

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

ERIC DMUCHOWSKY, *Applicant*

vs.

**LGS SKY CHEFS;
LIBERTY MUTUAL INSURANCE, *Defendants***

**Adjudication Numbers: ADJ10537630 (Master 5/18/16 DOI)
ADJ11337625 (5/3/16 DOI), ADJ11337625
Oakland District Office**

**OPINION AND ORDER GRANTING
PETITION FOR RECONSIDERATION**

Applicant seeks reconsideration from the Joint Findings and Orders (F&O) issued by a workers' compensation administration law judge (WCJ) on September 20, 2024. The WCJ found that in ADJ10537630, applicant's claim of specific injury on May 8, 2016 as a result of a physical altercation with co-worker Paresh Khatri, applicant was the initial physical aggressor (May 8 claim); and that in ADJ11337625, applicant's claim of specific injury on May 3, 2016 to his lower extremity, toes and foot was untimely filed on June 1, 2018 with no legal or factual basis to toll the statute of limitations (May 3 claim). The WCJ ordered that pursuant to the findings of fact and Labor Code¹ section 3600, subdivision (a)(7), applicant's May 8 claim is barred as a matter of law and that he take nothing from it; and, that pursuant to section 5400 and 5405, applicant's May 3 claim is barred by the statute of limitations and that he take nothing from it. Despite these orders barring both claims, the WCJ also deferred "all other issues."

Applicant contends that as to the May 3 claim, defendant may not assert the statute of limitations defense because it failed to comply with its duty to provide applicant with a DWC-1 claim form and notice of rights pursuant to section 5401 despite defense witness testimony confirming applicant's same-day reporting of his leg wound to multiple supervisors; that defendant's responsible employee determined that the leg wound was a "first-aid injury" without

¹ All further references are to the Labor Code unless otherwise noted.

sending applicant for medical evaluation and the wound resulted in necrotizing fasciitis (NF) which continues to harm applicant to the present day; and, that applicant's statute of limitations was therefore tolled pursuant to *Kaiser Found. Hosps. Permanente Medical Group v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 63 [50 Cal.Comp.Cases 411], *Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726 [39 Cal.Comp.Cases 768], and *CIGA v. Workers' Comp. Appeals Bd. (Carls)* 163 Cal.App.4th 853, 863-864 [73 Cal.Comp.Cases 771].

As to the May 8 claim, applicant contends that the evidence does not justify the WCJ's finding that applicant was the initial aggressor because there is more evidence to find applicant's version of the incident more credible than Mr. Khatri's version of the event.

Defendant filed an answer to the petition, and the WCJ filed a Report and Recommendation on Applicant's Petition for Reconsideration and Notice of Transmission to the Reconsideration Unit of the Appeals Board (Report), recommending that the petition be denied.

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 section 5950 et seq.

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.

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 November 14, 2024, and 60 days from the date of transmission is January 13, 2025. This decision is issued by or on January 13, 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. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on November 14, 2024, and the case was transmitted to the Appeals Board on November 14, 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 November 14, 2024.

II.

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

First, deposition transcripts are admissible evidence in workers’ compensation proceedings. (Lab. Code, § 5708 [The Appeals Board “shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division.”]; e.g., *Mote v. Workers’ Comp. Appeals*

Bd. (1997) 56 Cal.App.4th 902, 913 [62 Cal.Comp.Cases 891] [hearsay is admissible in workers' compensation proceedings].)

Next we note that Labor Code 5313 requires that after a matter is submitted, and together with findings of fact, orders, and/or awards, a WCJ "shall" serve "a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313; see also *Blackledge v. Bank of America, ACE American Insurance Company (Blackledge)* (2010) 75 Cal.Comp.Cases 613, 619-22 (Appeals Bd. en banc).) This opinion on decision must be based on admitted evidence (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*)), and 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] (*Garza*); *Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

The purpose of section 5313 is "to avoid careless and arbitrary action and to assist the reviewing court in meaningful judicial review by providing the court with the principles relied on by the Board." (*Twentieth Century-Fox Film Corp. v. Workers' Comp. Appeals Bd. (Conway)* (1983) 141 Cal.App.3d 778, 784 [48 Cal.Comp.Cases 275], citing *Goytia v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 889, 893 and *Patterson v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 916, 924.) The WCJ's opinion on decision therefore "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) As a consequence, any decision of the WCJ or the Appeals Board that fails to dispose of all issues raised and necessary for decision constitutes error, which would require remand upon review. (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145; see *Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal.2d 102, 124.)

Here, the statute of limitations issue was *very* generally raised at trial: "In ADJ11337625, defendant's statute of limitations defense with respect to the May 3, 2016 specific injury." (MOH, September 14, 2020, p. 3.)² The running of the statute of limitations is an affirmative defense, and

² There is some evidence in the record indicating that the May 3, 2016 date may need to be amended to conform to proof to May 4, 2016. Workers' compensation "[p]leadings may be amended by the Workers' Compensation Appeals

therefore, the burden of proof as to whether the May 3 claim is barred rests with defendant. (Lab. Code, §§ 5409, 5705.) Section 5405 states in full:

The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:

- (a) The date of injury.
- (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
- (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.

(Lab. Code, § 5405.)

The WCJ disposed of those issues related to the one-year statute of limitations found in section 5405, subdivision (a), and whether or not that one-year statute was tolled due to his employer's failure to provide him with a claim form and notice of his workers' compensation rights pursuant to cases like *Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 Cal.4th 24 [70 Cal.Comp.Cases 97], *Martin*, and *Reynolds*. (See F&O, Opinion on Decision, pp. 12-18; Report, p. 28 citing *Price v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1687 [applicant was represented by counsel "as of at least August 2016" but did not file the May 3 claim until June 1, 2018].) Ultimately, the WCJ found that applicant's May 3 claim was barred by section 5405, subdivision (a) and was not tolled under those principles enunciated by *Honeywell*, *Martin*, and *Reynolds*. Tolling under *Martin, et al*, is in pertinent part based on the employer's duty under section 5401, subdivision (a):

- (a) Within one working day of receiving notice or knowledge of injury under Section 5400 or 5402, *which injury results in lost time beyond the employee's work shift at the time of injury or which results in medical*

Board to conform to proof." (Cal. Code Regs., tit. 8, § 10492.) An amended application that "sets forth the required detail" but is filed more than one year from an applicant's date of injury "relates back to the original timely application and preserves the jurisdiction of the Board to hear the matter." (*Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 199-200.) "In workers' compensation proceedings, as in civil proceedings generally, "[the] statute of limitations will not bar amendment of an application where the original application was timely and the amendment does not present a different legal theory or set of facts constituting a separate cause of action." (citation)' (citation) ..." (*Id.*, at p. 200.) "If a party is disadvantaged by the insufficiency of a pleading, the remedy is to grant that party a reasonable continuance to permit it to prepare its case or defense. (citations)" (*Id.*, at pp. 200-201.)

treatment beyond first aid, the employer shall provide, personally or by first-class mail, a claim form and a notice of potential eligibility for benefits under this division to the injured employee, or in the case of death, to his or her dependents. ...

(Lab. Code, § 5401(a), italics added.)

The WCJ concluded that “*the evidence that such a scratch/cut [the May 3 claim injury] caused and/or was related to and/or caused a subsequent lower extremity infection of the toe and/or leg, is minimal at best, and such symptoms did not manifest until many weeks later.*” (Report, p. 26, italics added.) The WCJ concluded therefore that applicant’s May 3, 2016 injury did *not* result “in anything more than a need for first aid and/or a Band-Aide where he was bleeding” on the day of the injury. (Report, p. 27.) However, the cause, nature and extent of applicant’s May 3, 2016 injury was not raised for adjudication at trial. (MOH, September 14, 2020, p. 3.)³ Even so, the WCJ moved forward and determined those issues and consequently that defendant had no duty under section 5401 to provide a claim form or notice to applicant regarding his May 3, 2016 injury.

The WCJ 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] [“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 (citations)”]; see *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).) The WCJ, “. . . may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence.” (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 404 [65 Cal.Comp.Cases 264].)

³ We note that in the Pre-Trial Conference Statement dated November 14, 2019, the settlement conference WCJ set four issues for trial including the two issues that made it to trial in this matter, i.e., initial aggressor per section 3600 (a)(7) and the statute of limitations. (Pre-Trial Conference Statement, November 14, 2019, pp. 3-4.) The two other issues identified for trial which were not raised or adjudicated were due diligence in conducting discovery by applicant, and whether applicant is entitled to an infectious disease qualified medical evaluation and/or a psyche qualified medical evaluation. (*Ibid.*)

Here it is unclear from our preliminary review of the existing record as to whether defendant employer did not attempt to induce applicant not to file a workers' compensation claim, although certainly the record is not replete nor developed on the question. However, given that the issues were not specifically framed, and that there is some evidence that triggers *Honeywell* and *Peterson*, the WCJ should have disposed of the issue or more appropriately, and given the state of this record, deferred them pending further development of the record. Taking into account the statutory time constraints for acting on the petitions, 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. Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

III.

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 is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

For the foregoing reasons,

IT IS ORDERED that applicant’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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 13, 2025

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

**ERIC DMUCHOWSKY
LAW OFFICE OF ROBERT D. BLINDER
MCLAUGHLIN & COFFINBERRY**

PAG/abs

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