

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

NOUREDDINE MANSER, *Applicant*

vs.

RETURN-TO-WORK SUPPLEMENT PROGRAM, *Defendants*

**Adjudication Number: ADJ10813026
San Francisco District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

Applicant Nouredine Manser seeks reconsideration of the November 9, 2023 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant is not entitled to a second Return-to-Work Supplement Program (RTWSP) benefit under Rule 17302(b). Rule 17302(b) prohibits a second or subsequent RTWSP benefit "except where the individual receives a Voucher for an injury which occurs subsequent to receipt of every previous Return to Work Supplement." (Cal. Code Regs., tit. 8, Rule 17302(b).)

Applicant contends that the word "injury" in Rule 17302(b) should be liberally construed in favor of applicant and should include compensatory injury.

We received an answer from the Director of Industrial Relations as Administrator of the RTWSP. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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

FACTS

The facts are undisputed in this matter. As the WCJ states:

Noureddine Manser, while employed on March 19, 2017, as a taxi driver at San Francisco, California, by Barrett Business Services, sustained injury arising out of and in the course of employment to his head, neck, back, upper extremities, bilateral knees, and lower extremities. The sole issue for trial was whether the applicant was entitled to the Return-to-Work Supplement Program (RTWSP) benefit in relation to this March 19, 2017 claim in ADJ10813026.

The applicant had already received a Return-to-Work Supplement for a September 17, 2020 injury at the time he applied for a Return-to-Work Supplement related to the March 19, 2017 injury. The applicant argued that the March 19, 2017 injury continued to affect the applicant in an ongoing manner, and therefore was an injury occurring subsequent to his receipt of RTWSP benefits. (Applicant's Trial Brief filed 8/15/2023, p. 1, line 22-p. 2, line 8.)

...

"The applicant had a re-evaluation by neurology Qualified Medical Evaluator (QME) Robert Shorr, M.D. on September 3, 2020, just prior to his subsequent injury. (Applicant's exhibit 4, pp. 1, 5.) At the time the applicant was not yet at a state of maximum medical improvement. (*Id.* at p. 7.) Dr. Shorr noted in his January 27, 2022 report that:

"It is not clear if any of my previous recommendations have been followed through with, including the ophthalmological QME evaluation, medical/legal neuropsychological assessment, and neurological treatment of the claimant's headaches per the headache treatment guidelines from the American Academy of Neurology." (Applicant's exhibit 3, pp. 3-4.)

In his January 27, 2022 report, Dr. Shorr had no change to his opinions expressed in his September 3, 2020 report. (Applicant's exhibit 3, p. 4)

Even after the September 17, 2020 injury the applicant continued treating for the March 19, 2017 injury. (Applicant's exhibits 6 and 10.) He treated with primary treating physician Dr. Rutchik, M.D. from November 11, 2021 through September 14, 2022. (Applicant's exhibit 10.) Through the August 17, 2022

appointment, the applicant continued to be temporarily totally disabled by Dr. Rutchik who opined that the applicant's condition was not permanent and stationary. (*Id.* at p. 10.) During a September 14, 2022 telephonic appointment with his primary treating physician, the applicant indicated that he was declining further treatment in the interest of resolving his claim. (*Id.* at 10, pp. 1-2.) This included declining the scheduling of an authorized ophthalmology exam. (*Id.* at 10, p. 2.)

On March 11, 2022 and December 6, 2022, defendant issued temporary disability delay notices in the March 19, 2017 injury claim. (Applicant's exhibits 1 and 4.) Both notices stated that defendant was unable to pay temporary disability benefits for the period from December 10, 2021. (*Ibid.*) Defendant was seeking medical records, subsequent employment records, and records from the September 17, 2020 workers' compensation injury. (*Ibid.*) An order for an additional QME panel in ophthalmology was issued December 1, 2022 citing a need for development of the record in that specialty. (Applicant's exhibit 7.) No ophthalmology QME evaluation occurred. (8/16/2023 MOH, p. 2, line 28.)

The applicant received a Supplemental Job Displacement Benefit Voucher (SJDBV) and a Return-to-Work Supplement for the September 17, 2020 injury. (8/16/2023 MOH, p. 2, lines 30-32.) The RTWSP benefit related to the September 17, 2020 injury was received prior to receipt of an SJDBV for the earlier March 19, 2017 injury. (*Id.* at p. 2, lines 30-34.) The SJDBV for the March 19, 2017 injury was issued January 30, 2023. (Applicant's exhibit 9, pp. 2, 6.)

The applicant then applied for the Return-to-Work Supplement, which was denied per California Code of Regulations Title 8, Section 17302(b). (8/16/2023 MOH, p. 2, lines 32-35.) The applicant timely appealed the RTWSP denial in connection with the March 19, 2017 injury. (*Id.* at p. 2, lines 37-38.) The appeal was not introduced as evidence, but judicial notice may be taken of the EAMS file. (Evidence Code 452(d); *Faulkner v. WCAB* (2004) 69 CCC 1161 (writ denied).) The appeal of the RTWSP denial was filed March 15, 2023. (EAMS Doc. ID no. 45498027.)" (November 9, 2023 Opinion on Decision, pp 1-3.)

(Report, pp. 1-3.)

DISCUSSION

I.

Labor Code,¹ section 139.48 provides:

(a) There is in the department a return-to-work program administered by the director, funded by one hundred twenty million dollars (\$120,000,000) annually derived from non-General Funds of the Workers' Compensation Administration Revolving Fund, for the purpose of making supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss. Moneys shall remain available for use by the return-to-work program without respect to the fiscal year.

(b) Eligibility for payments and the amount of payments shall be determined by regulations adopted by the director, based on findings from studies conducted by the director in consultation with the Commission on Health and Safety and Workers' Compensation. Determinations of the director shall be subject to review at the trial level of the appeals board upon the same grounds as prescribed for petitions for reconsideration.

(c) This section shall apply only to injuries sustained on or after January 1, 2013. (§ 139.48.)

In accordance with section 139.48, the following relevant regulations were adopted:

Rule 17302

(a) To be eligible for the Return-to-Work Supplement, the individual must have received the Supplemental Job Displacement Benefit (SJDB) Voucher for an injury occurring on or after January 1, 2013.

(b) An individual who has received a Return-to-Work Supplement may not receive a second or subsequent Return-to-Work Supplement, except where the individual receives a Voucher for an injury which occurs subsequent to receipt of every previous Return to Work Supplement. (Cal. Code Regs., tit. 8, § 17302.)

Rule 17309

An individual dissatisfied with any final decision of the Director on his or her application for the Return-to-Work Supplement may, file an appeal at the Workers' Compensation Appeals Board (WCAB) District Office. The appeal must contain the name of the individual, the ADJ number of the case in which a voucher was provided, and a clear and concise statement of the facts constituting the basis for the appeal. A copy of the appeal shall be served on the Return-to-Work Program located at 1515 Clay Street, 17th Floor, Oakland, California, 94612. Any appeal must be filed with the WCAB within 20 days of the service

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

of the decision. After an appeal has been timely filed, the Return-to-Work Program may, within the period of fifteen (15) days following the date of filing of that appeal, amend or modify the decision or rescind the decision and take further action. Further action shall be initiated within 30 days from the order of rescission. The time for filing an appeal will run from the filing date of the new, amended or modified decision. Any such appeal will be subject to review at the trial level of the WCAB upon the same grounds as prescribed for petitions for reconsideration. (Cal. Code Regs., tit. 8, § 17309.)

We first examine whether the Appeals Board has jurisdiction to consider applicant's petition. The Director of Industrial Relations contends that section 139.48 limits review of the Director's determinations at the trial level of the Workers' Compensation Appeals Board (WCAB).

WCAB's trial level workers' compensation administrative law judges operate under delegated authority from the Appeals Board. (§§ 5309-5310.) The Appeals Board can therefore revoke this delegation of authority at any time in any proceeding and retains full authority to conduct judicial proceedings in the first instance, including the taking of evidence and testimony. (§§ 5309-5310, 5701.) The Appeals Board also retains continuing jurisdiction over all workers' compensation orders, decisions and awards, which may be rescinded or amended for good cause, granting it the ability to modify final awards to a degree far greater than the ability of a civil court to modify a final judgment. (See §§ 5803-04.)

In *Dennis v. State of California* (April 30, 2020) 85 Cal.Comp.Cases 389, 403 [2020 Cal. Wrk. Comp. LEXIS 19] (Appeals Board en banc), we stated that the Appeals Board has exclusive jurisdiction to adjudicate workers' compensation claims, which includes the RTWSP. Section 139.48, the statute authorizing the RTWSP, is found under Chapter 5, Division of Workers' Compensation, of Division 1, Department of Industrial Relations, of the Labor Code. Furthermore, the RTWSP is funded by the Workers' Compensation Administration Revolving Fund, which funds workers' compensation programs. (§ 62.5(a).) As such, we conclude that the RTWSP is a workers' compensation benefit.

The Appeals Board's exclusive jurisdiction to adjudicate workers' compensation claims has only been limited by specific statutory carve outs, which do not exist here. (*Dennis, supra*, 85 Cal.Comp.Cases at fn. 12 ["As discussed in *Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal. App. 4th 1074, 1091 [194 Cal. Rptr. 3d 469, 80 Cal. Comp. Cases 1262], the Legislature created statutory exceptions to the WCAB's exclusive adjudicatory jurisdiction in sections 4610 (utilization review) and 4610.6 (independent medical review). (§§ 4610 and 4610.6.) Sections

3715(c) (workers' compensation insurance) and 4603.6(f) (medical bills) are additional statutory exceptions to the WCAB's exclusive adjudicatory jurisdiction. (§§ 3715(c) and 4603.6(f).)"]

We note that section 139.48 and Rule 17309 do not prohibit appeals to the Appeals Board. RTWSP's argument that an appeal stops at the trial level of the WCAB would not only prevent a person from seeking review from the Appeals Board but also from the Court of Appeal and the Supreme Court. Section 5900 specifically provides that any person may seek reconsideration from the Appeals Board of a WCJ's final order, decision, or award. (§ 5900.) Section 5950 provides that any person may seek a writ of review from the Court of Appeal or the Supreme Court of an order, decision, or award of the Appeals Board. (§ 5950.) In contrast, section 139.48(b) and Rule 17309 are silent as to any remedy after the trial level of the WCAB. Prohibiting review from the Appeals Board will also prohibit review from the Court of Appeal and Supreme Court, which violates the constitutional right to due process. We do not believe that the language in section 139.48 and Rule 17309 create such draconian limitation.

Therefore, based on upon our preliminary review, it appears that the Appeals Board has jurisdiction to consider applicant's petition.

II.

We next examine the validity of Rule 17309(b). In doing so, we highlight the following legal principles that may be relevant to our review of this matter:

An administrative regulation may not contravene the terms, or exceed the scope, of the statutes under which they have been adopted. (*California Teachers v. Commission*, (1992) 7 Cal.App.4th 1469, 1475.) "It also may not create a remedy for the agency that the legislature has withheld. Dyna-Med v. Fair Employment, (1987) 43 Cal.3d 1379, 1389. Administrative regulations that alter, enlarge, or impair the scope of the authorizing statute are void and courts have the obligation to strike them down. Id. at 1389." (*Garner v. State Victim Comp. Bd.*, 2023 Cal. Super. LEXIS 27626, *63.)

Furthermore, generally, separate injuries are compensated separately in workers' compensation. In *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1560 [74 Cal.Comp.Cases 113], the court held that "each distinct industrial injury be separately compensated based on its individual contribution to a permanent disability." (*Ibid.*) Likewise, separate injuries entitle a worker with separate temporary disability indemnity, even if these

benefits run concurrently. (*Foster v. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1505, 1511 [73 Cal.Comp.Cases 466; *Jimenez v. Denco Sales Co. et al.* (January 6, 2012, ADJ6659926, ADJ6659223) [2012 Cal. Wrk. Comp. P.D. LEXIS 30].²) Separate injuries also entitle a worker to separate SJDB vouchers provided certain eligibility requirements are met. (*Silva v. LSG Sky Chefs* (July 15, 2015, ADJ 7812017, ADJ7813152) [2015 Cal. Wrk. Comp. P.D. LEXIS 405].)

Thus, we grant reconsideration in order to further consider whether Rule 17309(b) is authorized and consistent with section 139.48. The WCJ did not rule on the validity of Rule 17309(b). Should Rule 17309(b) be deemed valid, we agree with the WCJ that applicant is not entitled to a second RTWSP payment in connection with the March 19, 2017 specific injury.

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 § 5803 [“The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be

² Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6.) A California Compensation Cases digest of a “writ denied” case is also not binding precedent. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366 (Appeals Board en banc).) While not binding, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

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 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 applicant’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.

For the foregoing reasons,

IT IS ORDERED that Nouredine Manser’s Petition for Reconsideration of the November 9, 2023 Findings of Fact 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 A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 26, 2024

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

**NOUREDDINE MANSER
KURLANDER, BURTON & MACK
DIR – OFFICE OF THE DIRECTOR-LEGAL UNIT**

LSM/oo

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