WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE ORTEGA, *Applicant*

vs.

CARDENAS MARKETS, LLC; SAFETY NATIONAL CASUALTY CORPORATION, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ13713694
San Diego District Office

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION

Defendant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on February 3, 2025, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and in the course of employment (AOE/COE), while employed on May 10, 2020, in the form of COVID-19 infection pursuant to the Labor Code section[1] 3212.86 presumption and that defendant failed to meet their burden of proof to rebut the presumption.

Defendant does not dispute that the May 10, 2020, date of injury falls within the section 3212.86 COVID-19 presumption. However, defendant contends that applicant is not entitled to the section 3212.86 presumption because the WCJ's Findings and Order issued on February 3, 2025, and section 3212.86 was repealed effective January 1, 2024. Defendant also contends that the opinions of Sameer Gupta, M.D., Panel Qualified Medical Evaluator (QME) in internal medicine, are not substantial medical evidence upon which the WCJ can rely. Defendant further contends that the WCJ's request for supplemental reporting by the QME constituted judicial bias in favor of the applicant.

We received an Answer from applicant.

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

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

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 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 March 10, 2025, and 60 days from the date of transmission is May 9, 2025. This decision is issued by or on May 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 shall be notice of transmission.

Here, according to the proof of service for the Report by the WCJ, the Report was served on March 10, 2025, and the case was transmitted to the Appeals Board on March 10, 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 10, 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 and sequela to his respiratory system, lungs, left eye and left leg while employed as a meat assistant manager by defendant on May 10, 2020.

The Findings and Order issued by the WCJ on February 3, 2025, provides the following:

> Applicant alleges that at the time of injury he was exposed to the Coronavirus at work causing injury to his respiratory system, lungs, left eye and left leg. The evidentiary record consists of multiple medical records, records from Cardenas Markets pertaining to applicant as well as other employees, the QME evaluation reports from Dr. Gupta, as well as testimony from multiple witnesses.
> ...
>
> Applicant first presented to QME Gupta on August 28, 2021. QME Gupta indicated he reviewed over 200 pages of records and had a face-to-face interview with the applicant with the assistance of an interpreter. Applicant gave a history of the illness, noting that he was in a coma from May 21, 2020, to June 25, 2020. (Joint Exhibit 101, page 2) While in a coma, applicant had further complications including a blood clot in his lower leg, regained consciousness with blurred vision in his left eye, and developed a blood clot in his retina. Applicant noted at the time of the examination other complaints, including low back, hips, left leg and left ankle issues in addition to the left eye. At the time of this initial evaluation, applicant indicated that he believed he was the first person in his family to get COVID. The QME wished to obtain the family member's timeline of testing COVID positive.
> ...
>
> The QME issued the first supplemental report on October 3, 2022. (Joint Exhibit 102) For such report, he was given further records to review.
> ...

> After [a] second supplemental report, parties presented to the undersigned for trial. However, in reviewing such reports and further discussions with the parties, it was apparent that further clarification was needed with regards to the medical determination of the QME. Therefore, the parties were to develop the record with Dr. Gupta and questions regarding his report from the undersigned needed to be addressed.
> ...
>
> [The] QME issued a third report. (Joint Exhibit 103). In such report, the doctor indicated, to the best of his ability, the timelines of the development of applicant's symptoms as well as when co-workers tested positive for COVID.
> ...
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> Based on the additional information provided to the QME, a determination was made that
>
> > "It is more likely than not within a reasonable degree of medical probability that the applicant got the COVID infection from workplace exposure just from the co-worker data received. This does not even take into account the amount of public exposure that the applicant had, whose COVID status is unknown and would likely increase the risk of COVID exposure for this applicant. ..."

(Findings and Order, pp. 2-6.)

The WCJ's Report provides the following:

> Defendant argued that it appeared the WCJ was an advocate for the applicant. The WCJ is certain that defendant does not intend to impugn the WCJ's character, however, defendant is reminded that a judge has discretion to rely on evidence submitted or further develop the record. Thus, in no way can it be construed that the WCJ acted as applicant's advocate when requesting the supplemental report from the doctor in which the legislative standard was to be addressed. Rather, this WCJ may only make determinations on substantial medical evidence, which includes the reporting from medical providers using the correct standard. ...

(Report, p. 6.)

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 9, 2020 to July 5, 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, it is undisputed that applicant tested positive for COVID-19 on May 10, 2020, which was within 14 days of performing work at his employer's jobsite.

Section 3212.86 sets forth a presumption of compensability if a worker contracted COVID-19 at the employee's place of employment on or after March 19, 2020, and on or before July 5, 2020, and other conditions are met. (Lab. Code, § 3212.86(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:

> (b) The term "injury," as used in this division, includes illness or death resulting from COVID-19 if both of the following circumstances apply:
>
> > (1) The employee has tested positive for or was diagnosed with 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) on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after March 19, 2020, and on or before July 5, 2020. The date of injury shall be the last date the employee performed labor or services at the employee's place of employment at the employer's direction.
> >
> > (3) If paragraph (1) is satisfied through a diagnosis of COVID-19, the diagnosis was done by a licensed physician and surgeon holding an M.D. or D.O. degree or state licensed physician assistant or nurse practitioner, acting under the review or supervision of a physician and surgeon pursuant to standardized procedures or protocols within their lawfully authorized scope of practice, and that diagnosis is confirmed by testing or by a COVID-19 serologic test within 30 days of the date of the diagnosis.

(Lab. Code, § 3212.86(b).)

Here, it is undisputed that applicant tested positive for COVID-19 on May 10, 2020, which was within 14 days after a day that applicant performed labor or services at applicant's place of employment, at the employer's direction. Based on the parties' stipulations, together with trial

testimony, medical reporting by the QME, and other documentary evidence, the WCJ found that the section 3212.86 presumption applies.

This presumption is disputable and may be controverted by other evidence. (Lab. Code, § 3212.86(e).) 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 3212.86. (Lab. Code, §§ 3202.5, 5705.)

We note, however, that a defendant's successful rebuttal of the presumption of compensability does not bar a claim of industrial causation. In the absence of the presumption, it becomes the applicant's burden to establish industrial causation by a reasonable medical probability. (See Lab. Code, §§ 3600(a), 3202.5; *McAllister v. Workers' Comp. Appeals Bd*. (1968) 69 Cal. 2d 408, 416 [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].)

Additionally, 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 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141 (Appeals Bd. en banc); see also *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.)

Here, it is unclear from our preliminary review of the evidence, the legislative intent with respect to the COVID-19 presumptions, and section 3212.86 in particular, whether the section 3212.86 presumption applies.

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 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/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 9, 2025

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

JOSE ORTEGA
MITCHELL LAW CORPORATION
LAW OFFICES OF BRADFORD & BARTHEL

JB/*pm*

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