

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

HAYDEN BROWN (DECEASED), *Applicant*

vs.

**ENKI MEDICAL SERVICES; SERVICE AMERICAN INDEMNITY COMPANY,
administered by LWP CLAIMS SOLUTIONS, INC., *Defendants***

**Adjudication Number: ADJ15406201
Van Nuys District Office**

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION**

Defendants Enki Medical Services and Service American Indemnity Company, administered by LWP Claims Solutions, seek reconsideration of the February 5, 2024 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained injury arising out of and in the course of employment to her circulatory system and other body systems resulting in her death.

Defendants contend that (1) the finding of industrial injury is predicated upon a misapplication of the death inference and is unsupported by the evidence; (2) the holding in *Clemmens v. Workmen's Comp. Appeals Bd.* (1968) 26 Cal.App.2d 1 [33 Cal.Comp.Cases 186] is distinguishable; (3) the WCJ erroneously relied on hearsay evidence; and (4) applicant's heart failure was idiopathic and not industrial.

We received an answer from applicant Hayden Brown (deceased).¹ The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

¹ We also received applicant's Motion to Consider Answer, which was filed late due to a technical difficulty. WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964) states that supplemental petitions, pleadings, or responses shall be considered only when specifically requested or approved by the Appeals Board. We have accepted and considered applicant's Answer.

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 grant defendant's Petition for Reconsideration. Our order granting defendants' 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 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.

FACTS

As the WCJ stated in his Report,

Hayden Brown began employment with Enki Medical Services on or about April 19, 2021. She worked there as a mental health technician up until July 28, 2021 when she was found dead, on the floor, next to her desk in her office. Prior to her death she had told her husband that she worked in a "high-stress position." (Exhibit 8, deposition of Sandy Brown dated January 11, 2022, page 9 line 25 through page 10, line 2). She expressed her feelings about the stress level of her work to her husband ". . . approximately three times a week." (Exhibit 8, deposition of Sandy Brown dated January 11, 2022, page 10, line 24). On several occasions when Ms. Brown arrived home from work she expressed feeling both physically and mentally exhausted. (See Exhibit 8, deposition of Sandy Brown dated January 11, 2022, page 9 line 25 through page 10, line 2).

Sandy Brown last spoke with his wife on the morning of July 28, 2021. She appeared to him to be ". . . in a normal mood." (See Exhibit 8, deposition of Sandy Brown dated January 11, 2022, page 33, lines 6-10). Vincent Kegler, the security guard at Enki Medical Services, saw Hayden Brown arrived at work at approximately 8 AM. At that time she appeared to be in good physical health. Just after 5 PM, when the clinic closes, he began walking around the clinic to make sure everyone was out. When he opened Hayden Brown's ". . . office door, he saw her laying motionless on the ground, so he immediately called 911." (See Exhibit 4, police report by El Monte Police Department, dated June 23, 2022, page 3). Officer Romero of the El Monte Police Department responded. When he arrived at the scene he found Hayden Brown ". . . laying on the floor, directly next to her desk and rolling chair." He ". . . did not suspect foul play." [(]Exhibit 4, police report by El Monte Police Department, dated June 23, 2022, page 3).

The matter was tried on the issue of injury arising out of and occurring in the course of employment resulting in death. This judge found that Ms. Brown's death occurred under mysterious circumstances, and that a reasonable inference could be drawn that her injury and death arose out of and occurred in the course of her employment. Defendant's Petition for Reconsideration followed. (Report, pp. 2-3.)

DISCUSSION

I.

The issue here is whether the WCJ properly applied the death inference. The court in *Clemmens, supra*, 26 Cal.App.2d at pp. 5-6, quoting 1 Larson, Workmen's Compensation Law, stated:

“When an employee is found dead under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death, most courts will indulge a presumption or inference that the death arose out of the employment. The theoretical justification is similar to that for unexplained falls and other neutral harms: The occurrence of the death within the course of employment at least indicates that the employment brought deceased within range of the harm, and the cause of harm, being unknown, is neutral and not personal. The practical justification lies in the realization that, when the death itself has removed the only possible witness who could prove causal connection, fairness to the dependents [suggests] some softening of the rule requiring claimant to provide affirmative proof of each requisite element of compensability.”

It continued,

"In many so-called unexplained-death cases, however, there are some employment or personal ingredients on which an inference one way or the other could be based. . . ."

The California cases which appear to indulge a presumption or inference seem to be cases where the character of the harm is obviously work related. The problem in the present case is that the character of the harm is neither obviously work related nor obviously idiopathic, that is, personal, as it is in a case where the autopsy clearly shows that death resulted from disease. In a case where the employment appears to be the cause, the burden is placed on the employer to prove otherwise. In a case where disease appears to be the cause, the burden is placed on the applicant to prove the employment contributed.

...

. . . However, in her opinion on her findings the referee said that "from all of this evidence it appears that the deceased employee, John Starks Clemmens, died from a cause or causes which have not been determined." If that is the case, petitioners, as we have pointed out above, were entitled to the benefit of a presumption or inference that the death arose out of the employment, since it is undisputed that his employment brought him to the place where his death occurred. On the other hand, where there is conflicting expert medical evidence as to the cause of death, as there is in this case, it is the duty of the referee to resolve that conflict. (*Clemmens, supra*, at pp. 5-7.)

Here, the Qualified Medical Evaluator, Gerald Markowitz, M.D., provided the following opinion:

. . . had a weak heart and most probably died from a problem with her heart. It was probably either a heart attack or a malignant arrhythmia that caused sudden cardiac death. Her death could have been spontaneous or could have been precipitated by an external factor. For instance, a stressful appointment or meeting could have precipitated her final cardiac event. As stated above, there is no witness to her death. Without a witness, I have no other information about that last appointment.

. . .

Her employment brought her within a range of harm. The harm is unknown so be considered neutral and not personal.

. . .

Based on the available documentation provided, her death may be considered industrial but I would defer to the trier of fact. (Joint Exhibit Y1, Report of Dr. Markowitz dated October 6, 2022, pp. 4-5.)

However, Dr. Markowitz also stated:

. . . On a medical basis, she probably died from either a heart attack or a malignant arrhythmia that caused sudden cardiac death. It could have been spontaneous, or it could have been precipitated by an external factor at work.

In this case, I have not been able to identify a neutral harm such as an accidental explosion. I have not been able to identify a factor of her employment that would have been the cause because there is no witness to her death. Did the Applicant sustain her burden of showing that the

death arose out of and occurred in the course of employment? This becomes a legal question.

Are there any records regarding the appointments for that day or any work activities on the day of her death? With whom was the last appointment? Was the last appointment stressful? Were there any arguments? (Joint Exhibit Y1, Report of Dr. Markowitz dated October 6, 2022, pp. 4.)

We grant reconsideration to further study the issue of whether applicant’s injury arose out of and occurred in the course of employment, and specifically, whether the death inference applies, and if not, whether the record is sufficient, or whether the record needs to be developed to support and/or bolster Dr. Markowitz’s opinion on the issue of causation. Meanwhile, we encourage the parties to participate in the Appeals Board’s mediation program.

II.

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 *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 § 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 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.

III.

Accordingly, we grant defendants’ 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 defendants Enki Medical Services and Service American Indemnity Company's Petition for Reconsideration of the February 5, 2024 Findings of Fact 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/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 22, 2024

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

**GLAUBER BERENSON VEGO
GURVITZ & MARLOWE LLP**

LSM/oo

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