

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

GINA DAVIS, *Applicant*

vs.

**ORACLE AMERICA, INC. and SAFETY NATIONAL CASUALTY
CORPORATION, administered by TRISTAR RISK MANAGEMENT, *Defendants***

Adjudication Number: ADJ11167605

San Francisco District Office

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on August 9, 2023, wherein the WCJ found in pertinent part that applicant did not rebut the Combined Values Chart (CVC) in the 2005 Permanent Disability Rating Schedule (PDRS), and that her bi-lateral hands and wrists injury caused 89% permanent partial disability.

Applicant contends that the opinions of physical medicine and rehabilitation qualified medical examiner (QME) Steven D. Feinberg, M.D., are substantial evidence that her factors of disability should be added, not combined, resulting in an award of 100% permanent disability.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration, and we will order that this matter be referred to a WCJ at the Appeals Board for a status conference. Our order granting 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.

BACKGROUND

Applicant's employment with defendant began on September 10, 2007. (See Joint Exh. 102, Steven D. Feinberg, M.D., June 29, 2021, p. 2.) She claimed a cumulative injury to her bilateral wrists and hands while employed by defendant as a global trade compliance specialist, during the period from April 4, 2015, through April 4, 2016.

QME Dr. Feinberg initially evaluated applicant on June 15, 2016. After examining applicant, taking a history, and reviewing the medical record, he concluded that applicant had not reached permanent and stationary status. (Joint Exh. 108, Steven D. Feinberg, M.D., June 15, 2016, p. 14.) The doctor re-evaluated applicant on November 8, 2017, and he issued various supplemental reports. (See Joint Exhs. 107 – 103). Applicant underwent a course of treatment and on June 29, 2021, Dr. Feinberg again re-evaluated her. After his re-examination of applicant and review of the interim medical record, Dr. Feinberg concluded that applicant had again reached permanent and stationary status and that her permanent disability was, "... 100% related to her medical treatment and her resultant CRPS (complex regional pain syndrome) and apportionment to any pre-existing or other condition is not appropriate." (Joint Exh. 102 Steven D. Feinberg, M.D., June 29, 2021, p. 22.)

In his reports, when addressing the issues of applicant's work restrictions and permanent disability, Dr. Feinberg stated:

I frankly think I erred [in a prior report] and should have described her as being limited to Light Work with her upper extremities. Regarding the term "Repetitive" use, this term has to do with doing things repeatedly with the upper extremities. Providing a percentage loss though is not meaningful as I do not believe she could engage in repetitive activities such as typing, sorting objects regardless of the size on a regular basis or other similar tasks. ¶ Regarding the term "Forceful" use, she basically is unable to apply force when using her upper extremities and this would be limited to light type work activities. (Joint Exh. 103, Steven D. Feinberg, M.D., February 26, 2018, pp. 4 – 5.)

In terms of her work status, she could not return to her previous job. It is not medically probable that she could reengage in the open labor market. ¶ She has a disability to her upper extremities precluding right upper extremity use and for the left upper extremity no heavy or forceful or repetitive use. (Joint Exh. 102 pp. 21 – 22.)

Adding versus Combining: There are 2 methods to rebut the CVC Table and add rather than combine. If the impairments have no overlap on ADLs, [sic] adding is appropriate. If there are overlapping ADLs with synergistic/amplifying effect,

then adding is also appropriate. In this particular case, while there is evidence of overlap, the synergy between her upper extremities supports adding rather than combining.

(Joint Exh. 102, p. 22.)

I received an 8/3/21 letter from Mr. Richard [defense counsel]. ¶ He is correct that I stated that it is not medically probable that she could reengage in the open labor market. ¶ He is correct that I was providing a medical opinion and that the issue needs to be opined upon by a vocational expert following appropriate analysis.

(Joint Exh.101, Steven D. Feinberg, M.D., August 4, 2021, p. 1.)

The parties proceeded to trial on February 21, 2023, and the matter was continued for additional testimony by applicant. At the May 11, 2023 trial the matter was submitted for decision; the issues submitted included permanent disability and apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 21, 2023, p. 2.)

DISCUSSION

Our preliminary review of the trial record raises various issues, and it has long been the law that once reconsideration has been granted, the Appeals Board has the authority to address issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration. (Lab. Code, §§ 5906, 5908; (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]); (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].)

First, regarding applicant's argument that her factors of disability should be added, not combined, as noted above, Dr. Feinberg stated his opinion that applicant's factors of disability should be added rather than combined. We have previously held that the disability values of multiple impairments may be added instead of combined using the CVC if adding the impairments provides a more accurate rating of the injured worker's disability. (*Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 (writ den.); *De La Cerda v. Martin Selko & Co.* (2017) 83 Cal.Comp.Cases 567 (writ den.).) However, for his opinion to constitute substantial evidence, Dr. Feinberg must set forth a more complete analysis and explanation for his opinion, not just his conclusion. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

As to applicant's ability to engage in certain work activities, Dr. Feinberg stated, "... I do not believe she could engage in repetitive activities such as typing, sorting objects regardless of the size on a regular basis or other similar tasks. ¶ Regarding the term "Forceful" use, she basically is unable to apply force when using her upper extremities ..." (Joint Exh. 102, pp. 21 – 22.) "... [I]t is not medically probable that she could reengage in the open labor market." (Joint Exh.101, p. 1.) Again, based on our review of the entire record, it appears that applicant may have loss of use "of both hands" which would result in 100% permanent total disability. (Lab. Code, § 4662(a)(2).) However, whether applicant has lost the use of both hands is a medical determination, not a legal determination, and therefore it must be addressed by the reporting physicians. Although applicant's loss of use of both hands may be inferred from Dr. Feinberg's statements, as noted, to be substantial evidence on that issue, the doctor must provide a more detailed explanation as to his actual opinions regarding applicant's ability to use her hands, and he must explain the basis for his opinions. (*Escobedo v. Marshalls, supra.*)

Finally, surveillance videos of applicant were taken on October 18, 2019, November 2, 2019, June 12, 2021, and August 3, 2021. (Def. Exh. B, MOH/SOE, February 21, 2023, p. 5.) It appears that Dr. Feinberg was not provided the surveillance videos to review. To constitute substantial evidence a doctor's opinion must be based on an adequate examination and history. (*Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls, supra.*) Thus, Dr. Feinberg must be provided the surveillance videos in order to accurately assess applicant's level of disability.

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.)

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. . . .” (Lab. Code § 5310; see also, §§ 123.7, 5309.) In order to expedite handling of this matter, we will order the matter to a status conference before a WCJ at the Appeals Board.

We conclude by observing that under our broad grant of authority, our jurisdiction over this matter is continuing. 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 *Earley v. Workers’ Comp. Appeals Bd.* (2023) 94 Cal.App.5th 1, 13-15 [88 Cal.Comp.Cases 769] [the Appeals Board has the authority to issue a final decision when it grants reconsideration but is not required to do so]; 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”].)

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.

Accordingly, we grant applicant’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 applicant's Petition for Reconsideration of the Findings of Fact and Award issued by the WCJ on August 9, 2023, is **GRANTED**.

IT IS FURTHER ORDERED that this matter will be set for a Status Conference with a workers' compensation administrative law judge at the Appeals Board. Notice of the 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/ NATALIE PALUGYAL, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 30, 2023

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

**GINA DAVIS
GALINE, FRYE, FITTING & FRANGOS
RTGR LAW LLP**

TLH/AS/mc

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