

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

MARIA ELENA PADILLA, *Applicant*

vs.

**JACK IN THE BOX; ACE AMERICAN INSURANCE, ADMINISTERED BY
GALLAGHER BASSETT SERVICES, *Defendants***

Adjudication Number: ADJ11410257

Los Angeles District Office

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on August 8, 2023, wherein the WCJ found in pertinent part that applicant, while employed from February 26, 2018 to July 23, 2018, as a fast food worker at Jack in the Box, did not sustain injury arising out of or in the course of employment (AOE/COE) to various body parts, and ordered that applicant take nothing.

Applicant contends that the WCJ's decision to reject qualified medical evaluator (QME) orthopedic surgeon Michael Smith, M.D.,'s reporting on the grounds that it was not substantial evidence because it did not have an accurate history of applicant's injuries meant that there was no substantial medical evidence to support applicant's claim of injury and that the WCJ should have allowed further development of the record.

We received an Answer from defendant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ, recommending that the Petition for Reconsideration be denied.

We have reviewed the allegations in the Petition for Reconsideration and the Answer, and the contents of the Report. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. 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.

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

Insurance Code section 1871.4(a)(1) makes it unlawful for any person to make a “knowingly false or fraudulent material statement or material representation for the purpose of obtaining or denying any compensation...” Insurance Code section 1871.5 states that, “Any person convicted of workers’ compensation fraud pursuant to Section 1871.4 or Section 550 of the Penal Code shall be ineligible to receive or retain any compensation, as defined in Section 3207 of the Labor Code, where that compensation was owed or received as a result of a violation of Section 1871.4 or Section 550 of the Penal Code for which the recipient of the compensation was convicted.” (Ins. Code, § 1871.5.)

The clear language of section 1871.5 includes the element of causation, that is, an injured employee convicted of violating section 1871.4 is “ineligible” for compensation “owed or received as a result of” the violation. (Ins. Code, § 1871.5.) Yet, there is no indication of legislative intent to exclude workers convicted of violating section 1871.4 from receiving any compensation benefits, either as a preventative policy or as a punishment. In 1998, the First Appellate District held in *Tensfeldt* that: “following a conviction of workers’ compensation fraud under section 1871.4(a)(1), an individual who seeks to receive or retain workers’ compensation benefits is barred from retaining or receiving any compensation, as defined in Labor Code section 3207, which stems directly from the fraudulent misrepresentation.” (*Tensfeldt v. Workers' Comp. Appeals Bd.* (1998) 66 Cal.App.4th 116, 125-126 [63 Cal.Comp.Cases 973]; see *Farmers Ins. Group of Companies v. Workers’ Comp. Appeals Bd. (Sanchez)* (2002) 104 Cal.App.4th 684, 690-91 [67 Cal.Comp.Cases 1545] [“employee is entitled to continue to receive the benefits which were not part of the fraud”].)

As stated in *Tensfeldt*, whether further compensation may be due notwithstanding a conviction for workers’ compensation fraud must be determined on a case-by-case basis, and the Appeals Board must consider the following:

- (1) whether applicant sustained an actual, otherwise compensable, industrial injury;
- (2) whether substantial medical evidence supports an award of compensation not stemming from the fraudulent misrepresentation for which the claimant was convicted; and

(3) whether claimant's credibility is not so destroyed as to make claimant unbelievable concerning any disputed issue in the underlying compensation case.

(*Tensfeldt, supra*, 66 Cal.App.4th at pp. 125–126.)

Labor Code section 3600 states that liability for workers' compensation benefits "shall, without regard to negligence, exist against an employer for an injury sustained by his or her employees arising out of and in the course of the employment..." (Lab. Code, § 3600(a).) While an applicant holds the burden of proof to establish that an injury arises out of and in the course of employment, an employer seeking to bar or reduce a worker's compensation benefits must raise the issue at trial and bear the burden of proof. (See Lab. Code, § 5705 ["The burden of proof rests upon the party or lien claimant holding the affirmative of the issue."]) Therefore, the burden of proof rests with the employer to produce evidence that applicant was convicted under section 1871.4, and thus, pursuant to section 1871.5, its liability for compensation "owed or received as a result of" that conviction should be reduced or barred.

Here, the WCJ did not conduct a full *Tensfeldt* analysis; instead, she concluded that applicant did not sustain industrial injury based on the lack of substantial evidence. (See 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].) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board 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." (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

According to the Minutes of Hearing/Summary of Evidence at the trial on April 12, 2023, defendant raised Labor Code section 4628(e) and contended that the lack of an accurate history rendered Dr. Smith's reporting inadmissible. (Lab. Code, § 4628(e).) Labor Code section 4628 is an anti-ghostwriting statute, and a physician's failure to comply with the statute renders a report

inadmissible. (See *Scheffield Medical Group v. Workers' Comp. Appeals Bd.* (1999) 70 Cal.App.4th 868, 881.)

As stated above, *Escobedo, supra*, articulates the basis for consideration of whether a medical opinion is substantial evidence. We observe that statutory and case law favor the admissibility of medical reports provided they were obtained in accordance with the Labor Code. (See Lab. Code, §§ 4062.3(a); 4064(d), 5703(a), 5708; e.g., *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231 [78 Cal.Comp.Cases 1209].) Here, the WCJ did not make a finding as to the admissibility of Dr. Smith's reporting and did not provide any explanation in her Opinion as to whether she excluded the reporting, and if so, the basis for excluding the reporting.

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.) "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]).) Here, as noted briefly above, the WCJ did not engage in a *Tensfeldt* analysis and did not discuss the admissibility of Dr. Smith's reporting. Thus, according to our preliminary review, the matter will likely be returned to the trial level for proper consideration of the issues.

Additionally, 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.) Here,

based on our preliminary review, it appears that further development of the record may be appropriate.

II.

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 [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 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, 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 and Order issued by a workers' compensation administrative law judge on August 8, 2023 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/ NATALIE PALUGYAI, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSONER



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.

**MARIA E. PADILLA
TELLERIA, TELLERIA & LEVY, LLP
LAW OFFICES OF MARCIE DONALD**

AS/mc

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