

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

ROBERT ACEVEDO, *Applicant*

vs.

**OLD DOMINION FREIGHT LINE, INC.; GALLAGHER BASSETT, administered by
ACE AMERICAN INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ12595156
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration or in the alternative removal of the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on March 11, 2021. By the F&O, the WCJ found that the requested testing does not constitute medical treatment under Labor Code¹ section 4600. (Lab. Code, § 4600.) The WCJ ordered that the testing be provided to applicant.

Defendant contends that the WCJ has no jurisdiction to order the requested testing because this request was subject to the utilization review (UR) and independent medical review (IMR) processes.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration and/or Removal (Report) recommending that we deny reconsideration.²

We have considered the allegations of defendant's Petition for Reconsideration/Removal, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

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

² The Report inadvertently recommends that "applicant's" Petition be denied, although the Petition was filed by defendant. (Report, March 29, 2021, p. 5.)

FACTUAL BACKGROUND

Applicant claims injury to the head, brains, lungs and lower extremities on September 26, 2019 while employed as a truck driver by Old Dominion Freight Line, Inc.

The matter proceeded to trial on February 3, 2021 on the following issues:

1. Defendant alleges that the WCAB lacks jurisdiction over UR and IMR issues. These issues include Labor Code Section 4610.5, Labor Code Section 4610.5(e), and Labor Code Section 4610.6(h).
2. Defendant alleges that there is no factual dispute.
3. Applicant alleges that diagnostic studies in the form of digital QEEG and cognitive P300 and EEG pursuant to Labor Code Section 4610.6 is limited to medical necessity only they also raise Dubon II 79 CCC 1298; Regulation 9792.6.1; LC 4610(a); and LC 4662 and 4620 Vargas 2017 Cal.Wrk.Comp.Lexis 317 as well as Regulation 9795(a) Brower pursuant to 79 CCC 550.

(Minutes of Hearing, February 3, 2021, p. 2.)

The Minutes of Hearing identify applicant's exhibit number 1 as "Authorization for consult with Kenneth L. Nudleman, M.D., dated 2/24/2020" and state that this exhibit was admitted into evidence without objection. (*Id.*) The Minutes further state under this exhibit: "(Not provided to reporter.)" (*Id.*) A copy of this exhibit is not identified in the Electronic Adjudication Management System (EAMS).

The WCJ issued the resulting F&O as outlined above.

DISCUSSION

I.

Defendant sought reconsideration or in the alternative removal of the F&O. If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment (AOE/COE), jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.*

(*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

In the F&O, the WCJ found that applicant sustained injury AOE/COE to multiple body parts. Injury AOE/COE is a threshold issue fundamental to the claim for benefits. The WCJ also found that applicant is entitled to testing requested by Dr. Nudleman. This determination implicitly addressed whether adjudication of the disputed testing is subject to the jurisdiction of the Appeals Board or the UR/IMR process.³ An order determining jurisdiction is also a final order subject to reconsideration. (See *Gaona, supra*; see also *Allied Signal Aerospace v. Workers' Comp. Appeals Bd. (Wiggs)* (2019) 35 Cal.App.5th 1077, 1084-1085 [84 Cal.Comp.Cases 367] [the Court of Appeal held that the issue of whether the UR process or the Appeals Board has jurisdiction over a home health care dispute is a final order].) Therefore, we will treat defendant's Petition as one seeking reconsideration.

II.

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).) Furthermore, decisions of 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].) 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, former § 10566, now § 10787 (eff. Jan. 1, 2020).) “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*, at p. 475.) The WCJ's decision must “set[] forth clearly and concisely the reasons for the decision

³ Jurisdiction was expressly raised by defendant as an issue at trial. It is therefore unclear why the WCJ did not make an express determination regarding jurisdiction in the F&O.

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 exhibits admitted into evidence at trial reportedly included a February 24, 2020 authorization for a consult with Dr. Nudleman as one of applicant’s exhibits. However, this exhibit has not been identified in EAMS and does not appear to have been provided to the reporter as part of creation of the record. It is unclear why neither applicant nor the WCJ followed up to ensure the record contained all exhibits admitted into evidence. In the absence of a proper and complete record, we are unable to determine whether the WCJ’s decision is supported by substantial evidence.

Upon return of this matter to the trial level, we recommend the trier of fact create a complete evidentiary record regarding this dispute and issue a new decision. Either party may then seek reconsideration of that decision.

Therefore, we will rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order issued by the WCJ on March 11, 2021 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 14, 2021

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

**GLAUBER BERENSON & VEGO
KWAN & ASSOCIATES
ROBERT ACEVEDO**

AI/pc

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