WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GEORGE KRIKES, *Applicant*

vs.

GOLDMAN, MAGDALIN, & KRIKES, LLP;
THE HARTFORD ACCIDENT AND INDEMNITY INSURANCE, *Defendants*

Adjudication Number: ADJ16929084
Oxnard District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seek reconsideration of Findings of Fact (Findings) issued on September 3, 2025. The workers' compensation administrative law judge (WCJ) found in pertinent part that applicant was not employed by defendant but was covered by defendant's workers' compensation carrier and that applicant did not sustain an injury arising out of the course and scope of employment to his brain, face, eye, hearing, and stroke during the period from November 1, 1999 through June 17, 2022.

Applicant argues that the WCJ erred in finding that applicant was not an employee because applicant was in fact an employee pursuant to Labor Code section 3351(f)[1] because he was a working partner who was paid wages irrespective of profits. Applicant also alleges that the injury did arise out of and in the course and scope of employment because all activities of employment, even a "business act," do arise out of and in the course of employment. Hence, the injury should be found compensable because the medical evidence supports causation.

Defendant filed an answer. The WCJ issued a Report and Recommendation (Report) recommending denial of the petition.

[1] All further statutory references will be to the Labor Code unless otherwise indicated.

We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the decision and return the matter to the trial level for further proceedings consistent with this opinion.

FACTS

Applicant alleges injury while employed as an "attorney/managing partner" during the period of November 1, 1999 through June 17, 2022 to the circulatory system, brain, face, eye, hearing, and stroke. Defendant's carrier, The Hartford Accident and Indemnity Insurance (Hartford), denied the claim on February 23, 2023 due to lack of substantial evidence to support industrial injury. (Joint C.)

The matter proceeded to trial on June 11, 2025. (Minutes of Hearing, Summary of Evidence (MOH/SOE).) The matter was set on several issues, the most relevant here being employment, insurance coverage, and injury arising out of and in the course of employment. Specifically, whether applicant, as a partner in a law firm, was an employee at the time of injury and covered by Hartford's policy. (MOH/SOE, 2:14-16.)

Excerpts of the Hartford policy were admitted into evidence as Applicant 1. Defense Exhibit A was also admitted over applicant's objection as noted in the WCJ's opinion. Neither document encompasses the full policy, Defense Exhibit A is only an endorsement modifying the standard policy, and both documents appear to lump together different policy years.

At trial applicant testified that he and two other partners were the founding partners of the law firm and that he is currently a senior partner. (MOH/SOE, 4:6-11.) Applicant testified that in addition to handling a full caseload, he also marketed for the firm and handled personnel and hiring. (MOH/SOE, 4:10-14.) He testified that in February or March of 2022, an unexpected financial debt in the firm caused him to experience significant financial stress. (MOH/SOE, 6:15-19.) Applicant explained was paid as a draw against profits and that the monthly draw was considered a salary. (MOH/SOE, 7:2-5.) He also received a car allowance and his bar dues were paid. (MOH/SOE, 7:5-7.) He testified that he also had the option to be reimbursed for health insurance. (MOH/SOE, 7:7-10.)

In roughly May of 2022, applicant suffered his first stroke. He returned to work, but suffered a second stroke on or about June 17, 2022. (MOH/SOE, p. 8:17-9:3.) He has not worked

since that date, but did receive some payment from the firm through approximately July of 2022. (MOH/SOE, 9:16.)

Defendant called a witness, another named partner of the firm, to testify. This witness testified that he, the applicant, and one other person were the principal partners. (MOH/SOE, 10:11-13.) He testified that they would forecast revenues and expenses and then attempt to have monthly draws that were paid biweekly commensurate with expected revenue share in the course of the year. (MOH/SOE, 10:15-20.) He indicated that their draws were not necessarily reflective of actual profit and loss of the firm because they are cash based. (MOH/SOE, 10:21-22.) Other partners with lesser shares were guaranteed an income. (MOH/SOE, 10:25-11:2.) Neither party offered applicant's partnership agreement or testified that there was a written agreement.

Applicant attended two Qualified Medical Evaluator (QME) evaluations with QMEs in Neurology and Psychiatry. (Joint A&B.) The QME in neurology, Sherie Fineman, M.D., opined that the work related incident in April of 2022 wherein the partners were advised of a past account from 2015 that had turned negative, which resulted in back taxes being owed exacerbated his pre-existing hypertension and diabetes, which caused the strokes. (Joint A, p. 145.) The psychiatric QME Lindslee Egan, M.D., similarly opined that applicant's psychiatric condition was caused by a combination of the aforementioned financial event in April of 2022 as well as perceived excessive workload. (Joint B, p. 22-23.)

The WCJ found that applicant was not an employee but was still covered by Hartford as an attorney, but that applicant did not sustain an industrial injury. In her opinion, she explained that applicant was not employee under section 3351(f) because he only took a draw from profits and did not receive wages. However, she opined that Hartford's policy did cover him for any attorney work as outlined in the policy. With respect to her finding that applicant did not sustain a cumulative injury, she described the basis for her decision in the Opinion. She stated that the medical evidence from Dr. Fineman showed that:

> There is no finding being made that the neurological aspects, including the strokes, were due to a cumulative trauma related to the applicant's attorney duties. Rather, causation is specifically found due to the specific date on which the applicant learned about the partner's tax issues, and that he would have to pay a significant amount of money.

Therefore, since she decided that both QMEs found that the injuries sustained by applicant were the result of his business activity as a partner and not as a result of his employment activity as an attorney, the policy did not cover the injury and applicant did not sustain injury.

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:

> (2) 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.
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> (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 October 24, 2025 and 60 days from the date of transmission is December 23, 2025. This decision is issued by or on December 23, 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.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on October 24, 2025 and the case was transmitted to the Appeals Board on October 24, 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 October 24, 2025.

II

California has a no-fault workers' compensation system. With few exceptions, all California employers are liable for the compensation provided by the system to employees injured 4 or disabled in the course of and arising out of their employment, "irrespective of the fault of either party." (Cal. Const., art. XIV, § 4.) The protective goal of California's no-fault workers' compensation legislation is manifested "by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.'" (Lab. Code, §§ 3351, 5705(a)1; *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354 [54 Cal.Comp.Cases 80].)

An "employee" is defined as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." (Lab. Code, § 3351.) Further, any person rendering service for another, other than as an independent contractor or other excluded classification, is presumed to be an employee. (Lab. Code, § 3357.) Once the person rendering service establishes a prima facie case of "employee" status, the burden shifts to the hirer to affirmatively prove that the worker is an independent contractor or other excluded classification. (*Cristler v. Express Messenger Sys., Inc.* (*Cristler*) (2009) 171 Cal.App.4th 72, 84 [74 Cal.Comp.Cases 167]; *Narayan v. EGL, Inc*. (*Narayan*) (2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724].)

Section 3351(f) includes in the definition of employee, "all working members of a partnership or limited liability company receiving wages irrespective of profits from the partnership or limited liability company. *A general partner of a partnership or a managing member of a limited liability company may elect to be excluded from coverage in accordance with paragraph (17) of subdivision (a) of Section 3352*." (Lab. Code, §3351(f), emphasis added.)

Here, the WCJ found that applicant was not an employee because he was not receiving wages irrespective of profits.[2] The parties fail to acknowledge that the section goes on to specifically address general partners, without limiting language, that have not elected to be *excluded* from coverage.[3] Whether applicant was a working member of a partnership or a general partner, he would be automatically covered by the division regardless. Section 3352 (a)(17)(A) specifically provides that general partners *may be* excluded from the definition of employee, and thereby excluded from coverage, only when they execute "a written waiver of his or her rights under this chapter stating under penalty of perjury that the person is a qualifying general partner." (Lab. Code, § 3352(a)(17))[4] Neither party appears to dispute that applicant is a general partner that remained a practicing attorney, thereby meeting the definition of employee either under the general definition or the explicit inclusion of subsection f of Section 3351. Thus, this issue is not an employment issue, but a coverage issue.

Section 5275(a) (1) requires that disputes involving issues of insurance coverage shall be submitted for arbitration. (Lab. Code, § 5275.) This matter should have been submitted for arbitration prior to issuing an award on the other substantive issues regarding compensability of the claim. As such, we will rescind the findings of fact and return the matter to the WCJ to order the matter submitted to arbitration.

However, the employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd*. (*Clark*) (2015) 61 Cal.4th 291, 297 298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a) & 3202.5.) An injury must be proximately caused by the employment in order to be compensable. (Lab. Code, § 3600(a)(3); see also *Clark*, *supra*, 61 Cal.4th at pp. 297-298.) Proximate cause in workers' compensation

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[2] We make no finding on whether applicant was earning wages irrespective of profits. However, the record is not substantial on this point as neither witness was able to testify as to the compensation structure with any clarity, the partnership agreement is notably absent from the record, and applicant did testify that he was getting other remuneration including a car allowance and some possibility of reimbursement for health insurance.

[3] Prior to July 1, 2018, working member that were also general partners were excluded from the definition of employee and could only be covered by this division by affirmatively electing into coverage. AB 2883 revised the statute to eliminate the exclusion and provide that general partners were included in coverage unless they executed a waiver. (AB 2883, Stats. 2016, ch. 205)

[4] It is worth noting, that Exhibit 1, lists all the partners and notes "Included due to no exclusion endorsement." As noted above, both exhibits with excerpts of the alleged policies are woefully incomplete. However, it is likely that that this language indicates that none of the listed partners executed a waiver pursuant to section 3352(a)(17)(A). The WCJ's interpretation that this language meant that only attorney activities were covered is misplaced and not supported by the incomplete policy or the record.

requires the employment be a contributing cause of the injury. (*Clark*, *supra*, 61 Cal.4th at pp. 297-298 [outlining this standard and analyzing the difference between causation in tort law and causation in workers' compensation].)

Section 3208.1 defines a "cumulative" injury as one "occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." (Lab. Code §3208.1)

In any given situation, there can be more than one injury, either specific or cumulative or a combination of both, arising from the same event or from separate events. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1990) 219 Cal.App.3d 1265, 1271 [55 Cal.Comp.Cases 107].) Cumulative injury occurs from repetitive mental or physical activities at work over a period of time, which causes any disability or need for medical treatment. (§ 3208.1; *Western Growers Ins. Co., v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323]; *J.T. Thorp, Inc., v. Workers' Comp. Appeals Bd.* (*Butler*) (1984) 153 Cal.App.3d 327, 332-333 [49 Cal.Comp.Cases 224].) Findings regarding cumulative injury and the date of injury must be based on substantial evidence such as medical opinion and testimony considering the entire record. (*Garza v. Workmen's Comp. App. Bd.* (*Garza*) (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *Austin*, *supra*, 16 Cal.App.4th at pp. 233- 241; *City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467, 470-473 [50 Cal.Comp.Cases 53].)

It is well established that decisions and awards 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 medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117, 1121-1122 [72

Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924]; §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403-404 [94 Cal. Rptr. 2d 130, 65 Cal.Comp.Cases 264].) The "Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee." (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd*. (*McKernan*) (1999) 74 Cal. App. 4th 928, 937-938 [88 Cal. Rptr. 2d 516, 64 Cal.Comp.Cases 986].) The preferred procedure to develop a deficient record is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

While we make no determination as to the issue of whether applicant sustained industrial injury, we first note that a WCJ may not choose to ignore the conclusions of the medical evaluator if the WCJ believes that they are not substantial evidence; instead, further development of the record is appropriate in those circumstances. A medical opinion is not substantial medical evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378–379 [35 Cal.Comp.Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].) The function of the court on review is to determine whether the evidence, if believed, is substantial and supports the findings. (*Le Vesque v. Workers' Comp. Appeals Bd*. (1970) 1 Cal. 3d 627 [35 Cal.Comp.Cases 16]; *Foster v. Ind. Acci. Com*. (1955) 136 Cal. App. 2d 812, 816.)

We observe that QME Dr. Fineman's report betrays a fundamental lack of understanding as to the definition of an injury caused by cumulative trauma and causation thereof. If the matter returns to the trial level for further proceedings after the coverage determination, we recommend that the parties consider further development of the record with respect to Dr. Fineman's opinions, and if they are unable to be cured, the parties may wish to proceed with an agreed medical evaluator or request that the WCJ appoint a physician pursuant to section 5701.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of September 3, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of September 3, 2025 is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 22, 2025

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

GEORGE KRIKES
ROSE, KLEIN & MARIAS
TESTAN LAW

TF/md

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