WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EDDIE DALE HITCHCOCK, *Applicant*

vs.

WASTE MANAGEMENT OF ALAMEDA COUNTY, INCORPORATED; ACE AMERICAN INSURANCE COMPANY, administered by GALLAGHER BASSETT SERVICES, INCORPORATED, *Defendants*

Adjudication Number: ADJ19436133
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant filed a Petition for Reconsideration (Petition) of the Findings and Award (F&A) issued June 27, 2025, wherein the workers' compensation administrative law judge (WCJ) found that while employed by defendant as a truck driver during the period of June 18, 2023 through June 18, 2024, applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his neck; and that the injury caused temporary partial disability from June 19, 2024 until August 22, 2024 and temporary total disability from August 23, 2024 until the present and continuing.

In the Petition, defendant contends that the opinions of the Panel Qualified Medical Examiner (PQME) were not substantial evidence; and that defendant was denied due process when discovery was closed at the mandatory settlement conference.

Applicant filed an Answer.

The WCJ's Report and Recommendation (Report) recommends the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report of the WCJ with respect thereto.

Based on our review of the record and for the reasons discussed below, we will grant the Petition for Reconsideration, amend the F&A to find that applicant was entitled to temporary

partial disability through April 6, 2025, or forty-five days after the last treatment report, and otherwise affirm the findings of the WCJ.

I.

Former Labor Code section 5909[1] provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Former Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(Lab. Code, § 5909.)

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events the case was transmitted to the Appeals Board on August 7, 2025, and 60 days from the date of transmission is Monday, October 6, 2025. This decision issued by or on October 6, 2025, so that we have timely acted on the Petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

act on a petition. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

According to the proof of service, the Report was served on August 7, 2025, and the case was transmitted to the Appeals Board on August 7, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 7, 2025.

II.

PQME Dr. Konovalenko evaluated the applicant on October 26, 2024, and issued a report dated November 12, 2024.[2] PQME Dr. Konovalenko provided as a job description that applicant was employed as a garbage truck driver and a heavy equipment operator at defendants from 2002 up to the present. The applicant worked 11 to 12 hours per day and 5 days per week. The job duties include long hours of off-road driving, operating a loader and a dozer, as well as tasks such as unhooking and unloading equipment, and frequently climbing up and down the truck. He used and operated a truck, loader, and a dozer. (Exhibit 2, PQME Dr. Konovalenko, November 12, 2024, pages 11-12.) The applicant described "injury to the neck that he attributes to continuous and repetitive duties such as off-road driving, constant jarring movements, and driving over 10 miles each night." (Exhibit 2, PQME Dr. Konovalenko, November 12, 2024, page 10.)

PQME Dr. Konovalenko physically evaluated the applicant, reviewed medical records, and diagnosed myofascial pain syndrome of the cervical spine. Under discussion, PQME Dr. Konovalenko states applicant "was evaluated by the undersigned pursuant to a claim of cumulative injury to the neck. These injuries were sustained from 2020 through June 18, 2024, while he was working as a garbage truck driver and a heavy equipment operator for Waste Management, Inc." (Exhibit 2, PQME Dr. Konovalenko, November 12, 2024, page 18.) For causation, PQME Dr. Konovalenko states the "cause of Mr. Hitchcock's current injuries, impairments and disabilities to the neck are attributable to the cumulative industrial injury which occurred from 2020 through

[2] PQME Dr. Konovalenko also authored a December 30, 2024, supplemental report to which is attached an undated "To Whom It May Concern" letter. The letter states: "We are reaching out to inform you that our QME physician, Dr. Lucas Campos, has legally changed his name. As of December 15, 2024, he will be known as Dr. Lucas Konovalenko." (Exhibit 1, PQME Dr. Konovalenko, December 30, 2024, PDF page 6.) We therefore refer to Dr. Konovalenko only.

June 18, 2024. The described mechanism of injury is consistent with an appropriate force to result in the above listed industrial diagnoses." (Exhibit 2, PQME Dr. Konovalenko, November 12, 2024, page 19.) "The applicant has not reached maximal medical improvement and is not yet permanent and stationary for any injury being evaluated." (Exhibit 2, PQME Dr. Konovalenko, November 12, 2024, page 20.) "The applicant's work status is hereafter deferred to the primary treating physician until he has reached maximum medical improvement." (Exhibit 2, PQME Dr. Konovalenko, November 12, 2024, page 20.)

On December 30, 2024, PQME Dr. Konovalenko authored a supplemental report in response to a request from the defense attorney to address the appropriateness of his treatment recommendations. (Exhibit 1, PQME Dr. Konovalenko, December 30, 2024, pages 2, 4.)

Applicant filed an Amended Application for Adjudication of Claim dated February 4, 2025, amending injury for a cumulative end date of June 18, 2024.

Applicant was consistently found by his treating physicians to have industrial work restrictions from June 19, 2024, through February 20, 2025. (Exhibits 3 through 13.) Beginning on July 14, 2024, treating physician Dr. Jeff Jones recorded the history of injury as "6/18/24 repetitive work." (Exhibit 10, Dr. Jeff Jones, July 17, 2024, PDF page 3.) This history is again restated in Dr. Jones' August 26, 2024, November 19, 2024, December 19, 2024, January 22, 2025, and February 20, 2025, reports. (Exhibits 9, 7, 6, 4 and 3.)

On March 24, 2025, a mandatory settlement conference occurred, and the parties completed a Pre-Trial Conference Statement (PTCS) setting the case for trial. The Judge's Conference Notes reflect that: "AOE COE. Case previously was a specific injury. Case was amended to conform to what the QME opined which is a CT. DA wants to conduct discovery including deposing applicant. WCJ finds good cause to set case for trial." Discovery was ordered closed as to AOE/COE. (PTCS, March 24, 2023, page 4.) Included among other statements listed under "Other Issues" are "defendant alleges reports from Dr. [Konovalenko] are not substantial med. Evid.," "defendant further alleges due process," and "further discovery is needed because a new CT date was just amended on 2-4-25." (PTCS, March 24, 2023, page 3.)

At trial on May 7, 2025, it was stipulated that applicant's deposition was taken on April 28, 2025, and that PQME Dr. Konovalenko's deposition was scheduled for May 23, 2025, with notice on March 24, 2025. (Minutes of Hearing, Summary of Evidence (MOH), May 7, 2025, page 2, stipulations 6, 7.) As relevant here, issues listed included injury AOE/COE to the neck,

temporary disability, and "[d]efense objects to the trial proceeding due to due process violations and need for additional discovery due to new Amended Application for Adjudication." (MOH, May 7, 2025, pages 2-3, issues 1, 2, 3, 8.) PQME Dr. Konovalenko's two reports were admitted into evidence without objection. (MOH, May 7, 2025, page 6, lines 5-6.)

Applicant testified at trial that:

> [T]he trucks were in bad condition, they were beat up, and the dashboards were falling apart. At the Altamont facility, the roads are dirt roads and are rutted and filled with rocks. When he drove on these dirt roads, he would bounce up and down and be thrown from side to side. On June 18, 2024, he worked 11 to 12 hours that day at the Altamont Pass dump. He had worked there in the past and worked there sometimes two or three days during the last part of his shift as a hostler.

(MOH, May 7, 2025, page 7, lines 3-10.) Applicant also testified that "at some point in time on June 18, 2024, the applicant was injured when he started feeling pain in his neck going down into both shoulders." (MOH, May 7, 2025, page 7, lines 20-21.)

On cross examination applicant testified:

> [H]is neck pain started on June 18, 2024, when he felt neck pain from the jostling of the truck while driving on that particular day. On that day, he was going back and forth on the rough roads which caused his pain. He did not feel it just happened that day only, but it probably came from repeated driving over time in his job.

(MOH, May 7, 2025, page 9, lines 20-23.)

III.

As found by the WCJ in the F&A, applicant while employed during the cumulative period through June 18, 2024, working as a truck driver, sustained injury arising out of and occurring in the course of employment to his neck.

In the Petition, defendant argues A) PQME Dr. Konovalenko's reporting is not substantial evidence on the issues of AOE/COE or temporary disability, and B) that defendant was denied due process when not allowed to conduct further discovery. (Petition, pages 5, 7.)

A.

In the Petition, defendant provides scattershot complaints about the PQME's first report including such statements as: "He did not explain anywhere in the report exactly what was wrong with applicant's neck. Does applicant have arthritis? Is it a muscle ache? A herniation? Broken

neck bone? What?" (Petition, page 6, lines 25-28.) These statements are made despite PQME Dr. Konovalenko clearly diagnosing applicant with *myofascial pain syndrome of the cervical spine*. (Exhibit 2, PQME Dr. Konovalenko, November 12, 2024, page 18, emphasis added.)

Medical evidence that industrial injury was reasonably probable, although not certain, constitutes substantial evidence for a finding of injury AOE/COE. (*McAllister v. Workers' Comp. Appeals Bd*. (1968) 69 Cal.2d 408, 417 [33 Cal.Comp.Cases 660].) Although the factual issue of the occurrence of the alleged incident is a determination for the WCJ, the issue of injury is a medical determination, which requires expert medical opinion. As the Court of Appeal explained in *Peter Kiewit Sons v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188]: "Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a [WCAB] finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. Expert testimony is necessary where the truth is occult and can be found only by resorting to the sciences."

Further, it is clear "the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. [citation]." (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525].)

Here, PQME Dr. Konovalenko credibly found the "cause of Mr. Hitchcock's current injuries, impairments and disabilities to the neck are attributable to the cumulative industrial injury which occurred from 2020 through June 18, 2024. The described mechanism of injury is consistent with an appropriate force to result in the above listed industrial diagnoses." (Exhibit 2, PQME Dr. Konovalenko, November 12, 2024, page 19.) "The applicant has not reached maximal medical improvement and is not yet permanent and stationary for any injury being evaluated." (Exhibit 2, PQME Dr. Konovalenko, November 12, 2024, page 20.) "The applicant's work status is hereafter deferred to the primary treating physician until he has reached maximum medical improvement." (Exhibit 2, PQME Dr. Konovalenko, November 12, 2024, page 20.)

In addition, treater Dr. Jones congruently noted injury from "repetitive work." (Exhibit 10, Dr. Jeff Jones, July 17, 2024, PDF page 3; Dr. Jeff Jones Exhibits 9, 7, 6, and 4.) The treating physicians also support that applicant was not permanent and stationary but rather temporarily partially disabled by providing industrial work restrictions. (Exhibits 3 through 13.) The WCJ notes "the applicant provided credible testimony regarding his job duties that required him to drive on dirt roads that were rutted and filled with rocks and would cause him to bounce up and down

and be thrown from side to side." (F&A, Opinion on Decision, page 6.) The applicant also testified to having work restrictions. (F&A, Opinion on Decision, page 7.) We give the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500].)

It is clear PQME Dr. Konovalenko has provided well-reasoned opinions that are supported by the record and therefore substantial evidence.

B.

In the Petition are the assertions that "[d]efendant had no reason and no power to conduct discovery on a new CT claim until applicant actually filed a CT claim. The board did not have jurisdiction to enforce discovery or a deposition until a CT application was filed." (Petition, page 7, lines 22-25.)

Defendant cites to no authority for these assertions and is reminded "[a] petition for reconsideration, removal or disqualification may be denied or dismissed if it is unsupported by specific references to the record *and to the principles of law involved*." (Cal. Code Reg., tit. 8, § 10972, emphasis added.)

Here, applicant filed an Application for Adjudication of Claim with the Appeals Board invoking its jurisdiction and seeking benefits for a claimed neck injury with defendant. Once the Application was filed defendant not only had the right to conduct discovery, but defendant was also obligated to do so. This is true even if the Application completely misstates the mechanism of injury or even the date of injury.

"[A] claims administrator must conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for a workers' compensation benefit." (Cal. Code Reg., tit. 8, § 10109(a).) "The claims administrator may not restrict its investigation to the specific benefit claimed if the nature of the claim suggests that other benefits might also be due." (Cal. Code Reg., tit. 8, § 10109(b)(2).) Indeed, the "duty to investigate requires further investigation if the claims administrator receives later information, not covered in an earlier investigation, which might affect benefits due." (Cal. Code Reg., tit. 8, § 10109(c).)

If discovery in the claim reveals benefits should have been provided for a different date or type of injury, than the pleadings "may be amended by the Workers' Compensation Appeals Board to conform to proof." (Cal. Code Regs., tit. 8, § 10517.)

Such rules exist because the workers' compensation system "was intended to afford a simple and nontechnical path to relief." (*Elkins v. Derby* (1974) 12 Cal.3d 410, 419 [39 Cal.Comp.Cases 624]; see also Cal. Const., art. XIV, § 4.)

Defendant faced no bar to conducting discovery in this case. Indeed, defendant likely had an obligation to initiate discovery on the possible cumulative injury when Dr. Jeff Jones first recorded the history of injury as related to "repetitive work" on July 17, 2024. (Exhibit 10, Dr. Jeff Jones, July 17, 2024, PDF page 3.) It is clear defendant had such duty no later than PQME Dr. Konovalenko's report dated November 12, 2024, finding applicant's injuries cumulative in nature. (Exhibit 2, PQME Dr. Konovalenko, November 12, 2024, page 19.)

Defendant's failure to engage in discovery does not equate to a denial of due process. "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd*. (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].)

Here, defendant had a meaningful opportunity to present evidence on the issue of cumulative injury. After PQME Dr. Konovalenko issued his November 12, 2024, report, defendant was able to request and receive a supplemental report from PQME Dr. Konovalenko regarding treatment recommendations. (Exhibit 1, PQME Dr. Konovalenko, December 30, 2024.) There is no reason defendant was unable to conduct discovery such as requesting a supplemental report or setting the PQME's deposition.

Discovery was ordered closed as to injury AOE/COE in the PTCS completed March 24, 2025. (PTCS, March 24, 2023, page 4.) The May 7, 2025 MOH reflect that the parties stipulated that on the same day the PTCS was completed, defendant also set the deposition of PQME Dr. Konovalenko for May 23, 2025. (Minutes of Hearing, Summary of Evidence, (MOH), May 7, 2025, page 2, stipulation 7.) It appears that PQME Dr. Konovalenko's deposition was taken.

The Petition references the PQME's deposition sporadically, but most succinctly and relevantly as follows:

> It is defendant's contention that the deposition establishes and confirms that the medical report of QME Dr. Konovalenko is not substantial evidence. Defendant established that the report of Dr. Konovalenko was in clear violation of Labor Code 4628 and the report must be mandatorily stricken as inadmissible. Additionally, the doctor should be replaced by case law and the Labor Code.

(Petition, page 3, lines 26-28, page 4, lines 1-5.)

We note PQME Dr. Konovalenko's two reports were admitted into evidence at trial without objection. (MOH, May 7, 2025, page 6, lines 5-6.) Defendant waived any irregularity or objection to the reports by not objecting to their admission at trial.

PQME Dr. Konovalenko's deposition was not disclosed as an exhibit on the March 24, 2025 PTCS, despite defendant setting the deposition the day of the mandatory settlement conference. "Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." (Lab. Code, § 5502(d)(3).)

Here we do not consider the Petition's reference to the deposition transcript as the transcript was not admitted into evidence and therefore is not before us to review. Defendant has presented no persuasive evidence or argument to be relieved from the order closing discovery contained in the PTCS nor from the specific prohibition of section 5502(d)(3).

Defendant was aware of a cumulative injury no later than issuance of PQME Dr. Konovalenko's November 12, 2024 report and likely earlier. Defendant has been afforded due process, including a meaningful opportunity to present evidence regarding the issues.

IV.

We observe that 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.

Temporary disability may be total (incapable of performing any kind of work) or partial (capable of performing some kind of work). (*Huston v. Workers' Comp. Appeals Bd*. (1979) 95 Cal. App. 3d 856, 868 [44 Cal.Comp.Cases 798].) "If the partially disabled worker can perform some type of work but chooses not to, his "probable earning ability" will be used to compute wage-loss compensation for partial disability." "If the temporary partial disability is such that it effectively prevents the employee from performing any duty for which the worker is skilled or there is no showing by the employer that work is available and offered, the wage loss is deemed total and the injured worker is entitled to temporary total disability payments." (*Huston*, *supra*, at p. 868.)

A finding of temporary disability must of course be supported by substantial medical evidence. As discussed above, "[w]here an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a [WCAB] finding." (*Peter Kiewit Sons*, *supra*, at p. 838.)

Here the WCJ awarded in part "Temporary total disability from August 23, 2024, and to the present and continuing." (F&A, page 1.)

In reviewing this case we note however that the treating physicians have only endorsed temporary partial disability via industrial work restrictions from June 19, 2024, through February 20, 2025. (Exhibits 3 through 13.) The PQME Dr. Konovalenko stated "[t]he applicant's work status is hereafter deferred to the primary treating physician until he has reached maximum medical improvement." (Exhibit 2, PQME Dr. Konovalenko, November 12, 2024, page 20.)

Temporary partial disability is established from June 19, 2024, through at least the last report of February 20, 2025. "When continuing medical treatment is provided, a progress report shall be made no later than forty-five days from the last report." (Cal. Code Reg., tit. 8, § 9785(f)(8).) As minimum periodic reporting is required, we will extend the temporary partial disability period to forty-five days from the last report of February 20, 2025. Therefore, applicant is found temporarily partially disabled from June 19, 2024, through April 6, 2025. Temporary disability beyond April 6, 2025, is deferred pending further reporting. Either party may seek additional proceedings if unable to adjust benefits informally.

Accordingly, we grant defendant's Petition for Reconsideration, amend the F&A to find that applicant was entitled to temporary partial disability through April 6, 2025, or forty-five days after the last treatment report, and otherwise affirm the findings of the WCJ.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the June 27, 2025 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the June 27, 2025 Findings and Award is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

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2. The injury caused temporary partial disability from June 19, 2024, until April 6, 2025. The issue of whether applicant is owed further temporary disability benefits is deferred.

AWARD

A) Temporary partial disability is to be paid from June 19, 2024, until August 22, 2024, the amount to be adjusted by the parties informally with jurisdiction reserved.

Temporary partial disability is to be paid from August 23, 2024, to April 6, 2025, at the temporary disability rate claimed by employer based on an average weekly wage of $2,400.00, which renders a maximum weekly temporary total disability rate of $1,600.00, pending an informal agreement by the parties of the correct average weekly wage and temporary disability rate, with jurisdiction reserved. If an informal agreement cannot be reached the parties may set the issue for trial.

WORKERS' COMPENSATION APPEALS BOARD

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 6, 2025

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

EDDIE DALE HITCHCOCK
BOXER & GERSON
SLADE NEIGHNORS

PS/oo

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