WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LOU BLANCK, *Applicant*

vs.

WATER RESOURCES CONTROL BOARD; Legally Uninsured, Administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ2937484 (GRO 0034816)
San Luis Obispo District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant, Lou Blanck, has petitioned for reconsideration and/or in the alternative, removal of the Findings of Fact and Award issued by the workers' compensation administrative law judge (WCJ) in this matter on September 11, 2023.

In that decision, the WCJ found that applicant sustained industrial injuries to his upper extremities (fibromyalgia), nose (allergic rhinitis, sinusitis, post nasal drip), liver, psyche, hypertension, bowels (gastrointestinal system), eyes, mouth, teeth, and did not sustain injury to his kidneys, skin, nervous system, both hips, gall bladder, obesogens, thyroid, endocrine system, chronic fatigue syndrome, sexual function, reactive rheumatoid arthritis, and brain.

Applicant was further found to have sustained permanent disability of 56% payable forthwith, less reasonable attorney fees, to be held in trust by applicant's current attorney, jurisdiction reserved. He was awarded permanent disability as stated, as well as future medical treatment for his fibromyalgia, sinusitis (nose), liver, psyche, hypertension, bowels, gastrointestinal system, eyes, mouth, and teeth.

Petitioner contends that the WCJ erred in her findings and award, and asserts the following:

1. Applicant has been determined to be totally Permanently Disabled by his Primary Treating Physician, Dr. Robert Franco.
2. [t]here has been a significant amount of newly discovered information since the case was initially set for trial that justifies additional QME evaluations and re-evaluations.

3. Applicant disputes the Apportionment Finding of the Liver Impairment.
4. Applicant disputes that(sic) the Finding of Fact that Applicant had pre-existing hepatitis.
5. Dr. O'Neill is not a certified toxicologist and should not be relied upon as a toxicologist or for determining liver impairment or for determining digestive system impairment.
6. [t]here is an irreparable and substantial harm to Applicant Mr. Blanck if Mr. Blanck is not permitted to continue discovery.

In support of his assertions, petitioner notes that "as recently as 2021" Agreed Medical Examiner (AME) Edward O'Neill opined that the applicant should be evaluated by both a QME in Rheumatology, Otolaryngologist, and Gastroenterologist. The petition goes on to state that the applicant has since seen a QME in rheumatology and a QME in Otolaryngology who both found industrial causation for applicant's rheumatological system and nasal system, but has yet to be evaluated by a QME in gastroenterology. (Petition, at page, 2, lines 22-27.)

Petitioner also states that in AME O'Neill's medical reporting dated December 21, 2021, the doctor changed his initial opinion of non-industrial causation of applicant's liver injury as stated in his November 6, 2008 report, to industrial causation.

Further noted by petitioner is that during trial, several developments occurred to warrant the need to further develop the record and for discovery to remain open, including submitting the subsequent medical reporting of Dr. O'Neill to the Agreed Medical pulmonologist Dr. Levine for review.

Petitioner states that the evidence indicates that the applicant should be found to be totally permanently disabled, and in the alternative, that discovery be left open to allow further evaluations in gastroenterology, cardiology, orthopedics, ophthalmology, dentistry, and dermatology.

Defendant did not file a response to the Petition.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending denial of the Petition.

We have reviewed the allegations in the Petition, 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 workers compensation administrative law judge or designated hearing officer of the Appeals Board for a status conference. Our order granting applicant'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 of the record:

With respect to the issue of causation of applicant's liver disease, the Agreed Medical Examiner for applicant's pulmonary issues, Gerald Levine, M.D., opined in his May 2, 2011 reporting, that it was "medically improbable that he has occupationally related liver disease". (Ex. A, Report of Gerald Levine, M.D., May 2, 2011, p. 22). However, the liver injury was thereafter determined to be industrial, as found by internal AME Edward O'Neill, and ultimately, the WCJ.

Dr. Renee Rinaldi, in her deposition taken on January 17, 2023, indicated that she would defer to a cardiology Qualified Medical Evaluator (QME) on the issue of injury to the heart. (Ex. 8, Deposition of Renee Rinaldi, M.D. January 17, 2023, pg. 8, lines 6-9).

Further, QME Andrew Berman finds applicant's nasal condition industrial (Ex. 37, Report of Andrew Berman, March 17, 2023, p. 2).

In the medical report of Dr. Berman dated March 17, 2023, he goes on to state that:

> "If Mr. Blanck has not already had a Workers' Compensation workup for his eye problems, I would recommend referral to the appropriate ophthalmologist for that purpose. I would defer further comment about this condition.
>
> With regard to his complaints about heart problems, I would in fact recommend an evaluation by a cardiologist. I do not see significant medical records that show this complaint being previously addressed. There is a note from the AME in his case that was part of the records from my initial report about Mr. Blanck having atrial fibrillation.
>
> The AME noted that this condition should be treated by Mr. Blanck's primary care physician. I am unaware of why the AME for his heart condition felt that this condition was not industrial in nature. It is outside of my area of expertise and perhaps additional records were reviewed by the appropriate specialist. Regardless, I will defer to the findings of that specialist for treatment recommendations." (Ex. 37, Report of Andrew Berman, March 17, 2023, p. 3)

As the WCJ notes in her report and recommendation, this matter had 25 Mandatory Settlement Conferences, 5 Status Conferences, and 31 Trial Dates, before it was submitted for decision in August 2023.[1]

As stated by the WCJ in her report and recommendation:

> [T]he reporting of Dr Franco from March 13, 2023 and Dr. Berman appear to have not been reviewed by the other reporting physicians, including AME O'Neill.
>
> As for newly discovered evidence, applicant's primary treating physician Dr. Robert Franco is alleged to have opined that the applicant is totally permanently disabled in his reporting of March 13, 2023 (Ex. 40), and that on or around May 5, 2023, applicant was diagnosed with sebaceous carcinoma (Exh. 56), and has claimed industrial injury to his skin as well.
>
> Finally, applicant states that the permanent disability for applicant's eyes, mouth, and teeth should be determined by QMEs in these specialties.
>
> Petitioner claims substantial prejudice and irreparable harm as well as a violation of his due process should the existing findings and award stand, and requests that Pursuant to *Labor Code* § 3202, that the award be left open to allow for a Gastroenterology QME evaluation to evaluate the digestive impairment as well as for further discovery to allow for a cardiology QME Evaluation and Orthopedic QME, an Ophthalmologist QME Evaluation, and a Dentist QME Evaluation, as well as for a Dermatological QME Evaluation based on newly discovered skin cancer.

Also stated in the Report, the WCJ advises, in pertinent part:

> [A]pplicant's attorney argues that additional medical reports and QME evaluations should have been obtained during the extended course of the trial. Much of the evidence submitted was obtained after MSC because I determined Mr. Blanck should have every opportunity to prove his claims. At some point, however, discovery has to end, and a decision has to be made. The record presented was sufficient to address the issues raised.
>
> Considering the fact Mr. Blanck first filed an application for adjudication sometime in 2002 and he has been waiting for a disposition of his case since at least 2006 any further delays would be inconsistent with the already abused provisions of Article XIV Section 4 of the California Constitution.

[1] Trial of this matter commenced on February 4, 2021, and concluded after submission twelve days after the formal rating of August 9, 2023 issued.

> Applicant's attorney has raised several excellent arguments in his Petition for Reconsideration/Removal regarding the possible need for clarification from pulmonologist Dr. Levine regarding Dr. O'Neall's [*sic*] opinions as expressed in his deposition testimony and reports [issued] subsequent to those of Dr. Levine. He further argues for a gastrointestinal consultation and an orthopedist to address the hip replacement.

The Report goes on to state:

> In his deposition of March 21, 2022 at p, 9 Dr. O'Neill found causation of the liver condition to be from the potential toxic exposure at his employment. He discussed the December 21, 2020 report p. 10 and found 40% due to preexisting obesity and prior hepatitis and 60% due to toxic exposure... "But the most important part of that statement is whatever damage he has to his live[r] is negligent. (sic) That's the least of his problems. If you recall he has numerous comorbid medical conditions which apply to his liver ….(ex. J 4)
>
> During Dr. O'Neill's November 15, 2021 deposition applicant's attorney asked whether the liver disability due to obesity and the liver disability from chemical exposure were inextricably intertwined. At pages 45-46 Dr. O'Neill said he could not say the causes of liver disease of obesity and toxin exposure are inextricably intertwined he suggested the parties get a gastroenterologist to make an opinion.

II.

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

We note initially, that in the WCJ's Findings of Fact and Opinion on Decision she notes:

> "Over the life of this case several of the evaluators have changed or modified their opinions. Further, the opinion expressed last in chronological order by a particular examiner may not be the opinion most persuasive. It is the responsibility of the trier of fact to weigh all the evidence presented and decide each issue without simply going to the last page of the last report."

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.)

Medical evidence is required if there is an issue regarding the compensability of the claim. (Lab. Code, §§ 4060(c)(d), 4061(i), 4062.3(l).) A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) Defendant holds the burden of proof on apportionment of permanent disability. (Lab. Code, § 5705; see also *Escobedo, supra,* 70 Cal.Comp.Cases at p. 613.)

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]).)

In this regard, we note that although it appears that the WCJ did not list the Exhibits that were to be entered into evidence in any Minutes of Hearing or Summary of Evidence during the

pendency of the trial, there was a Joint Exhibit list filed by applicant's Counsel dated May 24, 2023 and entered into Filenet on May 25, 2023. (DOC ID 46541013). This document was not listed as an exhibit nor referred to by the WCJ in any hearing, but rather, was first mentioned on page 4 of the September 11, 2023 Opinion on Decision wherein she states "All proposed Exhibits marked for identification are hereby admitted into evidence." We cannot discern when the exhibits were actually marked for identification. Further, there appears to be no Order in the Findings and Award admitting the proposed exhibits into evidence.

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.)

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 of the evidence and the existing record as to whether the legal issues have been properly identified and addressed; 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. Thus, we will order the matter to a status conference before a workers' compensation administrative law judge or designated hearing officer of 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 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 Findings of Fact and Award issued on September 11, 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 designated hearing officer 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/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 27, 2023

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

LOU BLANCK
LAW OFFICES OF JOSEPH E. LOUNSBURY
STATE COMPENSATION INSURANCE FUND

AS*/ara*

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