker's industrial disability became permanent and stationary; i.e., it was insufficient that the non-industrial disability would have occurred at some indefinite future date." (Gay v. Workers' Comp. Appeals Bd. (1979) 96 Cal.App.3d 555, 562 [44 Cal.Comp.Cases 817]; Duthie v. Workers' Comp. Appeals Bd., supra, 86 Cal.App.3d at p. 728; Franklin v. Workers' Comp. Appeals Bd., 79 Cal.App.3d at p. 243.)

> Dr. Ward does not explain how or why applicant's total hearing loss is due to the congenital hearing loss issue as opposed to his head injury at work that caused sudden and total hearing loss in his right ear. He fails to allude to specific medical reports or other evidence that would lead to such a finding. He fails to address why 98% of this disability is due to the congenital hearing loss issue and his apportionment finding does not appear to properly note the difference between apportionment of causation and apportionment of disability. Defendant has the burden of establishing the percentage of disability caused by factors other than the industrial injury. They have had notice of the apportionment issue since September 8, 2021. They have failed to meet this burden and had plenty of time to do so. Therefore, I will not order further development of the record on this issue.
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> Furthermore, applicant went from diminished hearing to total hearing loss, and the rating is for total hearing loss in the right ear. There is no explanation by Dr. Ward as to how or why the pre-existing partial hearing loss in the right ear caused or contributed to the impairment stemming from the total hearing loss. Also, Dr. Ward's report from 10/03/2021 expresses the following point, "There is no factual basis to state that the applicant's pre-existing inner ear pathology made him more susceptible to further hearing loss in the event of a traumatic head injury." (See Defendant Exhibit B, Page 4). This defeats Dr. Ward's apportionment findings absent a more adequate explanation, which he has not provided.
>
> Therefore, his apportionment finding is not substantial evidence, and applicant is entitled to PD of 43% at a rate of $290.00 per week.
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> (Opinion on Decision, at pp. 3-4.)

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).)

The defendant has the burden of proof on apportionment. (Lab. Code, § 5705; *Pullman Kellogg v. Workers Comp. Appeals Bd. (Normand)* (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; *Kopping v. Workers' Comp. Appeals Bd. (Kopping)* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229]; *Escobedo v. Marshalls (Escobedo)* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc).) To meet this burden, the defendant "must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment." (*Gay v. Workers' Comp. Appeals Bd. (Gay)* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo, supra,* at p. 620.)

Here, it is unclear from our preliminary review that there is substantial medical evidence to support the WCJ's decision without additional development of the record. 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).)

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/ JOSE H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 2, 2025

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

STEVEN TOFANELLI
MCMONAGLE STEINBERG
LAW OFFICE OF LAURA CHAPMAN

PAG/bp

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