

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**VERNELL FLETCHER, *Applicant***

**vs.**

**XPO LOGISTICS INC. and  
ACE AMERICAN INSURANCE COMPANY,  
administered by  
CORVEL CORPORATION, *Defendants.***

**Adjudication Numbers: ADJ14750024 ADJ15318605**

**Riverside District Office**

**OPINION AND ORDER DENYING  
PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (prior Opinion) issued on November 21, 2023, by the Workers' Compensation Appeals Board (Appeals Board). In the prior Opinion, the Appeals Board granted applicant's Petition for Reconsideration, rescinded the Joint Findings and Order issued by the workers' compensation administrative law judge (WCJ) on September 18, 2023, and returned the matter to the WCJ for further development of the record.

By its Petition for Reconsideration (Petition)<sup>1</sup> defendant contends that since applicant's testimony was not credible there is no reason to develop the record; that the December 2, 2020 incident does not constitute an injury; and that applicant did not meet her burden of proof as to the March 4, 2021 injury claim. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer. For the reasons set forth in the prior Opinion which we hereby adopt and incorporate, and for the reasons discussed below, we will deny reconsideration.

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<sup>1</sup> As explained below, defendant's Petition will be dealt with as a Petition for Removal, not Reconsideration.

## DISCUSSION

We first note that a petition for reconsideration is properly taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order is one “which determines any substantive right or liability of those involved in the case.” (*Capital Builders Hardware v. Workers’ Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658 [81 Cal.Comp.Cases 1122] (*Gaona*); *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410].)

As stated above, in our prior Order we rescinded the September 18, 2023 Joint Findings and Order and returned the matter to the WCJ for development of the record and further proceedings as appropriate. A “final” order has been defined as one that either determines any substantive right or liability of the parties involved in the case, or determines a “threshold” issue that is fundamental to the claim for benefits. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068; [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171.) Accordingly, where the Appeals Board grants reconsideration, rescinds the decision of the WCJ, and returns the matter to the WCJ for further proceedings and a new decision, the Appeals Board’s action is not deemed a “final” order. (*Travelers Ins. Co. v. Workers’ Comp. Appeals Bd.* (1983) 147 Cal.App.3d 1033, 1036, fn. 3 [48 Cal.Comp.Cases 774, 775, fn. 3] (a petition seeking review of an Appeals Board order which remands a matter to the WCJ for further proceedings is ordinarily premature).) Thus, our prior Order was not a final decision, and therefore we will evaluate the issues raised by the Petition under the removal standard applicable to non-final decisions.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers’ Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).) Having again reviewed the entire record, including our prior Opinion, we see no evidence that defendant is subject to substantial prejudice or irreparable harm. Nor is there any indication that reconsideration will not be an adequate remedy if the WCJ’s final decision is adverse to defendant.

Accordingly, we deny reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration issued by the Workers' Compensation Appeals Board on November 21, 2023, is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**February 2, 2024**

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

**VERNELL FLETCHER  
LAW OFFICE OF RON NOLAN  
BRADFORD & BARTHEL, LLP**

**TLH/mc**

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

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION AND  
DECISION AFTER  
RECONSIDERATION**

Applicant seeks reconsideration of the Order Reinstating Joint Findings and Order 7/13/2023 (F&O) issued by the workers' compensation administrative law judge (WCJ) on September 18, 2023, wherein the WCJ re-issued the Findings that applicant did not sustain injury arising out of and occurring in the course of employment (AOE/COE) as claimed in case number ADJ14750024 and that applicant did not sustain injury AOE/COE as claimed in case number ADJ15318605.

Applicant contends that the opinions stated by chiropractic qualified medical examiner (QME) Carla Scheel, DC are substantial evidence that applicant sustained injury AOE/COE, and that there is no medical evidence in the trial record to the contrary.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

**BACKGROUND**

Applicant claimed injury to his head, shoulders, cervical, thoracic and lumbar spine, left leg, left knee, and body systems, while employed by defendant as a GTP Coordinator on December 2, 2020 (ADJ15318605). Applicant also claimed injury to his head, brain, neck, back, left shoulder, left leg, and left knee, while employed by defendant on March 4, 2021 (ADJ14750024).

On March 10, 2022, QME Dr. Scheel, evaluated applicant. After examining applicant, taking a history, and reviewing the medical record she was provided, Dr. Scheel diagnosed applicant as having mild, chronic cervical spine sprain and strain, right shoulder sprain and strain with impingement, mild, chronic thoracolumbar sprain and strain, and a “rule out” diagnosis of left knee internal derangement. (App. Exh. 1, Carla Scheel, DC, March 10, 2022, p. 30.) Dr. Scheel found that applicant had not reached maximum medical improvement (MMI) and regarding the cause of applicant’s condition, she stated:

Based on the history of Mr. Fletcher's injury, presentation of the patient and examination, it is with reasonable medical probability that need for treatment of these injuries arose out of employment. Causation of disability, if any permanent disability exists, will be discussed when at maximal medical improvement. (App. Exh. 1, p. 31.)

Dr. Scheel’s deposition was taken on June 8, 2022. (Joint Exh. 2, Carla Scheel, DC, June 8, 2022, deposition transcript.) Her testimony relevant to the issues addressed herein, included the following:

Q. I'll represent to you these are from the records of Manhattan Life. This is a VB disability claim form employee statement. The employer's name is Community Hospital of San Bernardino. It indicates date of the first symptoms of illness or date of accident, March 24, 2020. ¶ ... Do you recall reviewing that?

A. I do not.

Q. Did Mr. Fletcher tell you about that incident? A No.

Q Did you review the disability certificate from Allied Health Solutions dated March 26, 2020, having him out for two months?

A. Yes.

Q. Okay. I don’t know if you need to review these records again to make a determination,...

A. Yes. I would like to review those records, the ones from Metropolitan Life or whatever that you have. I can't see them -- Manhattan Life. I can't see those in my list of records.

(Joint Exh. 2, pp. 16 -17.)

Q. But you weren't aware that he was having severe back pain and neck pain back in March of 2020.

A. That's correct. With consideration of that, I saw the one piece of paperwork, the EDD form saying that there was severe pain. But I don't have any medical records documenting a physical examination or any sort of diagnostic testing that they might have done to justify those EDO forms ¶ If those records can be subpoenaed, that would be great.

(Joint Exh. 2, pp. 27 – 28.)

Q. Well, Doctor, does it cause you to question his credibility when in his deposition he testified that he didn't have any symptoms or complaints to his back prior to the dates of injury?

A. Yes and no. Only because patients sometimes had amazing injuries or big surgeries in the past, but because they've improved, they forget about them. So their histories aren't always like 100 percent. ¶ He seemed pretty straightforward. If I had the opportunity to reevaluate him, I could discuss it.

(Joint Exh. 2, pp. 32 – 33.)

A. Oh. See, the ones from Manhattan Life are distributed throughout the medical records I received. None of them have the dark, bold page numbers at the bottom right-hand corner.

Q. Okay. Did someone put those records in chronological order for you?

A. No. Could you send the records directly to me? Is that something that could be done, ...?

(Joint Exh. 2, p. 34.)

The parties proceeded to trial on January 11, 2023. The matter was continued and at the April 3, 2023 trial it was again continued. At the May 17, 2023, trial the matter was submitted for decision. The issues included injury AOE/COE as to both injury claims. (Minutes of Hearing and Summary of Evidence (MOH/SOE) January 11, 2023, pp. 2 – 3; MOH/SOE, May 17, 2023, p. 1.) A Joint Findings and Orders was initially issued on July 13, 2023 and it was Ordered amended on July 18, 2023. On July 25, 2023, the WCJ issued an Order Rescinding Joint Findings and Order, and on September 15, 2023, he issued the Order Reinstating July 13, 2023 Findings and Orders; the F&O at issue herein.

## DISCUSSION

Any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) When deciding a medical issue, such as whether the applicant sustained an industrial injury, the WCJ must utilize expert medical opinion, in addition to other reliable evidence. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) To be substantial evidence a medical opinion must be based on pertinent facts, on an adequate examination and accurate history, and it must set forth the basis and the reasoning in support of the conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

As noted above, in her report Dr. Scheel stated, "Causation of disability, if any permanent disability exists, will be discussed when at maximal medical improvement." (App. Exh. 1, p. 31.) Clearly Dr. Scheel expected to re-examine applicant when his condition reached maximal medical improvement. Also, at Dr. Scheel's deposition there was an agreement that she be provided additional records to review, and she testified that that a re-evaluation of applicant would give her an opportunity to discuss with applicant the inconsistencies alleged by counsel. However, there was no supplemental report from Dr. Scheel offered into evidence. Absent her re-evaluation of applicant and a report based thereon, Dr. Scheel's opinions are not based on an adequate examination and accurate history. Thus they do not constitute substantial evidence.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or where there is insufficient evidence to determine an issue. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) Under the circumstances of this matter, it is appropriate that Dr. Scheel be provided the additional medical records as discussed above, and that she re-evaluate applicant.

(See Report, pp. 3 – 6.) For example, the WCJ explained:

To add to the above inconsistencies noted, it appears that applicant had a very substantial prior history of symptoms/injuries reported in the trial exhibits, though not apparently disclosed by applicant when deposed. On deposition applicant denied prior injuries, pain/discomfort, or medical

treatment involving left leg, both shoulders, back or neck (Defendant's Exhibit A, pages 59-61). To the contrary, subpoenaed records of Allied Health (Joint Exhibit 1) establish admitted severe headaches in 2020 resulting in off work period between August 13, 2020-October 13, 2020 and severe back pain, bilateral shoulder pain and headaches in 2019 resulting in off work certification between May 19, 2019 through at least July 22, 2019. Further, records of Manhattan Life Insurance (Defendant's Exhibit C) reflect disability and treatment commencing in March of 2020 resulting from an injury occurring at home while applicant was lifting boxes and walking downstairs when he tripped and fell resulting in severe low back and neck pain. Again, this history was not disclosed on deposition. When questioned at hearing, applicant generally denied recollection of his testimony or answers raised in deposition, again going to issues of credibility. Notwithstanding any argument raised by applicant's counsel in his Petition for Reconsideration, this WCJ has a duty to weigh all evidence presented including witness credibility (*Garza v WCAB* (1970) 35 Cal. Comp. Cases 500, 504-505) Based on inconsistencies noted above and record establishing contrary evidence of substance, the WCJ did not find applicant's testimony or claim of injury to be credible (see *Lamb v WCAB* (1974), 39 Cal. Comp. Cases 310, 314). (Report, p. 5.)

To assure that QME Dr. Scheel has a complete and factually accurate record of applicant's injury claims and medical treatment history, it would be appropriate that she be given the opportunity to review the WCJ's Opinion on Decision and/or Report.

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.



For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Order Reinstating Joint Findings and Order July 13, 2023, issued by the WCJ on September 18, 2023, is **GRANTED**. **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 18, 2023 Order Reinstating Joint Findings and Order July 13, 2023 is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**November 21, 2023**

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

**VERNELL FLETCHER  
LAW OFFICE OF RON NOLAN  
BRADFORD & BARTHEL, LLP**

**TLH/mc**

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