

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

**PORFIRIO GARCIA LOPEZ, *Applicant***

**vs.**

**JOHN AND NICOLE SANTOS DAIRY;  
OMAHA NATIONAL INS.; ZENITH INSURANCE COMPANY, *Defendants***

**Adjudication Numbers: ADJ12895505, ADJ14723091  
Fresno District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact and Award (F&A) of April 22, 2024, wherein the workers' compensation judge (WCJ) found in relevant part that Dr. Klassen's medical reporting constituted substantial evidence. Applicant contends that Dr. Klassen's reporting did not constitute substantial medical evidence.

We have received an Answer from both defendants. The WCJ prepared a Report and Recommendation on Petition for Reconsideration and (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answers, and the contents of the Report, and we have reviewed the record in this matter. Based on our preliminary review of the record, we will grant the Petition for Reconsideration. Our order granting the 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<sup>1</sup> section 5950 et seq.

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise noted.

## I.

We highlight the following facts that may be relevant to our review of the matter. In ADJ12895505, applicant, while employed on December 2, 2017, as a milker, occupational group number 491, by John and Nicole Santos Dairy, sustained injury arising out of and in the course of employment (AOE/COE) to the neck and shoulders, and claims to have sustained injury AOE/COE to the back and upper extremities. At the time of that injury, the employer's workers' compensation carrier was Zenith Insurance Company.

In ADJ14723091, applicant, while employed on November 21, 2020, as a milker, occupational group number 491, by John and Nicole Santos Dairy, sustained injury AOE/COE to the bilateral wrists and left elbow, and claims to have sustained injury AOE/COE to neck, right shoulder, left shoulder, right knee, and back. At the time of that injury, the employer's workers' compensation carrier was Omaha National Insurance.

All parties agreed to use Dr. Michael Klassen as agreed medical evaluator (AME) for both claims. Dr. Klassen examined applicant and issued seven medical reports (Exs. 1-7) and was deposed on four occasions. (Exs. 8-11.)

The cases were consolidated and went to trial on March 6, 2024. (3/6/24 Minutes of Hearing (MOH), pp. 1-6; 3/6/24 Order of Consolidation.) Following the trial, the WCJ found that in ADJ12895505 that: 1) the opinions of Dr. Klassen constitute substantial medical evidence are relied upon by the court; 2) applicant sustained injury to the neck and bilateral shoulders 3) applicant did not sustain injury to the back or left elbow; 4) the injury caused permanent disability of 20%, after apportionment less credits for sums previously paid, and less attorney fees; 5) Dr. Klassen's apportionment opinions are sound, reasonable, and based on objective medical evidence, and constitute substantial medical evidence; 6) applicant needs further medical treatment to cure or relieve the effects of this injury; and 7) the reasonable value of services rendered by applicant's attorney is 15% of the permanent disability award which shall be commuted from the far end of the award to avoid interruption of applicant's benefits, if necessary. (F&A, pp. 2-3.) The WCJ made the following award in favor of the applicant against defendant as follows: 1) applicant awarded permanent disability per finding number 4, less amounts previously paid, if any; 2) apportionment is established as set forth in Finding of Fact number 5; 3) applicant is need of further medical treatment; and 4) applicant's attorney is entitled to 15% attorney fees. (F&A, p. 3.)

In ADJ14723091, the WCJ made the following findings: 1) the opinions of Dr. Klassen constitute substantial medical evidence are relied upon by the court; 2) applicant sustained injury to the bilateral shoulders, bilateral wrists and bilateral elbows; 3) applicant did not sustain injury to the back; 4) applicant did not sustain injury to the right knee; 5) Dr. Klassen's apportionment opinions are sound, reasonable, and based on objective medical evidence, and constitute substantial evidence; 6) the permanent and stationary (P&S) date is January 1, 2021, based on the reporting of AME Dr. Klassen; 7) the injury caused permanent disability of 12% after apportionment and equal to 38.25 weeks at the rate of \$290.00 per week in the total sum of \$11092.50, less credit for sums previously paid and less attorney fees in the amount of 15% of applicant's award to be commuted from the far end of the award; 8) defendant Omaha Insurance additionally is entitled to credit of \$9,973.25, based on AME Dr. Klassen's MMI date to be deducted from the permanent disability award; 9) need for future medical treatment to cure or relieve the effects of the industrial injury; and 10) the reasonable value of attorney's fee is 15% which shall be commuted from the far end of the award to avoid interruption of the applicant's benefits. (F&A, p. 4.) The WCJ made the following award in favor of the applicant against defendant as follows: 1) applicant entitled to permanent disability award as per Finding # 7; 2) defendant is entitled to credit per Finding # 8; 3) applicant is in entitled to medical treatment to cure or relieve the effects of his industrial injury as per Finding # 9; 4) applicant attorney fees as per Finding # 8. (F&A, pp. 4-5.)

Applicant filed the Petition for Reconsideration on May 8, 2024, contending, in part, that the reporting of Dr. Michael Klassen does not constitute substantial medical evidence, and that the WCJ should have ordered a regular physician to further develop the record. Applicant asserts the multiple reports are confusing, contradictory, and internally inconsistent. (Petition, p.6-7.)

Both defendants in their Answers assert that the WCJ correctly relied upon the reporting of Agreed Medical Evaluator (AME) Michael Klassen, M.D., and that there was no need to further develop the medical record.

The WCJ's Report indicates she found the medical reporting sufficient upon which to rely as substantial evidence, and thus supplementation under *McDuffie v Workers' Comp. Appeals Bd.* (en banc 2002) 67 Cal.Comp.Cases 138, was thus unnecessary.

## II.

We highlight the following legal principles that may be relevant to our review of the matter.

A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. en banc).) “Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board’s findings if it is based on surmise, speculation, conjecture or guess.” (*Heggin v. Workmen’s Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Medical evidence that industrial causation was reasonably probable, although not certain, constitutes substantial evidence for a finding of injury AOE/COE. (*McAllister v. Workmen’s Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 417 [33 Cal.Comp.Cases 660].) “That burden manifestly does not require the applicant to prove causation by scientific certainty.” (*Rosas v. Worker’s Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

On the other hand, there must be some solid basis in the medical report for the doctor’s ultimate opinion; the Appeals Board may not blindly accept a medical opinion which lacks a solid underlying basis, and must carefully judge its weight and credibility. (*National Convenience Stores v. Workers’ Comp. Appeals Bd. (Kesser)* (1981) 121 Cal.App.3d 420, 426 [46 Cal.Comp.Cases 783].) In other words, the Appeals Board must look to the underlying facts of a medical opinion to determine whether or not that opinion constitutes substantial evidence, and accordingly, the expert’s opinion is no better than the facts on which it is based. (*Turner v. Workers’ Comp. Appeals Bd.* (1974) 42 Cal.App.3d 1036, 1044 [39 Cal.Comp.Cases 780].)

### III.

It is well established that decisions by 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].) “The term ‘substantial evidence’ means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value.” (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924] [“The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims.”]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

The Appeals Board also 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.)

Here, it is unclear from our preliminary review whether the existing record is sufficient to support the decision, order, and legal conclusions of the WCJ; and/or whether further development of the record may be necessary.

#### IV.

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 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 [32 Cal.Comp.Cases 431]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593.) 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 sections 5950 et seq.

Accordingly, we grant the 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 applicant's Petition for Reconsideration of the Findings of Fact and Award of April 22, 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/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**KATHERINE A. ZALEWSKI, CHAIR**  
**CONCURRING, NOT SIGNING**



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

**July 8, 2024**

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

**PORFIRIO GARCIA LOPEZ  
DILLES LAW  
CHERNOW, PINE AND WILLIAMS  
COLEMAN CHAVEZ & ASSOCIATES LLP**

**JMR/mc**

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