WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JASON WILDER, *Applicant*

vs.

CITY OF CHULA VISTA POLICE DEPARTMENT; permissibly self-insured, administered by INTERCARE HOLDINGS INSURANCE SERVICES, *Defendants*

Adjudication Number: ADJ16333606
San Diego District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on February 20, 2025, wherein the WCJ found that applicant did not sustain injury arising out of and in the course of employment (AOE/COE) of Valley Fever or lungs and ordered that applicant take nothing by way of the claim filed.

Applicant contends that the presumption in Labor Code[1] section 3212 applies to applicant, and that applicant is entitled to the presumption of injury AOE/COE. Applicant further contends that defendant did not meet their burden to rebut the presumption pursuant to section 3212.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition the Answer, and the contents of the Report with respect thereto.

Based upon our preliminary review of the record, we will grant applicant'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

[1] All statutory references are to the Labor Code unless otherwise stated.

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.
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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 March 19, 2025, and 60 days from the date of transmission is Sunday, May 18, 2025. The next business day that is 60 days from the date of transmission is Monday, May 19, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, May 19, 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

[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.

act on a petition. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

Here, according to the proof of service for the Report by the WCJ, the Report was served on March 19, 2025, and the case was transmitted to the Appeals Board on March 19, 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 March 19, 2025.

II.

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

Applicant claimed injury to the respiratory system in the form of coccidioidomycosis pneumonia (Valley Fever) while employed by defendant as a police officer on May 24, 2022.

The WCJ's Report provides the following background:

> Applicant, born [], while employed on May 24, 2022, as a police officer, occupational group no. 490, at Chula Vista, California, by City of Chula Vista Police Department, claims to have sustained injury arising out of and in the course of employment to his respiratory system, resulting in a diagnosis of valley fever and pulmonary coccidioidomycosis. The City of Chula Vista timely denied the case.
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> **Alternate Dispute Resolution Agreement**
> Pursuant to the Alternative Dispute Resolution (ADR) agreement between the City of Chula Vista and the Chula Vista Police Officer's Association, the disputed issue was/is to be handled by way of alternative dispute resolution (ADR). Pursuant to the ADR agreement, the parties are required to utilize an Independent Medical Evaluator (IME) and be bound by the opinion of such IME.
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> Based upon the required stipulation in the ADR agreement, the parties utilized IME Dr. Jonathan Green who issued multiple five reports (five) (Joint Exhibits 1, 2, 3, 4 and 6) and was deposed on one occasion (Joint Exhibit 5).
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> ***
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> [T]he matter proceeded to Trial over several days on the sole issue of AOE-COE. The parties presented multiple medical reports from IME Dr. Jonathan Green (Joint Exhibits 1-4 and 6) and the Deposition of IME Dr. Jonathan Green (Joint Exhibit 5). The applicant testified on his own behalf.

(Report, pp. 3-4.)

III.

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

To be compensable, an injury must arise out of and occur in the course of employment. (Lab. Code, § 3600.) 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.) 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].)

However, in the case of certain public employees, who provide "vital and hazardous services" to the public, the Labor Code contains a series of presumptions of industrial causation. As explained by the Court of Appeal in *Marinwood Community Services, Inc. v. Workers' Comp. Appeals Bd. (Romo)* (2017) 10 Cal.App.5th 231 [82 Cal.Comp.Cases 317]:

> [I]n the case of certain public employees who provide 'vital and hazardous services' to the public [citation], the Labor Code contains a series of presumptions of industrial causation. These presumptions provide that when specified public employees develop or manifest particular injuries or illnesses, during their employment or within specified periods thereafter, the injury or illness is presumed to arise out of and in the course of their employment. (See §§ 3212 [hernia, heart trouble, pneumonia], 3212.2, 3212.3, 3212.4, 3212.5, 3212.6 [tuberculosis], 3212.7, 3212.8 [blood-borne infectious diseases], 3212.85 [exposure to biochemical substances that may be used as weapons of mass destruction], 3212.9 [meningitis], 3212.10, 3212.11 [skin cancer], 3212.12 [Lyme disease], 3213, 3213.2 [lower back impairments].) These presumptions are a reflection of public policy. [Citation.] Their purpose is to provide additional compensation benefits to employees who provide vital and hazardous services by easing their burden of proof of industrial causation.

(*Id.* at p. 241.)

Consequently, the presumptions are a reflection of public policy for the purpose of "provid[ing] additional compensation benefits to employees who provide vital and hazardous services by ***easing their burden of proof*** of industrial causation." (*City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal. App. 4th 298, 310–311 [70 Cal.Comp.Cases 109]

(citations) (emphasis added).) Thus, when an employee falls under a presumption and has one of the enumerated conditions, *the burden is on defendant to show that the condition was not caused by applicant's employment*.

In this case, applicant contends that, as a police officer, he is entitled to a presumption under section 3212 [hernia, heart trouble, pneumonia], whereas the WCJ evaluated applicant's contentions pursuant to section 3212.10 [heart trouble, pneumonia, tuberculosis, and meningitis]. As relevant here, section 3212 includes "members . . . of police or fire departments of cities and counties. . .", and section 3212.10 includes "a peace officer as defined in Section 830.5 of the Penal Code and employed by a local agency. . . ." Penal Code section 830.5 states that: "Any person who comes within the provisions of this chapter and who otherwise meets all standards imposed by law on a peace officer is a peace officer, and notwithstanding any other provision of law, no person other than those designated in this chapter is a peace officer. The restriction of peace officer functions of any public officer or employee shall not affect his or her status for purposes of retirement."

Here, the parties stipulated at trial that applicant was employed as a police officer for the City of Chula Vista. Applicant contends that as a police officer employed by City of Chula Vista, section 3212 applies to him. Based on our initial review, we agree. It is unclear from the WCJ's Opinion and the Report why she concluded that applicant falls under section 3212.10, and thus, it is unclear whether section 3212 or 3212.10 applies. It may be that the Alternative Dispute Resolution (ADR) agreement specifies which section applies, but unfortunately, the parties did not submit the ADR agreement into evidence.

Under section 3212, the analysis with respect to injury and burden shifting is as follows:

> The hernia, heart trouble, or pneumonia so developing or manifesting itself in those cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. The presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.
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> ***The hernia, heart trouble, or pneumonia so developing or manifesting itself in those cases shall in no case be attributed to any disease existing prior to that development or manifestation.***

(Lab. Code, § 3212 (emphasis added).)

We note that pneumonia falls under the rubric of both section 3212 and section 3212.10, although section 3212.10 does not contain the language in section 3212 with respect to "disease existing prior to that development or manifestation." Thus, the issue of which presumption applies may be significant to our determination of whether defendant rebutted the presumption.

In applying the presumptions, it is sufficient for an applicant to show that they fall under one of the enumerated job categories and that they had one of the enumerated conditions. Here, it is undisputed that applicant was employed as a police officer. It is also undisputed that applicant contracted valley fever (pneumonia) during the period of his employment and that it manifested on May 24, 2022. Defendant alleged that applicant's attendance at the Coachella concert in April 2022 rebuts the presumption that applicant's valley fever was industrial. However, as set forth in section 3212, it is not clear if evidence of possible non-industrial exposure prior to the manifestation of the disease is sufficient to rebut the presumption.

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; *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"].)

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 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/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 19, 2025

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

JASON WILDER
FERRONE LAW GROUP
PARKER IRWIN

JB/*pm*

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