

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

**IAN CHITWOOD, *Applicant***

**vs.**

**HENSELL MATERIALS, INC.;  
INSURANCE COMPANY OF THE WEST, *Defendants***

**Adjudication Number: ADJ14842904**

**Santa Rosa District Office**

**OPINION AND ORDER  
GRANTING PETITION  
FOR RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Order and Opinion on Decision (F&O) issued on August 27, 2024, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant did not sustain an industrial injury on February 18, 2021.

Applicant argues that the evidence does not support the Finding of Fact, that the WCJ failed to apply the rule of liberal construction, that the WCJ improperly created a negative inference from applicant's inability to testify, and that the WCJ's credibility determinations are not supported by the record.

We have received an answer from defendant.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the Petition for Reconsideration (Petition), the Answer, the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting the Petition 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.

### **FACTS**

Applicant worked as a loader/unloader when on February 18, 2021, he claims to have sustained a specific injury to his left shoulder, bilateral upper extremities, neck, back, head, and brain, and in the form of headaches. (Minutes of Hearing and Summary of Evidence (MOH-SOE), July 24, 2024, p. 2, lines 18-26.) The matter proceeded to trial on the sole issue of injury arising out of and in the course of employment. (*Id.* at p. 2, lines 28-30.)

The parties stipulated that if applicant were called to testify, he would have no independent recollection of the events on February 18, 2021. (*Id.* at p. 2, lines 32-34.) That is because in November 2021, applicant suffered a seizure with onset of retrograde amnesia. (Applicant's Exhibit 2, Report of Andrew Levine, Ph.D., April 1, 2024.)

Applicant was seen by qualified medical evaluator Steven Hickey, D.C., who authored one report in evidence. Dr. Hickey took the following history of injury:

Mr. Chitwood provides the following written statement: "I was walking across jobsite balcony. The balcony floor was covered in wet plastic underlayment material and various debris. I slipped on the wet plastic material and debris then fell backwards into metal scaffolding. The scaffolding hooked under my left arm - impacting my left under arm/side, jolting the left side of my body upward and causing whiplash in my neck/head as I fell down to the ground."

(Applicant's Exhibit 1, Report of Steven Hickey, D.C., November 3, 2022, p. 3.)

Applicant's girlfriend testified that she spoke with him on the day of the accident for 53 minutes. (MOH-SOE, *supra* at p. 9, lines 9-13.) Applicant told her that he slipped and fell at the jobsite, hitting his head. (*Id.* at p. 9, lines 14-20.) Applicant told her he was concerned about reporting the injury and how it would impact an upcoming bonus. (*Id.* at p.9, lines 21-26.) He also wanted to see if the injury would subside on its own. (*Ibid.*)

The girlfriend told applicant to take photos of where the accident happened, which applicant did while on the phone with the girlfriend. (*Id.* at p. 9, lines 28-30.) Applicant entered these photos into evidence. (Applicant's Exhibit 17.)

Multiple defense witnesses testified that applicant did not report an injury on February 18 a fact that applicant acknowledges. (MOH-SOE, *supra* at p. 5, lines 28-29; p. 11, lines 32-33.) Applicant continued to work regular duty until March 1, 2021, when he messaged his supervisor that he was not feeling well. (*Id.* at p. 12, lines 6-10.) Applicant first disclosed the work injury on March 9, 2021. (*Id.* at p. 12, lines 23-26.)

On September 6, 2024, applicant filed a letter requesting a transcript of the trial testimony. On order to issue a transcript issued on September 12, 2024. To date, a transcript has not been uploaded into EAMS. Accordingly, we will grant reconsideration to allow time for the transcript to be prepared.

## **DISCUSSION**

### **I.**

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.

(§ 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 October 2, 2024, and 60 days from the date of transmission is Sunday December 1, 2024, which by operation of law means that this decision is due by Monday, December 2, 2024. (Cal. Code Regs., tit. 8, § 10600.) This decision is issued by or on December 2, 2024, 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.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on October 2, 2024, and the case was transmitted to the Appeals Board on October 2, 2024. 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 2, 2024.

## **II.**

We would first address a technical deficiency in the petition for reconsideration. Defendant notes in its answer that applicant failed to provide a verification to the petition.

WCAB Rule 10510(d) requires that

All petitions and answers shall be verified under penalty of perjury in the manner required for verified pleadings in courts of record. A failure to comply with the verification requirement constitutes a valid ground for summarily dismissing or denying a petition or summarily rejecting an answer.

(Cal. Code Regs., tit. 8, § 10510(d).)

“[I]t has long been recognized that lack of verification does not necessitate automatic dismissal of a nonconforming pleading.” (*Torres v. Contra Costa Schools Ins. Group* (2014) 79 Cal.Comp.Cases 1181, 1186 (writ den.) citing *United Farm Workers v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 915; *Mullane v. Industrial Acc. Com.* (1931) 118 Cal.App. 283, 286; *Wings West Airlines v. Workers’ Comp. Appeals Bd. (Nebelon)* (1986) 187 Cal.App.3d 1047 [51 Cal.Comp.Cases 609]; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703,712, fn.3 [57 Cal.Comp.Cases 230].) “Failure to correct a lack of verification within a reasonable time after receiving notice of the defect allows dismissal of the nonconforming petition.” (*Torres, supra*, at 1186.)

Applicant is on notice that he should file a verification to the petition for reconsideration within a reasonable time and that failure to file a verification may result in dismissal of the petition.

### III.

All parties to a workers’ compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is “. . . one of ‘the rudiments of fair play’ assured to every litigant . . .” (*Id.* at 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, [The] commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law. (*Id.* at 577.)

When deciding reconsideration, the Appeals Board is required “to achieve a substantial understanding of the record[.]” (*Allied Compensation Ins. Co. v. Industrial Acc. Com.* (1961) 57 Cal.2d 115, 120.) Here, applicant has requested a trial transcript, but the transcript has not been prepared in time to allow either the parties, or the Appeals Board to review the transcript.

We further 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 therefore.”].)

“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.

Accordingly, and to allow all parties due process and to further our obligation to achieve a substantial understanding of the record when deciding reconsideration, we will grant reconsideration to study the issues presented, and specifically to review the trial transcript, once it is completed.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings of Fact issued on August 13, 2024 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/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**December 2, 2024**

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

**IAN CHITWOOD, *IN PRO PER*  
RICHARD MONTARBRO, ESQ.**

**EDL/PAG/mc**

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