**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**KENNETH COOK, *Applicant***

**vs.**

**MID VALLEY GRINDING COMPANY; OAK RIVER INSURANCE COMPANY, care of BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ12055950**
**Los Angeles District Office**

# OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Lien Claimant Dental Trauma Center (DTC) seeks reconsideration of the Findings of Fact and Order issued by the workers' compensation administrative law judge (WCJ) in this matter on October 10, 2024. In that decision, the WCJ found that DTC did not prove that an industrial injury occurred in this case, and that they did not establish that they provided valid medical-legal services.

The WCJ ordered DTC take nothing on their lien.

Petitioner contends that the WCJ erred in finding DTC failed to prove applicant sustained industrial injury solely based upon the medical reporting from Del Carmen Medical Center (DCMC), and that the reporting of Dr. Schames, as well as the Qualified Medical Evaluator (QME) Steven Brourman, M.D., proves applicant sustained industrial injury.

Defendant filed an Answer to the petition.

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

We have considered the Petition for Reconsideration (Petition), the Answer, the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant lien claimant's Petition for Reconsideration. Our order granting the Petition 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[1] section 5950 et seq.

## BACKGROUND

Applicant, while employed by defendant, claimed to have sustain injury arising out of and in the course of his employment to his back, neck, shoulders, knees, legs, feet, headaches, stress, internal, dental, teeth, TMJ, and related body parts. (Minutes of Hearing and Summary of Evidence, April 4, 2024, p. 2.)

The case settled by Compromise and Release (C&R) for $87,500.00. The C&R was approved on June 15, 2022. The C&R notes the following under Comments:

> DEFENDANT DISPUTES INJURY AOE/COE. SETTLEMENT BASED UPON 3/28/22 DEPOSITION OF PQME DR BROURMAN DEFERING [*sic*] OPINION ON CAUSATION OF INJURY PENDING FORMAL JOB ANALYSIS. PARTIES WISH TO AVOID HAZARDS OF LITIGATION AND BUY PEACE. PARTIES STIPULATE NO SJDB DUE PER BELTRAN. ATTACHED ADDENDA INTEGRATED AND INCORPORATED INTO SETTLEMENT. AS NO PART OF SETTLEMENT FOR FUTURE MEDICAL CARE PARTIES ASSERT MEDICARE WOULD HAVE NO INTEREST IN SETTLEMENT.
>
> (C&R, 6/10/22, p. 7.)

Further, Addendum "A" to the C&R, under reasons for Compromise (Paragraph 10) states:

> "**REASONS** FOR COMPROMISE (PARAGRAPH 10):
>
> **DEFENDANT CONTENDS**
>
> Serious dispute exists with regard to whether the injured worker sustained any industrial injury arising out of or occurring in the course of employment, which might, if resolved against the employee, totally bar the injured worker's recovery of any compensation benefits.
>
> Defendant offers the 3/28/22 deposition testimony of PQME Dr. Brourman that opinion on causation of injury deferred pending formal job analysis. **Defendant asserts** ~~Parties agree~~ that Dr. Brourman gave indication at 3/28/22 deposition that

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

> he may find applicant's job duties not sufficiently arduous to result in CT with objective findings due to prior injuries/MVAs or non-industrial degeneration.
>
> Therefore **Defendant contends** ~~the parties agree~~ that a take-nothing award could issue should this matter proceed in further litigation. As a result of the compensability issues detailed above, the parties and WCAB acknowledge that this settlement is a settlement of the injured workers entitlement to any form of Workers Compensation benefits, further noting that this settlement is in no manner a commutation or compromise of future medical care."

(C&R, 6/10/22, p. 10, emphasis and strike-outs in original.)

On April 4, 2024, the matter was set for a lien trial. The liens of Del Carmen Medical Center and Bell Community Medical Group were placed at issue, as well as the issue of injury AOE/COE and parts of body. The lien of DTC was not listed as at issue in the Minutes, and was bifurcated at the request of their attorney, who initially appeared, but was excused by the WCJ from the hearing. Evidence was offered, and the matter was submitted for decision. (MOH/SOE, 4/4/24, p. 1-2.)

On April 29, 2024, the WCJ issued an Order Striking Submission and Limited Order to Develop the Record (Order Striking) for the purpose of adding the deposition transcript of the QME Dr. Brourman into evidence, which had not been properly labeled as an exhibit. The WCJ also set the matter for a status conference.

The case returned to the trial calendar on September 26, 2024, at which time all lien claimants appeared, including DTC. The WCJ noted that "this is the part two of the trial of [applicant], case number ADJ12055950, with the previous trial having been tried and submitted on April 4, 2024." (MOH/SOE, 9/26/24, p. 2.)

There were no additional issues listed by the WCJ to be decided at this trial, but further exhibits were offered by defendant as well as by lien claimant DTC. (MOH/SOE, p. 5.)

On October 10, 2024, the WCJ issued a Findings and Order in which he found that lien claimants Del Carmen Medical Center, Bell Community Medical Group, and DTC did not prove an industrial injury occurred in this case, and ordered them to take nothing on their liens.

It is from this findings and Order that DTC seeks reconsideration.

## I.

## DISCUSSION

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 19, 2024 and 60 days from the date of transmission is Saturday, January 18, 2025. The next business day that is 60 days from the date of transmission is Tuesday, January 21, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Tuesday, January 21, 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

[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.

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 November 19, 2024, and the case was transmitted to the Appeals Board on November 19, 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 19, 2024.

**II.**

Preliminarily, we note that Stipulations and Issues relating to the lien of petitioner DTC do not appear to have been properly raised or placed at issue at either of the hearings.

A workers' compensation administrative law judge's (WCJ) decision must be based on admitted evidence and must be supported by substantial evidence. (*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; see also Cal. Code Regs., tit. 8, § 10566.) "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, supra,* 66 Cal.Comp.Cases 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 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350] [a full and complete record allows for a meaningful right of reconsideration]; *Lewis v. Arlie Rogers & Sons* (2003) 69 Cal.Comp.Cases 490, 494, emphasis in original ["decision [must] be based on an ascertainable and adequate record," including "an *orderly identification* in the record of the evidence submitted by a party;

and *what evidence is admitted or denied admission*."].) "An organized evidentiary record assists an arbitrator in rendering a decision, informs the parties what evidence will be utilized by the arbitrator in making a determination, preserves the rights of parties to object to proffered evidence, and affords meaningful review by the Board, or reviewing tribunal." (*Id.*)

Turning to the merits, we note that the WCJ finds that lien claimants have failed to prove applicant sustained an injury AOE/COE.

Our preliminary review of the medical evidence indicates that we do not appear to have all the medical reporting of the QME Steven Brourman, M.D., who evaluated applicant and issued several medical reports. With respect to said QME, the WCJ notes the following in his report:

> The parties to the case-in-chief selected Dr. Brourman as a Qualified Medical Evaluator (PQME) through the panel process. Dr. Brourman issued at least two reports, which initially found industrial injury to the orthopedic body parts. See Exhibit 11, Supplemental Report of Dr. Brourman of 07 April 2021 at pp. 21 – 22. In this supplemental report Dr. Brourman seemed to have done a good job of supporting his opinion on industrial causation despite prior spinal surgery approximately 25 years before the examination date.
>
> However, on or about 28 March 2022, the parties took the deposition of Dr. Brourman. (See Exhibit FF.) At the deposition, he was confronted with the prior MRI from the non-industrial injury prior to this injury. He testified that he would need more information in order to determine whether or not the underlying orthopedic injury was industrial. Rather than conduct further discovery, the parties entered into a Compromise & Release on or about 10 June 2024 and ordered approved on 15 June 2022.

(Report, 11/19/24, p. 2.)

Here, Dr. Brourman stated in his reports and at his deposition taken on March 28, 2022, that the injuries applicant sustained were industrial. On the issue of industrial causation at his deposition, the QME opined as follows:

> [Q.] Would your request for a formal job analysis be on the question of causation as to all orthopedic body parts?
>
> A. Well, whatever you ask me. You send a cover letter. Do you want me to request on all body parts or just the shoulders? I'll go on your instructions.
>
> Q. Understood. But let me put it this way -- maybe I'll ask it a different way.
>
> If you find out through a formal job analysis that the applicant's job duties were not, in your opinion, significantly arduous enough to result in a cumulative

trauma to the lumbar spine, that would certainly have an affect on your opinion on causation as to the lumbar spine, would it not?

A. Of course.

Q. Okay. And the same thing would apply for the knees; right? I mean, if you find out from a formal job analysis that the applicant's job requires little or no bending or stooping, would that not have an effect on your opinion on causation as to the applicant's knees?

A. It could. Let me add this then. I, again, if you send me a formal job analysis, I'll reexamine causation of injury of all body parts. Usually that comes with a cover letter. Just ask me and I'll be happy to analyze it again.

(Ex. GG, p. 19: 1-25.)

Thus, although he advised that he may change his mind regarding industrial causation if defendant provided him with a formal job analysis of the applicant's job duties as a machinist, none was ever provided, and the matter settled by C&R thereafter. The altered language by the parties in the C&R documents defendant's position regarding causation, and the applicant's counsel further acknowledges same without agreeing to stipulate to same, as noted by the crossed-out language.

Additionally, in his deposition of March 28, 2022, Dr. Brourman defers issues regarding applicant's stress, headaches, teeth and gastrointestinal to the appropriate specialists. (Ex. GG, p. 12-13.)

The only medical-legal reporting relative to applicant's teeth appears to be the permanent and stationary report from applicant's treating physician in the field of dentistry, Dr. Schames, who finds applicant's conditions of aggravated bruxism, myalgia of the facial muscles, and aggravated inflammation of the gums industrial. (Ex. 19, 2/25/21.)

Section 3202.5 states, in pertinent part, "All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. 'Preponderance of the evidence' means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth."

In general, for the purposes of the causation requirement in workers' compensation, it is sufficient if the connection between work and the injury be a contributing cause of the injury . . . ." (*South Coast Framing v. WCAB (Clark)* (2015) 61 Cal. 4th 291; *Nash v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1793, 1809.)

When translated to the standard necessary for expert medical opinions, this means reasonable medical probability, meaning more likely than not. Certainty, or anything approaching certainty, is not the proper standard. (*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal. Comp. Cases 660].)

**III.**

The Appeals Board 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. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924] ["The 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."]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

Here, it is unclear from our preliminary review whether the legal issues have been properly identified; whether the existing record is sufficient to support the decision, order, and legal conclusions of the WCJ; and/or whether further development of the record may be necessary with respect to the issues noted above.

**IV.**

Finally, we observe that 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 [62 Cal.Rptr. 757, 432 P.2d 365]; *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"].)

Labor Code 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 sections 5950 et seq.

**V.**

Accordingly, we grant lien claimant's Petition for Reconsideration, and 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.

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 of the Findings and Order issued on October 10, 2024 by a workers' compensation administrative law judge 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 WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**


**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**January 21, 2025**

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

**THE DENTAL TRAUMA CENTER**
**BELL COMMUNITY MEDICAL GROUP**
**DEL CARMEN MEDICAL CENTER**
**LAW OFFICE OF RAMIN YOUNESSI, ESQ.**
**LAW OFFICE OK SAAM AHMADINIA**
**LAW OFFICES OF SAUL ALLWEISS, McMURTRY & MITCHELL**
**PEATMAN LAW GROUP**

**LAS/abs**

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