

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

SELENE BARUCH ALCANTARA MARTINEZ (deceased), *Applicant*

vs.

**KELLOGG COMPANY, permissibly self-insured;
administered by CORVEL CORPORATION, *Defendant***

**Adjudication Number: ADJ7651912
Pomona District Office**

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact (Findings) issued on June 19, 2023 by a workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part that even though applicant properly raised objection at the Mandatory Settlement Conference (MSC) to closing discovery, the objection was overruled because applicant is barred by the equitable doctrine of laches from proceeding with discovery related to decedent's permanent and stationary date; and, that the permanent and stationary date for all of decedent's injuries was March 23, 2015 based on the evaluation and report of the psychiatric Panel Qualified Medical Evaluator (PQME).

Applicant seeks reconsideration of the WCJ's finding that laches bars further development of the record on the issue of decedent's permanent and stationary date because defendant failed to meet its burden of proof to produce evidence of actual prejudice resulting from any delay pursuant to *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61 [200 Cal. LEXIS 6119], *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614 [1980 Cal. LEXIS 188], *Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037 [2002 Cal.App. LEXIS 200], and *Lam v. Bureau of Security & Investigative Services* (1995) 34 Cal.App.4th 29 [1995 Cal.App. LEXIS 371]; there is no substantial evidence to support the Findings; and, the Findings deprived applicant of the right to

due process pursuant to *Rucker v Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151 [65 Cal.Comp.Cases 805].

Defendant filed an Answer to Petition for Reconsideration (Answer) requesting the Petition for Reconsideration be denied because applicant's "right to such discovery and investigation was not denied but rather sat on by applicant's counsel;" the seven year delay between decedent's last evaluations by the orthopedic, psychiatric, and internal PQME and applicant's current notices of deposition of the PQMEs constitutes an unreasonable delay under *Johnson and Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351 [1969 Cal. LEXIS 213]; that defendant sustained prejudice because it incurred attorney fees and costs caused by applicant's delayed pursuit of additional accrued benefit; and, that applicant's failure to file a petition for removal of the order setting this matter for trial vitiates any argument based on due process.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending denial of the Petition for Reconsideration because applicant states no good cause for delaying medical-legal discovery four years after applicant's death, and seven years after the last medical-legal reporting, and therefore, applicant's delay would prejudice defendant who has already paid more than enough permanent disability advances.

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

DISPOSITION

We grant applicant's Petition for Reconsideration pursuant to Labor Code¹ section 5906, for further consideration of the factual and legal issues presented therein "on the basis of the evidence previously submitted in the case." (Lab. Code, § 5906; *Earley v. Workers' Comp. Appeals Bd.* (2023) 94 Cal.App.5th 1, 13-15 [88 Cal.Comp.Cases 769].) Reconsideration is warranted in this matter under section 5903, subdivision (c), which states that reconsideration may be sought on the grounds that "the evidence does not justify the findings of fact." (Lab. Code, § 5903(c).)

Our order granting applicant's Petition for Reconsideration ***is not a final order*** subject to writ of review.² (Lab. Code, § 5950 et seq.; see *Earley, supra*, 94 Cal.App.5th at pp. 13-15 [the

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

² 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"

Appeals Board has the authority to issue a final decision when it grants reconsideration but is not required to do so].) We defer issuance of our final decision on the merits of the Petition for Reconsideration (*Ibid.*)

DISCUSSION

In this case, defendant raised the equitable doctrine of laches as an affirmative defense to bar further development of the medical-legal record in this case.³ Defendant had the affirmative burden of proof to establish the elements of laches to obtain such a bar. (Lab. Code, § 5705.) “Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances... (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624 (*Miller*)).) The Supreme Court describes the requisite showing for a claim to be barred by laches as follows:

As we pointed out in *Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351 [82 Cal. Rptr. 337, 461 P.2d 617], the affirmative defense of laches requires unreasonable delay in bringing suit “plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.” (*Id.*, at p. 359, fns. omitted.) Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue. (*Id.*, at p. 361.)” (*Miller, supra*, 27 Cal.3d at p. 624.)

In addition, “prejudice should not be presumed solely because of the fact of delay: ‘[U]nreasonable delay by the plaintiff is not sufficient to establish laches. There must *also* be prejudice to the defendant **resulting from the delay** or acquiescence by the plaintiff.” (*Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1049-1051, italics in the original, bold added.)

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”].)

³ “The appeals board has broad equitable powers with respect to matters within its jurisdiction. (*Dyer v. Workers’ Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [28 Cal.Rptr.2d 30].) Thus, equitable doctrines. . .are applicable in workers’ compensation litigation. (*State Farm General Ins. Co. v. Workers’ Comp. Appeals Bd.* (2013) 218 Cal.App.4th 258, 268 [159 Cal.Rptr.3d 779]; 2 Hanna, Cal. Law of Employee Injuries and Workers’ Compensation (rev. 2d ed. 2016) § 24.03[1], p. 24-14 (rel. 81-3/2015).)” (*Truck Ins. Exchange v. Workers’ Comp. Appeals Bd. (Kwok)* (2016) 2 Cal.App.5th 394, 401 [81 Cal.Comp.Cases 685].)

A decision of the Workers' Compensation Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-81 [39 Cal.Comp.Cases 310].) Moreover, in this case, "[a]ny decision to impose laches not based on substantial evidence constitutes "a manifest injustice." (*City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1286 [1989 Cal.App. LEXIS 517].) In other words, any such decision would be vulnerable to appellate review. (*Id.*; see Lab. Code, § 5950 et seq.)

Here, it appears that the WCJ based his findings related to the element of prejudice necessary to apply laches solely on the fact of applicant's alleged delay, and not on specific evidence of prejudice to defendant related to or *caused by* that alleged delay. The WCJ did not cite to any specific evidence produced by defendant to meet its burden of proof to establish the existence of laches, nor did the WCJ discuss the relevant case law cited by applicant in Applicant's Trial Brief in the Opinion on Decision or the Report.

Accordingly, we must grant reconsideration in order to further consider the factual and legal issues presented "on the basis of the evidence previously submitted in the case." (Lab. Code, § 5906.) This grant is necessary to ensure that the Findings are supported by the evidence. (Lab. Code, § 5903(c).) This is not a final decision on the merits of the Petition for Reconsideration, and we will order issuance of the final decision after reconsideration 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.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact issued on June 19, 2023 by a workers' compensation administrative law judge is **GRANTED**.

IT IF FURTHER ORDERED that the final decision after reconsideration on the merits of applicant's Petition for Reconsideration of the Findings of Fact issued on June 19, 2023 by a workers' compensation administrative law judge is **DEFERRED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 8, 2023

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

**LOURDES ALCANTARA
PEREZ LAW, PC
HINSHAW & CULBERTSON, LLP**

AJF/abs

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