

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

ROBERT JACKSON, *Applicant*

vs.

**RUSH TRUCK CENTERS;
AIU INSURANCE, administered by SEDGWICK
CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ15963667
Santa Ana District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

Applicant seeks reconsideration of the August 2, 2023 Findings and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant "did not timely raise the issue of untimely denial of the cumulative trauma [CT] claim during the period of [October 20, 2020 to October 20, 2021]" though there was no prejudice to defendant; that defendant's denial of the CT claim during the period October 20, 2020 to October 20, 2021 was timely; and that applicant did not suffer injury arising out of and occurring in the course of employment (AOE/COE) on October 20, 2021 or during the period of October 20, 2020 to October 20, 2021. Based on these findings, the WCJ ordered that applicant take nothing for the claim of injury on October 20, 2021 or during the period of October 20, 2020 to October 20, 2021.

Applicant appears to contend that the WCJ erred in finding defendant's denial of applicant's claim timely, in failing to find the injury presumptively compensable pursuant to Labor Code section 5402, and in relying on the unsubstantial opinion of qualified medical examiner (QME) Leisure Yu, M.D.

Defendant filed an Answer.

The WCJ issued a Report and Recommendation on Applicant's Petition for Reconsideration recommending that reconsideration be denied.

We have reviewed the allegations in the Petition for Reconsideration, the Answer, and the contents of the Report. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration and we will order that this matter be referred to a status conference before a WCJ at the Appeals Board. Our order granting 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.

The WCJ provided the following factual summary:

FACTS

Applicant claims to have suffered injury during the periods of 10/20/2020-10/20/2021 in the Pre-Trial Conference Statement amended 07/10/2023 (hereinafter "PTCS") p: 2. EAMS Doc ID: 76922040. The parties jointly amended the originally filed PTCS on the date of trial to reflect numerous amendments after significant pre-trial efforts with and by the judge.

One of the amendments effectuated by the parties by joint agreement at trial, affirmed via initialing, was to assert the above-referenced cumulative trauma date of injury was alleged, as opposed to a specific date of injury on 02/01/2022. Original Pre-Trial Conference Statement Fully Executed with DKTs Second Edits May 4, 2023 (hereinafter "OPTCS") EAMS Doc ID: 46234863 p: 2.

A full morning of pre-trial proceedings were conducted by the undersigned in order to clarify exactly what the parties were asserting, what exhibits were being offered and ensuring necessary filings in the WCAB Electronic Adjudication Management System (EAMS) before testimony could be taken. PTCS p: 1, 11: 12-13.

Evidentiary trial commenced, concluded and the case submitted for decision on July 10, 2023. Post-trial briefing was tendered to fully ensure it was clear to the court what was being argued. Issues submitted for decision, and those which were not because of the parties' own PTCS, were made clear to parties as evidenced by the following footnote in the Findings and Award at issue:

1 The record reflects Applicant and Defendant did not present the issue of whether Applicant suffered specific injury or injury via cumulative trauma during any period other than between the periods 10/20/2020-

10/20/2021 in the Pre-Trial Conference Statement. The only claim form filed reflects injury on “10-20-21” and the Application for Adjudication of Claim reflects “specific injury on 02/01/2022” but suggests cumulative trauma injury in narrative form. This opinion is limited only to the injury alleged to have occurred during the periods 10/20/2020-10/20/2021 raised in the parties’ Pre-Trial Conference Statement. Finding of Fact or Order on any other date of injury or claim shall not be inferred in reliance on this decision.

Findings and Award did issue with the above necessary footnote on August 2, 2023. Applicant petitions for reconsideration asserting that by the order, decision or award made by the Workers’ Compensation Administrative Law Judge, (“WCJ”) and the Appeals Board acted without, or in excess of, its powers and the evidence does not justify the Findings of Fact.

(Report, at pp. 2-3, emphasis in original.)

II.

We highlight the following legal principles that may be relevant to our review of this matter:

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 WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board 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.)

“In any given situation, there can be more than one injury, either specific or cumulative or a combination of both, arising from the same event or from separate events.” (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].) Section 3208.2, the anti-merger statute, provides in full:

When disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific, cumulative, or both, all questions of fact and law shall be separately determined with respect to each such injury, including, but not limited to, the apportionment between such injuries of liability for disability benefits, the cost of medical treatment, and any death benefit.

(Lab. Code, § 3208.2.)

Whether an applicant has sustained a specific or a cumulative injury, or multiple injuries, is question of fact which must be determined by the WCJ. (Lab. Code, §§ 5952-5953; *Austin, supra*, 16 Cal.App.4th at pp. 233-235.) As with any decision by a WCJ, a decision on the number and nature of injuries must be supported by substantial evidence in light of the entire record. (Lab. Code, § 5952(d); see *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]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal.Comp.Cases 16].)

The date of injury for cumulative trauma claims “is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.” (Lab. Code, § 5412.) Although the period of liability for cumulative trauma claims is limited to the last year of injurious exposure per section 5500.5, the actual date of injury under section 5412 may be different than applicant's last date of work. (Lab. Code, § 5500.5.) “Pursuant to section 5412, the date of a cumulative injury is the date the employee first suffers a ‘disability’ and has reason to know the disability is work related.” (*Austin, supra*, 16 Cal.App.4th at p. 238.) Disability has been defined as “an impairment of bodily functions which results in the impairment of earnings capacity.” (*J.T. Thorp v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 336 [49 Cal.Comp.Cases 224].) Disability can be either temporary or permanent. (*Chavira v. Workers'*

Comp. Appeals Bd. (1991) 253 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631].) Medical treatment alone is not disability, although it may be evidence of permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005-1006 [69 Cal.Comp.Cases 579].) Whether there is temporary or permanent disability indicating the date of cumulative injury is a question of fact, which must be supported by substantial evidence. (*Austin, supra*, 16 Cal.App.4th at pp. 233-235.)

III.

Here, it is unclear from our preliminary review what date of injury(ies) is/are alleged, whether the legal issues have been properly identified; whether the existing record is sufficient to support the decision, order, and legal conclusions of the WCJ; and/or whether further development of the record may be necessary.

Labor Code section 5310 states in relevant part that: “The appeals board may appoint one or more workers’ compensation administrative law judges in any proceeding, as it may deem necessary or advisable, and may refer, remove to itself, or transfer to a workers’ compensation administrative law judge the proceedings on any claim. . . .” (See also Lab. Code, §§ 123.7, 5309.)

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 *Earley v. Workers’ Comp. Appeals Bd.* (2023) 94 Cal.App.5th 1, 13-15 [88 Cal.Comp.Cases 769] [the Appeals Board has the authority to issue a final decision when it grants reconsideration but is not required to do so]; 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”].)

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 Labor Code sections 5950 et seq.

IV.

Accordingly, we grant applicant's Petition for Reconsideration, order that this matter be set for a status conference, 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 applicant's Petition for Reconsideration of the August 2, 2023 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED that this matter will be set for a Status Conference with a workers' compensation administrative law judge at the Appeals Board. Notice of the date, time, and format of the conference will be served separately, to be heard in the Lifesize electronic platform, in lieu of an in-person appearance at the San Francisco office of the Appeals Board.

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/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ NATALIE PALUGYAI, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 24, 2023

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

**ROBERT JACKSON
THOMAS LAW ALLIANCE, INC.
MICHAEL SULLIVAN & ASSOCIATES**

PAG/abs

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