

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

MIGUEL LUA, *Applicant*

vs.

**CALIFORNIA INSURANCE COMPANY for
LUA'S BUILDING SERVICES, *Defendants***

**Adjudication Number: ADJ11438289
Salinas District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

Applicant's attorney, on his own behalf, seeks reconsideration of the August 14, 2025 Findings and Order issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained injury arising out of and in the course of employment (AOE/COE) to his brain, head, right wrist, lumbar spine, and psyche, while employed as a journeyman on April 30, 2018. The WCJ further found that no attorney fees have been paid and no attorney fee arrangements have been made; that applicant received a net recovery of \$2,105,893.18 from his third-party settlement related to this injury; and that defendant's petition for credit is granted against the full amount of Applicant's net recovery. Based on these findings, the WCJ ordered that "Defendant(s) be allowed a credit against its/their liability for compensation in the amount of [\$2,105,893.18], which is the amount recovered by the employee through a third-party settlement. Said credit is to be applied against any and all workers' compensation benefits (including, but not limited to, medical treatment, indemnity payments, and attorneys' fees) now due or due in the future."

Applicant's attorney contends that the WCJ erred in allowing his fee to be subject to credit for the third-party recovery arguing that he did not participate in the third-party settlement.

We received an Answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration recommending that we deny reconsideration.

We have considered the Petition for Reconsideration, the contents of the Report, and have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's attorney'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 Code¹ section 5950 et seq.

I.

Preliminarily, we note that former section 5909 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. (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.

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 October 13, 2025 and 60 days from the date of transmission is December 12, 2025. This decision is issued by

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

or on December 12, 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 act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on October 13, 2025, and the case was transmitted to the Appeals Board on October 13, 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 October 13, 2025.

II.

The WCJ stated following factual summary in the Report:

FACTS

Applicant, Miguel Lua, while employed on 4/30/18 as a Journeyman, Occupational Group number 360, at Santa Clara, California, by Lua's Building Services, Inc., then insured by California Insurance Company, sustained injury AOE/COE to his brain, head, right wrist, lumbar spine, and psyche.

Applicant petitioned for reconsideration of the undersigned's findings that Applicant received a net recovery of \$2,105,893.18 from his third-party settlement related to this injury and that Defendant's petition for credit is granted against the full amount of Applicant's net recovery. (Findings & Order, Findings 4 and 5, p. 1.)

DISCUSSION

A WCJ's report "cures any technical or alleged defect in satisfying the requirements of Labor Code section 5313." (*City of San Diego v. Workers' Comp. Appeals Bd (Rutherford)* (1989) 54 Cal. Comp. Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd* (1980) 45 Cal. Comp. Cases 1026 (writ den.).) To the extent that the undersigned failed to elaborate on her conclusions, they will be discussed below.

Applicant argues in his Petition that credit to the employer is discretionary. Perhaps the applicant is confusing Labor Code section 3861 with section 4909, which does allow the court to use its discretion to allow a credit for overpayments. However, in the case of third-party recoveries, the employer's credit is mandatory.

The appeals board is empowered to and *shall allow*, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorneys' fees, pursuant to the provisions of Sections 3856, 3858, and 3860 of this code, or has not been applied to reimburse the employer. (Lab. Code, § 3861, emphasis added.)

Pursuant to Labor Code section 3858, "After payment of litigation expenses and attorneys' fees fixed by the court pursuant to Section 3856 and payment of the employer's lien, the employer shall be relieved from the obligation to pay further compensation to or on behalf of the employee under this division *up to the entire amount of the balance of the judgment, if satisfied, without any deduction.*" (Emphasis added.)

The Court of Appeal has held that, "'Compensation,' in this context, is given a broad, expansive meaning.' Compensation has been found to include disability indemnity, med-legal costs, medical expenses and future medical expenses, penalties, and attorney's fees awarded in the workers' compensation case." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Borges)* (1997) 53 Cal.App.4th 579, 583.)

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

(Report, at pp. 1-2.)

III.

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

Section 3858 currently states:

After payment of litigation expenses and attorneys' fees fixed by the court pursuant to Section 3856 and payment of the employer's lien, the employer shall be relieved from the obligation to pay further compensation to or on behalf of the employee under this division *up to the entire amount of the balance* of the judgment, if satisfied, without any deduction. No satisfaction of such judgment

in whole or in part, shall be valid without giving the employer notice and a reasonable opportunity to perfect and satisfy his lien.

(Lab. Code, § 3858, emphasis added.)

Section 3861 currently states:

The appeals board is empowered to and shall allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorneys' fees, pursuant to the provisions of Sections 3856, 3858, and 3860 of this code, or has not been applied to reimburse the employer.

(Lab. Code, § 3861.)

The employer's credit applies against the employer's liability for compensation. (Lab. Code, § 3861.) Here, "compensation" is given a broad, expansive meaning and includes attorney fees awarded in the employee's compensation case. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Borges)* (1997) 53 Cal.App.4th 579, 583 [62 Cal.Comp.Cases 300].) However, recognizing that the employer's obligation is relieved while there is a credit, the Appeals Board has required that the credit be exhausted before any compensation, including the attorney's lien, is paid. (*Parker v. Workers' Comp. Appeals Bd.* (1993) 59 Cal.Comp.Cases 151 (writ den.))

In this case, there has been no determination regarding the amount of compensation due to applicant as a result of his industrial injury. Therefore, an order that defendant's "credit is to be applied against **any and all workers' compensation benefits** (including, but not limited to, medical treatment, indemnity payments, and attorneys' fees) **now due or due in the future**," appears premature and overbroad.

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, supra*; *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 Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis

removed and citations omitted.) Based on our review, we are not persuaded that there is substantial evidence to support the WCJ's decision at this time. Where the evidence or opinion on an issue is incomplete, stale, and no longer germane, or is based on an inaccurate history, or speculation, it does not constitute substantial evidence. (*Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

IV.

In addition, 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”].)

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.

V.

Accordingly, we grant applicant’s attorney’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 attorney'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 A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG L. SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 12, 2025

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

**MIGUEL LUA
FIORE LEGAL
LAW OFFICES OF JOAN S. SHEPPARD**

PAG/bp

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