WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

OFELIA LOPEZ, *Applicant*

vs.

ALBERTSONS, permissibly self-insured, administered by SEDGWICK, *Defendants*

Adjudication Number: ADJ13811313
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant has petitioned for reconsideration of the Findings of Fact, Award and Orders issued and served by the workers' compensation administrative law judge (WCJ) in this matter on November 8, 2023. In that decision, the WCJ found that applicant sustained industrial injury arising out of and in the course of employment during the period August 7, 2002 to March 23, 2020 to her cervical, thoracic and lumber spine, shoulders, knees, left foot and wrists in the form of bilateral carpal tunnel syndrome. Applicant was found to be temporarily totally disabled for the period January 18, 2020 to January 26, 2022, and disability indemnity was awarded in the amount of $55,076.32 for this period of time, less the lien of Employment Development Department (EDD) in the amount of $26,365.00 and less attorney fees of $4,306.70. Applicant was also awarded a Labor Code[1] section 4650(d) increase totaling $5,507.63, and a section 5814 increase of $10,000 less amounts awarded per section 4650(d).

Permanent disability indemnity of 74% was awarded, along with future medical treatment, and reasonable attorney fees.

Petitioner contends that the WCJ erred in admitting the medical report of Gabriel Rubanenko, M.D. dated August 24, 2022 into evidence asserting it is an improperly obtained medical legal report obtained by applicant for the purpose of rebutting the medical opinions of the PQME Lynn Wilson, M.D., and thus should be deemed inadmissible per Labor Code sections

[1] All future references are to the Labor Code unless otherwise indicated.

4061(i) and 4062. Defendant further contends the reporting of Dr. Rubanenko does not constitute substantial medical evidence, and that instead the PQME reporting of Dr. Lynn Wilson does constitute substantial evidence upon which the WCJ should have relied. Defendant also alleges that the period of total temporary disability found by the WCJ as well as the permanent disability and occupational group number found is unsupported by the medical and testimonial evidence. Finally, defendant asserts that the finding of unreasonable delay of temporary disability and resultant penalties awarded are unsupported and not ripe for adjudication in the absence of a penalty petition.

Petitioner requests that their petition be granted, that the WCJ's findings, award, and orders be set aside, and the matter be returned to the WCJ for further development of the record.

Applicant filed a response recommending the petition be denied and the WCJ's decision be affirmed.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending the petition be granted to amend the findings of fact numbers 6, 7, 8, 9, and 14, and orders as it relates to the period owed for temporary disability benefits, the amount owed, as well as related attorney fees, and otherwise affirmed.

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

Based upon our preliminary review of the record, we will grant defendant's Petition for Reconsideration, and we will order that this matter be referred to a WCJ or designated hearing officer of the Appeals Board for a status conference. Our order granting defendant'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.

Preliminarily, we note the following in our review:

> The report of the WCJ addressed the issue of the admissibility of the report of Gabriel Rubanenko, M.D. in pertinent part, as follows:

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> Prior to the election of Dr. Rubanenko, applicant was treating with Tri-City Health Group. First with Archie Mays, M.D. who left Tri-City and then Scott Rosenzwig, M.D. wrote a report without examining applicant. Dr. Mays issued a PR-2 on January 26, 2022, in which he recommends a treatment plan, and that the Applicant remain off work for six weeks and says the next report is due no later than six weeks. (Exhibit 3 at pages 99-100.) In April 27, 2022, Dr. Scott Rosenzwig, M.D. wrote a report without examining the Applicant stating that Tri-City Health Group/Tri-County Medical had closed and recommended the patient be referred to another physician for a complete maximal medical improvement evaluation. (Exhibit 1 at page 3.) It was then that Applicant elected Dr. Rubanenko, who examined Applicant and found Applicant had reached maximum medical improvement on August 24, 2022. (Exhibit 2 at page 31.) Dr. Rubanenko recommended future medical care for exacerbations of her symptoms. Dr. Rubanenko is currently Applicant's primary treating physicians and will probably treat her in the future for exacerbations. Since Applicant is permanent and stationary there is no need for periodic examinations with her primary treating physician. Just because there is yet to be an exacerbation requiring treatment is no reason to exclude Dr. Rubanenko's PR-4.

We also note that defendant disputes the substantiality of the medical reporting of Gabriel Rubanenko, M.D. as found by the WCJ, and asserts that the reporting and conclusions of PQME Lynn Wilson, M.D. constitutes substantial medical evidence that should be followed instead.

As for the former, Dr. Rubanenko appears to have evaluated the applicant on one occasion for purposes of performing a permanent and stationary medical examination on August 24, 2022, but failed to review any of applicant's prior treatment records.

With respect to the latter, Dr. Wilson initially indicates that the applicant advised her of a March 23, 2020 specific fall at home in which she injured her right shoulder and arm, and felt pain in her back, however, she also refers to a March 20, 2020 fall off the stairs at her daughters house. (Exh. E, report of Lynn Wilson, M.D., August 23, 2021, pp. 2-3).

In her subsequent reporting of April 18, 2022, however, Dr. Wilson states she was "unaware of this fall at home from stairs on March 23, 2020" which would "certainly raise doubts as to the authenticity of the medical history given by the applicant regarding her so-called cumulative trauma for the right shoulder hip and headaches an[d] antalgic gait…" (Exh. B, report of Lynn Wilson, M.D., p.2).

Finally, it appears that PQME Wilson does not address apportionment in any of her reporting, nor whether there is any impairment as it relates to the applicant's right shoulder, thoracic spine, or lower extremities.

II.

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.)

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 Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924] ["The principle of allowing full

development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims."]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

The Appeals Board also 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.)

Labor Code section 5310 states in relevant part that: "The appeals board may appoint one or more workers' compensation administrative law judges in any proceeding, as it may deem necessary or advisable, and may refer, remove to itself, or transfer to a workers' compensation administrative law judge the proceedings on any claim. . . ." (See also Lab. Code, §§ 123.7, 5309.)

Here, it is unclear from our preliminary review whether the existing record is sufficient to support the findings of fact, decision, orders, and legal conclusions of the WCJ as to applicant's injuries and claims; and/or whether further development of the record may be necessary. Thus, we will order the matter to a status conference before a WCJ at the Appeals Board.

III.

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 [62 Cal.Rptr. 757, 432 P.2d 365]; *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 defendant's Petition for Reconsideration, order that this matter be set for a status conference, 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 defendant's Petition for Reconsideration of the Findings of Fact, Award, and Orders issued on November 8, 2023 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED that this matter will be set for a Status Conference with a workers' compensation administrative law judge or assigned designee of the Appeals Board. Notice of date, time, and format of the conference will be served separately, to be heard in the Lifesize electronic platform, in lieu of an in person appearance at the San Francisco office of the Appeals Board.

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/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 25, 2024

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

OFELIA LOPEZ
GLAUBER BERENSON
AMARO BALDWIN LLP

AS/*ara*

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