

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

OSAMA AGAIBY, *Applicant*

vs.

**CITY OF CULVER CITY, permissibly self-insured,
adjusted by INTERCARE, *Defendants***

Adjudication Number: ADJ15643990; ADJ13744962

Van Nuys District Office

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award and Order (F&A) issued in ADJ15643990 on July 23, 2024 and the Findings and Award and Order (F&A) issued in ADJ13744962 on July 23, 2024, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant was entitled to a full year of benefits pursuant to Labor Code section 4850¹ in ADJ15643990 and a second full year of benefits in ADJ13744962, notwithstanding the fact that the periods of applicant's temporary disability partially overlapped.

Defendant argues that the benefits paid under section 4850 are credited to both dates of injury where the temporary disability periods overlap, so that applicant was not entitled to separate section 4850 benefits in each injury when the temporary disability benefits overlap.

We have received an Answer from applicant.

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

We have considered the allegations of the Petition for Reconsideration and the Answer, and the contents of the WCJ's Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant defendant'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

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

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

Per the WCJ's Report:

ADJ13744962

Osama Agaiby was a police captain employed by Culver City. On August 5, 2020, during an exercise workout in the course and scope of his duties, Agaiby fell forward with 75-pound weights strapped to his wrists, causing him to strike his face on the ground and to lose consciousness. The impact caused injuries to his neck, back, both shoulders, and both knees. (MOH/SOE pg. 3) Agaiby was temporarily totally disabled for a couple weeks but returned to modified duties performing desk work. Agaiby then was taken off work by Dr. Jae Chon February 9, 2021(Exhibit F). The applicant never returned to work. Agaiby underwent left shoulder surgery on November 11, 2021. He was found maximally medically improved for these injuries February 7, 2023 by QME Dr. William Mealer (Exhibit EE).

ADJ15463990

Osama Agaiby sustained a cumulative trauma claim for the period May 1, 1994 to February 8, 2021 for bilateral carpal tunnel syndrome (MOH/SOE pg. 2). AME Steven Brouman noted that the applicant experienced some numbness and tingling following the specific incident on August 5, 2020, but the electrodiagnostic study (EMG/NCV) of the bilateral upper extremities performed on August 24, 2020, shortly after the specific incident of August 5, 2020 did not reveal carpal tunnel syndrome. However, the subsequent electrodiagnostic study dated January 31, 2022 did show bilateral carpal tunnel syndrome. Dr. Brouman concluded that the bilateral carpal tunnel syndrome was not due to the specific incident but a work-related cumulative trauma(Exhibit AA). Initially, AME Dr. Brouman found that applicant was temporarily totally disabled as the result of the carpal tunnel syndrome beginning March of 2021(Exhibit BB). It should be noted that the cumulative trauma claim was originally pled as May 1, 2004 to March 4, 2021. However, according to the evidence presented, the applicant was taken off work as of February 9, 2022 for the August 5, 2020 injury and he never returned to work. Therefore, there was no injurious exposure attributable to the bilateral carpal tunnel syndrome past

February 8, 2021, and this is the proper end date of the cumulative trauma injury. Dr. Brouman later amended his opinion as to the start date of temporary total disability to February 9, 2021 (Exhibit DD) . The applicant was found permanent and stationary by both Dr. Keith Feder, the primary treating physician (Exhibit B), and Dr. Brouman, the Agreed Medical Evaluator (Exhibit BB) on February 16, 2023.

(WCJ's Report, pp. 1-2.)

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 August 27, 2024, and 60 days from the date of transmission is Saturday, October 26, 2024, which by operation of law means that this decision is due by Monday, October 28, 2024. (Cal. Code Regs., tit. 8, § 10600.) This decision is issued by or on Monday, October 28, 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 August 27, 2024, and the case was transmitted to the Appeals Board on August 27, 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 August 28, 2024.

II.

Section 4850(a) states that:

Whenever any person listed in subdivision (b), who is employed on a regular, full-time basis, and is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the city, county, or district, to a leave of absence while so disabled without loss of salary in lieu of temporary disability payments or maintenance allowance payments, if any, that would be payable under this chapter, for the period of the disability, but not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments pursuant to Section 4850.3.

(§ 4850(a).)

The WCJ analyzed the issue of application of section 4850 as follows:

Agaiby, a police officer, had two separate and distinct injuries which entitle him to two separate periods of Labor Code Section 4850 leave of absence benefits. The case on point is *City of Montclair v. WCAB*, 66 Cal. Comp. Cases 899; 2001 Cal. Wrk. Comp Lexis 5110. In that case, applicant Leone was a police sergeant who sustained a psychiatric injury from September 27, 1996 to November 20, 1997 after someone who Leone arrested accused him of using excessive force and filed a federal civil rights suit. Leone was TTD from November 24, 1997 until July 11, 1998, when he returned to modified duty. On July 12, 1998, Leone sustained another psychiatric injury when he assisted another officer during an arrest and was

accused of using excessive force. The applicant's psychiatric condition worsened and resulted in another period of TTD from July 13, 1998 to March 1, 1999. The WCJ awarded a second period of Labor Code Section 4850 benefits for the second injury. Defendant contended that the trial judge erred in awarding a second period of Labor Code Section 4850 benefits because the applicant was not permanent and stationary from the first injury at the time of the second injury. The WCAB denied reconsideration. Agaiby's entitlement to two separate periods of Labor Code Section 4850 benefits is even more discernible because he had two completely different mechanisms of injury with no common body parts which would necessarily contribute to a singular period of TTD. AME Dr. Brouman confirmed at his deposition that the injury to the wrists, bilateral carpal tunnel syndrome, was a separate and distinct injury from the specific trauma (Exhibit DD, page 29, lines 6-15). Thus, the second period of TTD in Agaiby's case is incidental to the first period, not consequential.

Defendant contends that the court should follow *Cardoza v. County of Alameda 2018 Cal Wrk Comp PD Lexis 279*, wherein the court held that Cardoza, a police officer, was entitled to only one period of Labor Code Section 4850 benefits. The case at bar is distinguishable because Cardoza did not miss any time from work between the first specific injury and the second specific injury. Also, Cardoza's right ankle was injured in both incidents. Cardoza's treating doctor opined that the applicant should have been TTD for the right ankle beginning from the first date of injury, and thus there really only was one period of disability.

It has been long established that the legislature intended to ensure that police officers and firefighters would not be deterred from zealous performance of their mission while protecting the public by fear of loss of livelihood. (*Kimball v. County of Santa Clara (1972) 37 Cal Comp Cases 937, 939; Biggers v. WCAB (1999) 64 Cal Comp Cases 19, quoting 51 Ops. Cal. Attny. Gen 32,34*).

Therefore, the facts of the instant case, case law, and the legislative intent require a finding that Agaiby is entitled to two periods of Labor Code Section 4850 benefits. Accordingly, the payment of Agaiby's two periods of Labor Code Section 4850 benefits must be applied in a manner that does not deprive him of the full value of said benefits while complying with the 104-week limitation on TTD pursuant to Labor Code 4656 (c)(2).

(WCJ's Report, pp. 2-3.)

The crux of this case requires resolution of the scope of section 4850 and how it interacts with temporary disability benefits. There is currently a split of authority on this issue. Moreover, the Supreme Court has accepted review on a related issue with respect to the definition of section 4850 benefits and in its order granting review, the Court noted that there is a conflict in authority. (See *California Department of Corrections and Rehabilitation v. Workers' Compensation Appeals*

Board (Ayala) (S282013) [WCAB Case No. ADJ1360597], 94 Cal. App. 5th 464 [writ of review issued December 28, 2023].)

All findings of the Appeals Board must be based on substantial evidence. (*Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 [Appeals Bd. en banc].) Section 5906 specifically empowers the Appeals Board to take additional evidence upon the filing or granting of a petition for reconsideration. (§ 5906.) Independent of a petition for reconsideration, section 5701 empowers the Board to, among other things, cause testimony to be taken. (§ 5701.) The Board's power to take additional evidence is well-established and has enjoyed continuing support. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 404 [65 Cal.Comp.Cases 264] ["it is well established that the WCJ or the Board may not leave undeveloped matters which it acquired specialized knowledge should identify as requiring further evidence."]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In fact, it has been held that a full development of the record to enable a "complete adjudication [on the merits]" is an employee's due process right. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].)

Here, it is unclear from our preliminary review whether the existing record is sufficient to support the order and decision of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above. To ensure uniformity of decisions, the Appeals Board will grant the petition for reconsideration to study the issue of application of section 4850 where an applicant sustains two injuries and periods of eligibility for section 4850 benefits overlap.

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 §§ 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 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”].)

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 sections 5950 et seq.

IV.

Accordingly, we grant defendant'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.

While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award and Order (F&A) issued in ADJ15643990 on July 23, 2024, and the Findings and Award and Order (F&A) issued in ADJ13744962 on July 23, 2024 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 28, 2024

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

**OSAMA AGAIBY
BARRY LAW GROUP
GILSON DAUB**

EDL/mc

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