

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

JOSE MALDONADO, *Applicant*

vs.

**WASTE MANAGEMENT INC; ACE AMERICAN INSURANCE COMPANY;
GALLAGHER BASSETT SERVICES INC., *Defendants***

**Adjudication Number: ADJ11919641
San Diego District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

Applicant seeks reconsideration of the January 22 2024 First Amended Findings, Award and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained admitted industrial injury to his head, psyche, hearing, dental, closed head brain injury, MTBI, stroke, eyes and vision while employed as a commercial truck driver on July 12, 2018; that applicant did not sustain industrial injury in the form of sleep apnea; that the injury herein caused 67% permanent disability; and that applicant failed to meet his burden of proof that he rebutted the permanent disability rating schedule or establish 100% permanent disability. Pursuant to our authority, we accept applicant's supplemental pleading. (Cal. Code Regs., tit. 8, § 10964.)

Applicant claims the WCJ should have found him to be 100% permanently disabled, that the Global Assessment of Functioning (GAF) score of 55 for sleep apnea was valid, and that the medical opinion of Sara Siavoshi, M.D., on the issue of apportionment does not constitute substantial medical evidence.

Defendant filed an Answer. The WCJ prepared a Report and Recommendation of Workers' Compensation Judge on Petition for Reconsideration (Report), recommending that the Petition be denied.

In the Report, the WCJ stated:

This is a case involving mostly admitted injuries sustained by the Petitioner while in the employ of Defendant Waste Management, Inc. An Application for Adjudication of Claim was filed by Petitioner on December 18, 2018. The Petitioner alleged injuries to his head, brain, ear, mouth and psyche. It should be noted at the outset that there was never an allegation of injury in the form of sleep apnea on the original or subsequent amended Applications by Petitioner.

The injury occurred when the Petitioner slipped and fell hitting his head on a large metal trash dumpster. The injury was admitted and benefits were provided. Eventually, the Petitioner was treated by several different doctors including but not limited to Dr. Thomas Schweller, M.D. for his neurological complaints (Exhibits 18, 19, 20, and 21) There was Dr. Keith Jackson an ENT specialist for various injuries (Exhibit 10). There was Dr. Delia M. Silva, Dr. Ryan Salahi, M.D. and Dr. Raphael Morris, and Dr. Miguel Alvarez, M.D. (Exhibits 7, 8, 9 14, 15, 16 & 17) for his psyche injury. There were several other doctors as well.

Of significance was that on December 18, 2019, approximately seventeen months after the original injury, the Petitioner suffered an ischemic stroke, which caused various consequential injuries. Ultimately, the parties presented to Dr. Sara Siavoshi as a neurological PQME. Dr. Siavoshi authored several reports (Exhibits J2 & J3). Eventually the Petitioner was declared permanent and stationary by the evaluators.

In an attempt to rebut the permanent disability rating schedule, the Petitioner procured the services of vocational consultant Alex Calderon of Canizalez & Associates (Exhibits 22 & 23). Based upon that reporting the Petitioner now claimed he was 100% permanently and totally disabled. The Defendant objected to that allegation and retained Mark Remas as its vocational consultant (Exhibit A).

On October 21, 2022 (which was after the stroke), the Petitioner filed a Declaration of Readiness to Proceed claiming under penalty of perjury that discovery was complete on all issues. Eventually the parties had a Mandatory Settlement Conference on November 17, 2022. At that conference, stipulations and issues were framed for trial. Once again it should be noted that the Petitioner did not allege any injury in the form of sleep apnea in the Pre-trial Conference Statement. The matter was set for trial.

The matter came to trial on February 1, 2023. There were actually three total days of trial. On the first day of trial, the parties went on the record. Stipulations and Issues were read into the minutes. The parties were asked if either party wished to augment or delete the Stipulations and Issues as read. The Petitioner's attorney clearly responded "no". There was no listing of sleep apnea as an alleged admitted body part or a body part that was at issue. The issues listed were permanent disability, apportionment, need for further medical treatment,

and attorney's fees. As a sub-issue of permanent disability, the Petitioner was alleging he was 100% permanently and totally disabled. The WCJ was unaware that there was any allegation of sleep apnea injury until after the case was submitted for decision and he received a Petition for Reconsideration.

The trial was continued twice to take Petitioner's testimony. On the second day of trial occurred on April 6, 2023, the Petitioner presented direct examination. There was no testimony by Petitioner that he had any sleep apnea complaints or issues. There was nothing elicited on cross-examination about such an injury.

On August 15, 2023, the WCJ issued his Findings of Fact and Opinion on Decision. It was found that the Petitioner had sustained a permanent disability of 67% after apportionment with future medical care and attorney's fees awarded. It was specifically found that the Petitioner had failed to rebut the permanent disability rating schedule. The Petitioner was not found to be 100%. In essence, the reporting of Alex Calderon had failed to address valid apportionment as well other non-industrial conditions in his opinion which affected the Petitioner's ability to be amendable to vocational rehabilitation. Mr. Calderon basically substituted his own conclusion of no vocational apportionment analysis and failed to follow Nunes v. State of California, Dept. of Motor Vehicles (2023) 88 CCC 894.

The Petitioner then filed a Petition for Reconsideration on August 31, 2023, claiming that the WCJ had erred and had omitted the never alleged injured body part of sleep apnea in his Findings of Fact. Additionally, it was alleged that the WCJ was in error by not finding that the Petitioner had failed to meet his burden of proof in rebutting the permanent disability rating schedule.

After receiving the first Petition for Reconsideration and being surprised and concerned that he had possibly and inadvertently omitted an issue, the WCJ vacated his Findings and Award and immediately set the matter for a Status Conference. A Status Conference was held on November 6, 2023.

At that conference, the WCJ inquired of the parties as to whether he had inadvertently omitted an admitted body part. The Defendant point blank stated that there was no omitted body part. The WCJ asked the Petitioner's attorney if there had been an Application for Adjudication of Claim alleging sleep apnea as a claimed injury. The attorney replied that no there was no such allegation originally or later by amendment.

The WCJ then inquired of Petitioner's attorney as to whether the sleep apnea had been listed on the Pre-trial Conference Statement as an issue. He replied that no there was no such listing. No explanation was given. The WCJ then inquired of the Petitioner's attorney why it was not brought up as an issue at the time of trial. There was no explanation given by Petitioner's attorney. ... The issue of injury to sleep apnea was waived by operation of law.

It should be noted that at no time, either at the Status Conference or after, was there an effort by Petitioner's attorney to either amend anything or to seek relief under Code of Civil Procedure 473. The matter was then resubmitted for decision on November 30, 2024.

On January 22, 2024, the WCJ issued his 1st Amended Findings of Fact and Opinion on Decision. Once again it was found that the Petitioner had sustained a permanent disability of 67%, with future medical care and attorney's fees.

On February 6, 2024, the Petitioner again filed a Petition for Reconsideration. The arguments were again that the WCJ erred in not finding a sleep apnea injury. It was also alleged that Dr. Siavoshi's apportionment was not valid. Further, that it was alleged that the WCJ erred by not finding that the Petitioner had rebutted the permanent disability rating schedule.

(Report, at pp. 2-4.)

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 will grant applicant's Petition for Reconsideration. Our order granting the 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:

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.” (*Heggin 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]).)

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, 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. We note that in his July 8, 2021 qualified medical examination (QME) report, Miguel Alvarez, Ph.D., that applicant’s sleep study and/or treatment should be addressed by the appropriate specialist. It does not appear that this occurred.

II.

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.

III.

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. ***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 applicant's Petition for Reconsideration 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 WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 8, 2024

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

**JOSE MALDONADO
LAW OFFICE OF STEVEN SCHULMAN
LAW OFFICE OF JAMES B. JAMES**

PAG/pm

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