WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BERENICE TORRES, ***Applicant***

vs.

WALMART INC;
ACE AMERICAN INSURANCE COMPANY;
ADMINISTERED BY SEDGWICK,
Defendants

Adjudication Numbers: ADJ13523690; ADJ13523692
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Lien claimant, Medland Medical, has petitioned for reconsideration of the Joint Findings and Award issued and served by the workers' compensation administrative law judge (WCJ) in this matter on February 24, 2025. In that decision, the WCJ found that lien claimant failed to prove that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) in both ADJ13523690 (specific injury claim for July 20, 2020, injury to head, ear, eye, back, right lower extremity, psyche, hair loss and COVID-19 and ADJ13523692 (cumulative trauma claim to head, back, ears, lower extremity, legs, chest, and respiratory system); and failed to prove entitlement to reimbursement for treatment services in either case. The WCJ awarded lien claimant reimbursement for reasonable medical-legal charges arising from the evaluation and report dated September 21, 2020 and disallowed the remaining dates of service.

Petitioner contends that the WCJ erred in relying on the panel qualified medical evaluator (PQME) report in finding that lien claimant did not prove industrial injury and in not relying on the medical-legal reporting of applicant's treating physician.

Defendant filed an answer to lien claimant's petition.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending denial of the Petition.

Based upon our preliminary review of the record, we will grant defendant's 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 section 5950 et seq.

I.

Former Labor Code section 5909[1] 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.

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 April 9, 2025 and 60 days from the date of transmission is Sunday, June 8, 2025. The next business day that is 60 days from the date of transmission is Monday, June 9, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision

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

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

is issued by or on Monday, June 9, 2025, 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 workers' compensation administrative law judge, the Report was served on April 9, 2025, and the case was transmitted to the Appeals Board on April 9, 2025. 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 April 9, 2025.

II.

Preliminarily, we note the following, which may be relevant to our review:

Applicant claimed injury in the form of exposure to COVID-19 while employed as a department manager by defendant on July 20, 2020.

The WCJ's Report provides the following background:

> The Applicant filed a cumulative trauma claim for injuries sustained during her employment with Walmart Associates, Inc., from August 12, 2002, to August 20, 2020. The injuries alleged were to her head, back, ears, lower extremity, legs, chest, and respiratory system. (ADJ13523692).
>
> She also filed a specific claim for a date of injury of 7/20/20 for injury to her head, ear, eye, back, right lower extremity, psyche, hair loss and COVID-19. ADJ13523690. Defendants claim that Dr. Vasile is the PTP and the Lien Claimant objects.
>
> There is a denial letter for the specific date of injury. Defendant's Exhibit "L" dated 9/17/20 is a denial letter stating that "there is no substantial medical evidence to support industrial causation." There are no delay or denial letters offered for the CT claim. Defendant's Exhibit "G" dated 12/30/3020 is an objection to medical treatment provided by Medland for the date of loss of 8/20/2020 which is the ending date of the CT claim. It notes that "this claim was denied based on no substantial medical evidence to support industrial causation. The Covid Testing is outside the existing Governors executive order."

Lien claimant, Medland Medical, filed Exhibit 14, a letter dated September 17, 2020, prepared by the Applicant Attorney, Robert Ozeran, Esq., noting that he elected Dr. Omid Haghighinia D.C. of Medland Medical as the treating physician under Labor Code 4600.

The letter stated:

> I am specifically requesting that you prepare a narrative report giving substantially more elaboration of medical information beyond that required by and set forth in CCR 9785.
>
> Please comment, if necessary concerning the appropriateness of all previously recommended treatment. Should you initiate treatment of this client, I request that you supplement your routine PR-2's with periodic consultative narrative reports at times as such would be advisable for purposes of clarification and/or elaboration of information beyond the minimum required by CCR 9785, which only requires a brief report. Below are areas, which your report must cover to be complete. (Exhibit 14).

On or around January 19, 2021, the Applicant was evaluated by internal Panel QME Dr. James Lineback, M.D., who would have been the appropriate physician to address the Applicant's claim of Covid 19, and whether or not the disease accelerated or aggravated her orthopedics issues. Dr. Lineback recommended that the Applicant go to an orthopedist for her back pain and a dermatologist for hair loss. Referral to an ENT specialist to address the eyes and ears claim of injury was made, which were all outside the scope of the specialty of internal medicine PQME.

On September 1, 2021, the Applicant underwent an evaluation by Panel Qualified Medical Evaluator (PQME) Dr. Jason Chiu, M.D., a specialist in orthopedics. He diagnosed the Applicant with multilevel lumbar degenerative disc disease, chronic right lower back pain, and radiculopathy but concluded that the causation of her condition was non-industrial, attributing it instead to obesity and degenerative changes.

Dr. Omid Haghighinia of Medland Medical conducted a comprehensive medical evaluation of the Applicant on September 21, 2020, as part of his first report of injury.

The Applicant ultimately settled the case by way of Compromise and Release on or around September 27, 2023, when she signed the settlement for $40,000.00.
(Report, pp. 1-3.)

III.

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

Sections 3212 through 3213 contain a series of statutory presumptions regarding the industrial nature of various injuries. Sections 3212.86, 3212.87, and 3212.88 were enacted pursuant to Senate Bill (SB) 1159 as urgency statutes - necessary for the immediate preservation of the public peace, health, or safety, on September 17, 2020. In broad terms section 3212.86 applies to the time frame from March to July 2020; section 3212.87 applies to front-line workers; and section 3212.88 applies to workers not described in section 3212.87, who meet certain criteria. Here, applicant tested positive for COVID-19 on July 23, 2020.

Section 3212.88 sets forth a presumption of compensability if a worker contracted COVID-19 during an outbreak at the worker's specific place of employment and certain other conditions are met. (Lab. Code, § 3212.88(a)-(b)). It is applicant's burden to establish the presumption. This may be shown by stipulation of the parties, testimony, or documentary evidence. Specifically the applicant must establish:

> (1) That they tested positive for COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction.
>
> (2) The day referenced in paragraph (1) was on or after July 6, 2020.
>
> (3) The positive test occurred during a period of an outbreak at the employee's specific place of employment.

(Lab. Code, § 3212.88(b).)

This presumption is disputable and may be controverted by other evidence. (Lab. Code, § 3212.88(e)(1)d.) Unless controverted, however, the Appeals Board is bound to find in accordance with the presumption. (*Id*.) Thus, if the presumption applies, the burden shifts to the defendant to establish, by a preponderance of the evidence, that applicant's COVID-19 related injury is not entitled to a presumption of compensability pursuant to section 3212.88. (Lab. Code, §§ 3202.5, 5705.) Section 3212.88(e)(2) provides that "Evidence relevant to controverting the presumption may include, but is not limited to, evidence of measures in place to reduce potential transmission of COVID-19 in the employee's place of employment and evidence of an employee's nonoccupational risks of COVID-19 infection." (Lab. Code, § 3212.88(e)(2).)

Here, defendant does not dispute that applicant tested positive for COVID-19 on July 23, 2020; and that applicant last reported for work on July 20, 2020. However, the record contains no evidence of whether any additional coworkers tested positive for COVID-19 in the same period, or any evidence of

an inquiry made by the parties into whether there was a period of outbreak at the employee's specific place of employment. Thus, it is not possible to ascertain whether the presumption under section 3212.88 applies.

The WCJ's decision 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).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313.) "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* at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision 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 (citation omitted).)

Additionally, all parties in workers' compensation proceedings retain their fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (*Rucker*) (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) As stated by the Supreme Court of California 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 p. 577.)

Due process guarantees all parties the right to notice of hearing and a fair hearing. (*Rucker, supra,* 82 Cal.App.4th at pp. 157-158.) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (*Gangwish*) (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker* at pp. 157-158, citing *Kaiser Co. v. Industrial Acci. Com.* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (*Katzin*) (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) Here, the issue of whether the presumption applies raises a question of due process, as neither party has had the opportunity to properly develop the evidentiary record on the actual issue(s) presented. (*Katzin, supra,* 5 Cal.App.4th at pp. 711-712; *Gangwish, supra,* 89 Cal.App.4th 1284.)

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

IV.

In addition, 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]; *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 after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to section 5950 et seq.

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 lien claimant's Petition for Reconsideration 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/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 6, 2025

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

BERENICE TORRES
MEDLAND MEDICAL
MULLEN&FILIPPI

LN/md

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