WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WARREN P. HARVEY, *Applicant*

vs.

SOCAL MACHINE, INC. insured by TRUCK INSURANCE EXCHANGE, administered by FARMERS INSURANCE, *Defendant*

Adjudication Number: ADJ17547374
San Diego District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant has petitioned for reconsideration of the Findings and Award issued and served by the workers' compensation administrative law judge (WCJ) in this matter on October 23, 2024. In that decision, the WCJ found that the equitable hourly reimbursement rate for in-home health care (HHC) to the applicant for his spouse's services are $17.53 when the wife is performing regular caregiver duties such as laundry, meal preparation, changing sheets, and assisting applicant in dressing and bathing, and $53.55 when the wife is performing duties equivalent to nursing such as medication dispensing, bandage changing or wound care, assisting with therapy, catheterization, and the bowel program. The WCJ awarded applicant's attorney a reasonable attorney fee of 12% from the retroactive benefits received for the period February 4, 2024, to the date of the Award.

Petitioner contends that the WCJ erred in failing to find a simple reimbursement rate for all HHC services, and by calculating the rate based upon hourly pay of HHC employees instead of the cost of equivalent services from a HHC provider in the community. Petitioner also asserts that the WCJ erred by limiting any future increase in HHC reimbursement rate, and by failing to award a reasonable attorney fee.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied, or that in the alternative, clear guidelines be provided as to how to determine a proper rate for HHC from one's spouse.

In response to the WCJ's Report, applicant filed a request to submit a supplemental petition along with the proposed petition. Finding good cause to approve the supplemental petition, we exercise our discretion to accept and consider it. (WCAB Rule 10964(b), Cal. Code Regs., tit. 8, § 10964(b).)

We have considered the Petition for Reconsideration, the Answer, the contents of the Report, the supplemental petition, 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[1] section 5950 et seq.

PROCEDURAL HISTORY

As per in the Minutes of Hearing and Summary of Evidence (MOH/SOE) dated June 19, 2024, the parties stipulated that the applicant, while employed on November 3, 2022 as an operations manager by defendant, sustained injury arising out of and in the course of employment to his neck.

The issues were listed as follows:

1. Equitable reimbursement for home health care services per Labor Code section 4600(h).
2. Attorney fees with the period of June 7, 2022 through August 3, 2023 deferred, if not already paid.

(Minutes of Hearing and Summary of Evidence (Minutes), 6/19/24, p. 2).

The medical evidence and exhibits were offered and entered into evidence, and testimony was received from applicant, his spouse, and defendant's witness.

On October 23, 2024, the WCJ issued her Findings and Award in which it was found, in pertinent part, that the equitable reimbursement rate for in-home health care services to the applicant for his spouse's services are $17.53 when the wife is performing regular caregiver duties

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

such as laundry, meal preparation, changing sheets, and assisting applicant in dressing and bathing and $53.55 when the wife is performing duties equivalent to nursing such as medication dispensing, bandage changing or wound care, assisting with therapy, The WCJ further awarded reasonable attorney fees of 12% of the retroactive benefits awarded from February 4, 2024 to the date of the Award.

It is from these Findings and Order that applicant seeks reconsideration.

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."

Here, according to Events, the case was transmitted to the Appeals Board on November 25, 2024 and 60 days from the date of transmission is January 24, 2025. This decision is issued by or on January 24, 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. 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 November 25, 2024, and the case was transmitted to the Appeals Board on November 25, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 25, 2024.

II.

Petitioner asserts that the WCJ erred in finding and awarding the reimbursement rate to applicant for the services provided to him for home health and nursing care provided by his spouse based upon the hourly rate for such employee versus the cost of equivalent services that the defendant would need to pay to a third-party provider. (Petition, pp. 5-6.)

The WCJ stated in her Report the following, in relevant part:

> Applicant argues that the appropriate reimbursement rate for HHC is the cost to defendant for equivalent services from HHC providers. Specifically, applicant references a recent 2021 case, ADJ7932198, *John Ginn v. Lancaster School District.* In such case, the applicant required HHC eighteen hours per day, seven days per week, consisting of 10 hours of CNA care and eight hours of LVN care. However, this case is not a binding case and the facts of such case are distinguishable. The HHC provider in the *Ginn* case is the spouse of the applicant and, in fact, is a registered nurse (RN). Applicant's wife in this matter at hand is not a registered nurse.
>
> Rather she has no other certifications other than being CPR certified. Applicant argues that the undersigned did not follow completely those findings as in *Puckett.* However, the facts in *Puckett* are distinguishable from the current matter. One clear example is that in the current matter applicant has the ability to put on his shirt, assist in some activities of daily living like brushing his teeth and combing his hair, and most significant, the ability to work for 4 hours a week. This is in contrast to the applicant in the *Puckett* case where the applicant's breathing was assisted by a breathing/ventilator machine, which provided oxygen to the lungs through a tube inserted in an opening in the trachea which life supporting device requires frequent suctioning and careful monitoring. The care of Mr. Puckett with his breathing machines, with gastric feeding tubes and urinary catheters, giving injections and monitoring vital bodily functions appear to be a higher level of care than needed by the current applicant. While it is true that in the current case *some* of the duties performed

by applicant's wife are in line with the same type of treatment given in the *Puckett* case, it does not rise to the same demands and monitoring as Mr. Puckett. This was taken into consideration when determining the proper rate(s) of reimbursement.

Applicant contends that the unrebutted testimony of his wife should be relied upon for determining a proper rate. This WCJ did consider this testimony and gave it the weight it deserved. It should be noted that this is another instance wherein the facts of this case are distinguishable from *Puckett.* In *Puckett,* the WCJ gave consideration to the applicant's exhibit provided by a registered nurse who gave the range of costs and salary rates for various levels of nursing services appropriate for a patient like her husband. In the current matter, while by no means does the undersigned believe that applicant's wife was trying to mislead the Court in any way, it should be noted that applicant's wife is not in the medical field, is not applicant's treating physician and is not an expert in the costs of home health care. This WCJ did refer to both the applicant's evidence of rates of care as well as the findings and testimony given by the claims adjuster on this same issue. Finally, just like the *Puckett* case, the calculation of the amount due in this matter was based on the facts of this case and the evidence received. (See *L.A. County Metro. Transp. Auth. v. Workers' Comp. Appeals Bd., 68 Cal. Comp. Cases 501, 504 (Puckett))*

(Report, pp. 2-3.)

Petitioner asserts the following in his supplemental pleading:

While it did not appear to be a factor in the *Ginn* decision, the WCJ here distinguishes this case from *Ginn* based on the WCJ's assessment that Jody Harvey lacks experience in health care and lacks any certification other than CPR. "The HHC provider in the *Ginn* case is the spouse of the applicant and, in fact, is a registered nurse (RN). Applicant's spouse in this matter is not a registered nurse. Rather she has no other certifications other than being CPR certified." (R&R, 11/25/2024, p.2)

While by no means does Warren believe that the WCJ is trying to intentionally mislead the tribunal in any way, the WCJ's characterization of Jody Harvey's background is not accurate. The following language is from Applicant's Trial Brief: "Mrs. Harvey has been a certified Ophthalmic Technician since 1993 (This is a typographical error. The intended year was 1983). Not long before Mr. Harvey's injury, Mrs. Harvey reduced her workweek as an Ophthalmic Technician at Rady Children's Hospital, from full-time to three days a week.

Moreover, from the WCJ's 09/05/2024 Summary of Evidence:

Prior to this date of injury, she worked approximately four years as a Certified Ophthalmic Technician. The last 14 years were in a [sic] pediatric ophthalmology at Rady's [sic] Children's Hospital. Prior to that, she worked at UCSD Medical Center of Ophthalmology.

> Briefly, while at UCSD, she worked in the regional tissue bank harvesting skin and bone from cadavers for the San Diego Burn Center.
>
> She assisted in minor procedures in ophthalmology. She did not work in an operating room, but she did assist with some cosmetic eyelid surgery, some biopsies, and excisions of lesions. She worked in sterile fields." (MOH SOE, 09/05/2024, 9:5-9:12)
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> On cross-examination she testified that:
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> "She confirmed what she described in her history with ophthalmology, some of which was in a clinical setting. She had to have certification in her field. She was a Certified Ophthalmic Technician. There are three levels of certification. She is in the middle level.
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> The witness then described the different levels of certifications and what is needed to reach such levels. There were tests along with practical and proficient exams. There were written evaluations she had to do. She would be tested on her skills which showed that she was proficient to obtain those certifications.
>
> Mrs. Harvey has spent her entire career providing patient care in the healthcare industry. She is trained in sterile technique and has worked extensively as a surgical assistant in the Ophthalmology Department at UCSD. She has spent 14 years working in the private sector for three different ophthalmologists, routinely assisting with oculoplastic procedures, temporal artery biopsies, and cosmetic injections, among other eye procedures. She is no stranger to patient care.

(Supplemental report, pp. 3-4.)

In *Ginn,* the Appeals Board affirmed the findings of the WCJ who determined that the home health care services provided to applicant by his spouse should be reimbursed at a rate substantially equal to those it would pay a third party health care service provider. In affirming this finding, the panel stated:

> "The services provided by Mrs. Ginn are akin to those of an independent contractor; and, inasmuch as the rates of reimbursement defendant is to pay her are substantially equal to those it would pay a third party health care services provider, we are unable to discern merit to the argument that the rates are excessive or unreasonable."

(Opinion and Decision after Reconsideration, 7/6/2021, p. 5.)

With respect to the issue of the proper rate of reimbursement, the WCJ states in her report:

> It should be noted that there is no case exactly on point for this issue, such this WCJ finds herself in a conundrum. The determinations made in this current case were done taking into account the evidentiary record created by both parties as well as hours of legal research on this specific issue.
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> The Findings and Award should be upheld based on the sound Opinion on Decision. However, as there is not much guidance on determining proper rates

> for HHC and there is no OMFS for such services, it may behoove the Board to issue a determination with such relevant factors.

(Report, p. 3.)

Finally, Petitioner contends that the WCJ failed to award a reasonable attorney fee to his counsel given the complexity of the case, his expertise, the time incurred, and the reasonable fee standard as set forth in the workers' compensation community.

The Appeals Board has exclusive jurisdiction over fees to be allowed or paid to applicants' attorneys. (*Vierra v. Workers' Comp. Appeals Bd. (Vierra)* (2007) 154 Cal.App.4th 1142, 1149 [72 Cal.Comp.Cases 1128]; Cal. Code Regs., tit. 8, § 10840.) In calculating attorney fees, our basic statutory command is that the fees awarded must be "reasonable." (Lab. Code, §§ 4903, 4906(a), (d).) Pursuant to Labor Code[1] section 4906, in determining what constitutes a "reasonable" attorney fee, the Appeals Board must consider four factors: 1) the responsibility assumed by the attorney; 2) the care exercised by the attorney; 3) the time expended by the attorney; and 4) the results obtained by the attorney. (Lab. Code, § 4906(d); see also Cal. Code Regs., tit. 8, § 10844.)

Additionally, although not binding legal authority, WCAB/DIR Policy & Procedure Manual, section 1.140, also provides guidance in our analysis of this matter. Under section 1.140, we may also consider the complexity of the issues, whether the case involved highly disputed factual issues, and whether detailed investigation, interrogation of prospective witnesses, and/or participation in lengthy proceedings are involved.

Here, while the issue of attorney fees was raised as an issue at trial, the percentage and specific amount to be awarded was not specifically raised in the first instance, and applicant's counsel has not had an opportunity to present evidence in support of his request. Thus, while the issue of reasonable fees is ultimately the determination of the trier of fact, no record has been created upon which we may review the issue and finding of the WCJ as to this issue.

III.

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].)

Further, 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; see also Cal. Code Regs., tit. 8, § 10787.) "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]).)

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924] ["The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims."]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

The Appeals Board 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].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

Here, it appears that the existing record may not be sufficient to support the decision, findings, award, and legal conclusions of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above.

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"].)

Labor Code 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.

V.

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 and Award issued on October 23, 2024 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/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 24, 2025

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT

WARREN P. HARVEY
LAW OFFICE OF MIKE HERRIN
LAW OFFICES OF SCOTT C. STRATMAN

LAS/bp

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