

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

WALTER AMAYA CANO (Deceased), *Applicant*

vs.

**APEX DESIGN BUILDERS, INC.; BELLA TOLUCA, LLC; NILE NIAMI;
STATE COMPENSATION INSURANCE FUND for APEX DESIGN BUILDERS;
others uninsured, *Defendants***

**Adjudication Number: ADJ659445 (VNO 0538764)
Van Nuys District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

State Compensation Insurance Fund, the insurance carrier for defendant Apex Design Builders, Inc. has petitioned for reconsideration of the Findings of Fact, Orders, and Award issued and served by the workers' compensation administrative law judge (WCJ) in this matter on November 28, 2023. In that decision, the WCJ found that decedent Walter Amaya Cano, sustained industrial injury arising out of and in the course of employment on June 30, 2006 resulting in his death. The WCJ further found that applicant was dually employed by Bella Toluca, LLC/Nile Miami and Apex Design Builders, Inc. with joint and several liability.

The WCJ rejected defendant's affirmative defense of intoxication when finding industrial causation for decedent's death, and further found that applicant had three total dependents, his brother David Amaya, his sister, Mirna Maribel Amaya Cano, and his mother Maria Leonor Amaya. The dependents were awarded the full death benefit of \$320,000, to be divided equally by the dependents, with a special death benefit awarded to David Amaya to be adjusted by the parties. Reasonable attorney fees of \$48,000 were awarded, payable to Sparagna & Sparagna, Burial expenses were also awarded in the sum of \$5,000.

Petitioner contends that the WCJ erred in finding decedent's death to be industrial, that each of the applicants failed to prove dependency, and that decedent's brother did not qualify for

the conclusive presumption of dependency under Labor Code¹ section 3501(a) as he was not decedent's child, nor was he entitled to the continuing payment allotted to totally dependent minor children per section 4703.5(a).

Petitioner further contends that decedent's wife, Veronica Chavarria, was a named applicant in this matter, however there was no finding as to her claim for dependency, and there is no indication that she voluntarily withdrew her claim for a portion of the death benefits.

Petitioner requests that their petition be granted, that the WCJ's findings of fact, orders, and award, be set aside, and that a new findings and award issue consistent with the evidence presented at trial.

Applicant filed a response recommending the petition be denied and the WCJ's decision be affirmed.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending the petition be granted solely to amend the findings of fact number 10 to state that David Amaya is not entitled to the special death benefit per Labor Code section 4703.5, and the findings otherwise be affirmed.

We have reviewed the allegations in the Petition for Reconsideration, and the contents of the Report.

Based upon our preliminary review of the record, we will grant defendant's Petition for Reconsideration, and we will order that this matter be referred to a WCJ or designated hearing officer of the Appeals Board for a status conference. Our order granting defendant's 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 the following in our review:

Defendant has raised the issue of the lack of a finding relating to one of the claimed dependents, Veronica Chavarria. A review of the court file indicates that an application for adjudication of death benefits was initially filed on September 15, 2006, by the claimants' former

¹ All further references are to the Labor Code unless otherwise noted.

attorney, Law Offices of Harold Weiner. The application lists three surviving dependents claiming benefits; Mirna Maribel Amaya, applicant's sister, Veronica Chavarria, applicant's wife, and David Osbaldo Amaya-Cano, applicant's brother. Applicant's mother, Maria Leonor Amaya, is not listed as a claimed dependent. (Exh. W, Application for Adjudication of Claim (Death Case).)

On September 14, 2009, Sparagna and Sparagna served the WCAB, defendant, and their carrier, a notice of dismissal of attorney and substitution of attorney dated June 2009, indicating they were now representing David Osbaldo Amaya-Cano and Mirna Maribel Amaya (EAMS ID. No. 29475529). Mr. Weiner does not appear to have been served.

It is unknown as to when the decedent's mother, Maria Leonor Amaya, was added as a claimed dependent, as this case was initially filed prior to the migration of the court to the Electronic Adjudication Management System (EAMS), and thus several documents appear missing relative to events occurring after September 15, 2006 and prior to the Declaration of Readiness filed on November 10, 2009 by claimants' counsel, Sparagna and Sparagna, including, but not limited to, whether there was a further substitution of attorney documentation as to claimant Veronica Chavarria, or whether Ms. Chavarria is still represented by Mr. Weiner, another attorney, or is in pro per. Further missing from the court file is any documentation or amended applications for adjudication adding decedent's mother as a dependent. Those documents may help clarify issues of concern.

The trial commencing on December 20, 2022, which resulted in the November 28, 2023 findings, order, and award of the WCJ of which defendant seeks reconsideration proceeded as to three claimants, all represented by current counsel Sparagna and Sparagna. Insofar as this indicates dual representation and a potential conflict for death benefits, we would presume that there would be a signed and filed conflict of interest waiver as to the parties by counsel.²

California Rule of Professional Conduct 3-310(C) is clear that such a potential conflict can be waived if an informed written consent/waiver of such a conflict is obtained from each of the clients affected. Subsection (C)(2) of that rule indicates that even an *actual* conflict of interest can

² Absent informed written consent, a lawyer may not concurrently represent clients who have actual or potential conflicts; nor may a lawyer represent one client against another in an unrelated matter. (*Truck Ins. Exchange v. Fireman's Fund Ins. Co.*, *supra*, 6 Cal.App.4th at pp. 1055, 1056; Rules Prof. Conduct, rule 3-310(C)). The primary value at stake in cases of simultaneous or dual representation is the attorney's duty—and the client's legitimate expectation—of *loyalty*, rather than confidentiality. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284 [36 Cal.Rptr.2d 537, 885 P.2d 950].) Thus, the rule prohibiting concurrent representation of adverse interests “is a *per se* or ‘automatic’ one. (*Cal West Nurseries, Inc. v. Superior Court* (2005) 129 Cal. App. 4th 1170, 1175).

be waived by the filing of written consents by the clients involved in the joint representation. (*Contreras v. A.C. Custom Catering*, 2016 Cal. Wrk. Comp. P.D. LEXIS 108, *17-18).

A review of the court's file does not contain such conflict waivers.

Additionally as previously stated, there is no evidence as to what occurred with respect to decedent's claimed spouse, Veronica Chavarria, whether she is currently represented, and by whom, whether there was a withdrawal of her claim, or whether there was proper notice to Ms. Chavarria or her counsel that the matter was going to move forward without her claim and evidence.

On September 28, 2010, the Death without Dependent's Unit (DWD) was ordered joined by WCJ Michael Greenberg per the Minutes of Hearing (MOH). On May 9, 2011, Christine Harwell, counsel for the DWC Unit served correspondence on Sparagna and Sparagna as well as State Compensation Insurance Fund, indicating they would not be appearing at the upcoming hearing set for July 5, 2011. The correspondence, in pertinent part, states as follows:

The Death Without Dependents Unit (DWD) was joined as party "defendant" by Judge Feldman on September 28, 2011, however, DWD is not listed on the official address-roster. It appears that a "wife," Veronica Chavarria, and a "sister," Mirna Maribel Amaya, are listed as legacy applicants. If Mr. Amaya-Cano was legally married, DWD would have no basis for seeking death benefits because there is a presumption of dependency for a surviving spouse.

This will serve to advise you that if deceased was legally married, or otherwise supported a putative spouse who was a live-in good faith member of the family, DWD has no interest in pursuing death benefits under Labor Code section 4706.5. (EAMS Doc. ID. 2531148)³

As stated by defendant in their petition:

Veronica Chavarria is a named applicant and alleged dependent in the above matter per the application of adjudication dated September 15, 2006. She is listed as the wife of the deceased and her address was on 6747 Densmore Ave. Mirna Amaya verified Veronica Chavarria lived at the Densmore house for over a year, but she moved out a month before deceased's died. At this time, defendant is not aware of any document filed by Veronica Chavarria, stating she withdrew from the proceedings and was waiving any claims of dependency that she may have. Defendant is not sure Veronica Chavarria was given notice of the proceedings

³ It is noted that DWC subsequently changed their position and requested they be joined on June 19, 2012. On June 25, 2012, WCJ Michael Greenberg issued an Order Joining the Death Without Dependents Unit.

before the court. Mirna Amaya stated she did not know if Ms. Chavarria was decedent's dependent. Whether Veronica Chavarria is a dependent and whether she is a total or partial dependent may affect the total amount of the death benefit awarded if dependency is found by the court. (Labor Code § 4702).

The court file indicates that the last proof of service of a Declaration of Readiness to Proceed served on attorney Harold Weiner appears to be served by SCIF and is dated June 18, 2018. The address served is the one on the official address record.

Also noted is a proof of service dated March 9, 2021 of an Order Joining UEBTF, served by applicant's counsel on Veronica Chavarria and David Osbaldo Amaya-Cano, both at the Densmore Avenue address. Attorney Weiner was not served.

On October 6, 2021, SCIF served the Minutes of Hearing of September 2, 2021 on Mr. Weiner at an address on Collins St. in Woodland Hills, CA.

On October 20, 2022, SCIF filed and served a fully executed pre-trial conference statement, and served Harold Weiner, Esq. at his official address of record. Veronica Chavarria was listed by applicant's counsel as a witness.

Trial commenced on December 20, 2022, and the Minutes of Hearing/Summary of Evidence was served on December 28, 2022. Neither attorney Weiner nor Veronica Chavarria were served with these minutes nor the MOH/SOE of the subsequent four hearings, however the Findings and Award dated November 28, 2023 appears to be served on a closed address for attorney Weiner and the Densmore address for Veronica Chavarria, who is listed as a "legacy applicant".

At trial, decedent's sister and claimed dependent, Mirna Maribel Amaya Cano testified that Veronica Chavarria, who was her ex-husband Mario's cousin, lived in the house with them and she believed that her brother Walter had a relationship with her, but that she was not living there at the time of decedent's death (Minutes of Hearing/Summary of Evidence (MOH/SOE), June 27, 2023, p. 3:20-22). She believed that Veronica was Walter's girlfriend, not wife, but did not know if Veronica was Walter's dependent in 2006 (MOH/SOE, June 27, 2023, p. 5:8-11).

Thus, there appears to be a potential conflict as to the multiple representations of not only the three applicants being represented by current counsel, and who have been awarded the death benefit for equal distribution, but of the non-participating claimant, applicant's wife, whether actual or putative, Veronica Chavarria.

Further, given the prior legal representation of at least two of the current dependents in this matter, there also may be a statutory lien for attorney fees that has yet to be addressed as it relates to the current proceeding.

With respect to the issue of total dependency, decedent's brother in law, Eugenio Marroquin, testified that he was working at a different work site on the day of applicant's injury. Mr. Marroquin also had another job as a security guard at his work site, Bloomfield (MOH/SOE, February 28, 2023, p. 6:24-25, p. 7:1-5; March 28, 2023, p. 3:12-13). Further, while Mr. Marroquin testified that he sent about \$700 of the \$900 he made each week home to his wife in El Salvador, he resided in the same home as the decedent and two dependents at the time of his death. While he paid \$150 per month in rent, he did not know how much money the deceased paid. Other members of the household included claimant Mirna, her ex-husband Mario Castro, his cousin Ricardo, tenant Jose, and decedent's brother, claimant David Amaya. He did not know whose name was on the lease nor how much they all paid in rent. (MOH, p. 6:18-23)

Claimed dependent Mirna Maribel Amaya Cano, the deceased's sister, although no longer married to her spouse, was also residing in this home along with the decedent, her ex-husband, Mario Castro, Eugenio, her brother and claimant David, Ricardo, and Jose. The house was rented by Mario Castro (MOH, March 28, 2023, p. 9:6-9; 21/22.).

Thus, further clarification regarding the extent of dependency may be necessary.

II.

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 v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *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 Hospital v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

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.)

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.)

Here, it is unclear from our preliminary review whether the existing record is sufficient to support the decision, order, award, and legal conclusions of the WCJ as to the decedent's

dependents, as well as whether further development of the record may be necessary with respect to the issues noted above. Thus, we will order the matter to a status conference before a WCJ at the Appeals Board.

III.

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 *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 [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 defendant’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 defendant's Petition for Reconsideration of the Findings of Fact, Orders, and Award issued on November 28, 2023 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED that this matter will be set for a Status Conference with a workers' compensation administrative law judge or assigned designee of the Appeals Board. Notice of 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/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 15, 2024

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

**WALTER AMAYA CANO (DECEASED)
SPARAGNA & SPARAGNA
STATE COMPENSATION INSURANCE FUND
TOBIN LUCKS, LLP
OFFICE OF THE DIRECTOR – LEGAL UNIT (LOS ANGELES)
VERONICA CHAVARRIA**

PAG/ara

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