

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

MANUEL AGURTO, *Applicant*

vs.

**PETERBERG CONSTRUCTION, INC.;
PRAETORIAN INSURANCE WORK COMP PROGRAM, *Defendants***

**Adjudication Number: ADJ8759846
Marina del Rey District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the February 4, 2025 Findings and Order (F&O) wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed by defendant, sustained injury arising out of and in the course of employment (AOE/COE) to his psyche with an average weekly wage of \$500 per week based upon applicant's earning capacity at the time of termination per Labor Code¹ section 4453(c)(4). (F&O, p. 1.) The WCJ ordered further development of the record, including reevaluations by orthopedic Agreed Medical Evaluator (AME), Dr. Albert Simpkins, Jr., and psyche panel Qualified Medical Evaluator (PQME), Dr. David Glaser, and an updated report from internal panel PQME, Dr. James Sherman. (*Id.* at p. 2.)

The WCJ made several additional findings in her Opinion on Decision (OOD) which were not listed in the F&O, including injury AOE/COE during the period from January 14, 1980 through April 18, 2012 to the cervical spine, lumbar spine, bilateral shoulders, bilateral legs, bilateral knees, and hernia and a finding of occupational group 480 for construction laborer. (OOD, pp. 1, 6.) The WCJ also awarded future medical for the above listed body parts (with the exception of

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

the bilateral legs). (*Id.* at p. 6.) The issue of future medical for psyche was deferred along with the issues of temporary disability, permanent disability, apportionment, right to a supplemental job displacement voucher, attorney's fees, penalties, and the employment development department (EDD) lien. (*Id.* at pp. 3-7.)

Applicant contends that: he is 100% permanently totally disabled; the section 5402(b) presumption applies to all claimed body parts; he is entitled to two years of temporary disability; he is entitled to a section 4658(d) increase; his occupational group numbers are 380 and 480; he has a right to a supplemental job displacement voucher; apportionment does not meet the requisite evidentiary standard; the issue of average weekly earnings should be vacated for further discovery per section 4661.5; a replacement psyche QME panel is necessary due to Dr. Glaser's passing; and penalties should be deferred. (Petition, pp. 1-3, 14.)

We have not received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition for Reconsideration (Petition) be denied.

We have considered the Petition and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for the purpose of rescinding the F&O and substituting it with a Findings, Award, and Order (FA&O) which reflects all of the WCJ's findings, awards, and orders, including injury AOE/COE to the cervical spine, lumbar spine, bilateral shoulders, bilateral legs, bilateral knees, and hernia, an award of future medical to the cervical spine, lumbar spine, bilateral shoulders, bilateral knees, and hernia, and an order for additional discovery, including a reevaluation by Dr. Simpkins and an updated report from Dr. Sherman, and deferral of all other issues, including future medical for psyche, temporary disability, permanent disability, section 4658(d) increase, apportionment, right to a supplemental job displacement voucher, attorney's fees, penalties, and the EDD lien.

FACTS

Applicant claimed that, while employed by defendant as a laborer during the period from January 14, 1980 through April 18, 2012, he sustained injury AOE/COE to his back, lower extremities, and hernia. Psyche was later added as an injured body part.

The parties proceeded with discovery and retained Dr. James Sherman as the PQME in internal medicine, Dr. Albert Simpkins Jr. as the orthopedic AME, and Dr. David Glaser as the psyche PQME.

On January 3, 2024, defendant filed a Declaration of Readiness to Proceed to a mandatory settlement conference on the issues of permanent disability, apportionment, and future medical.

On February 29, 2024, a mandatory settlement conference was held and continued to April 25, 2024, and finally, June 10, 2024.

On August 7, 2024 the parties proceeded to trial and listed the following issues: parts of body injured (psyche); earnings; temporary disability; permanent disability; permanent and stationary date; apportionment; occupation and group number; need for further medical treatment to the psyche and bilateral lower extremities; EDD benefits paid; attorney's fees on temporary and permanent disability; and right to a supplemental job displacement voucher. The following relevant facts were admitted: injury AOE/COE, during the period from January 14, 1980 through April 18, 2012, to the cervical and lumbar spine, bilateral shoulders, bilateral knees, bilateral lower extremities, and hernia; and future medical for all body parts listed, except the bilateral lower extremities and psyche.

On February 4, 2025, the WCJ issued an F&O which held that applicant sustained an injury AOE/COE to his psyche and that applicant's average weekly wage is \$500 per week based upon an earning capacity of \$12.50 hourly for 40 hours per week at the time of termination and section 4453(c)(4). (F&O, p. 1.) The WCJ ordered reevaluations by orthopedic AME, Dr. Simpkins and psyche PQME, Dr. Glaser, and an updated report from internal PQME, Dr. Sherman. (*Id.* at p. 2.) Additional findings in the OOD included injury AOE/COE, during the period from January 14, 1980 through April 18, 2012, to the cervical spine, lumbar spine, bilateral shoulders, bilateral legs, bilateral knees, and hernia while employed by defendant as a construction laborer (occupational group number 480). (OOD, pp. 1, 6.) There was also an award of future medical to the cervical spine, lumbar spine, bilateral shoulders, bilateral knees, and hernia. (*Id.* at p. 6.) Future medical for psyche was deferred along with issues of temporary disability, permanent disability, apportionment, right to a supplemental job displacement voucher, attorney's fees, penalties, and the EDD lien. (*Id.* at pp. 3-7.)

DISCUSSION

I.

Preliminarily, 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 under the Events tab 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 April 8, 2025, and 60 days from the date of transmission is June 7, 2025, which is a Saturday. The next business day that is 60 days from the date of transmission is Monday, June 9, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision was issued by or on June 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

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 shall constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on April 8, 2025, and the case was transmitted to the Appeals Board on April 8, 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 April 8, 2025.

II.

We also find it relevant here to discuss the distinction between a petition for reconsideration and a petition for removal. A petition for reconsideration is taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order is defined as one that determines “any substantive right or liability of those involved in the case” or a “threshold” issue fundamental to a claim for benefits. (*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]; *Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Threshold issues include, but are not limited to, injury AOE/COE, jurisdiction, the existence of an employment relationship, and statute of limitations. (See *Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian, supra*, at 1075 [“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”].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, and other similar issues.

If a decision includes resolution of a “threshold” issue, then it is a “final” decision, whether all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Bd. en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. Here, the WCJ made findings as to injury AOE/COE to applicant’s psyche and applicant’s earning capacity, which are the only two findings that are final. As explained above, and as further discussed below, applicant does not challenge those two findings; instead, he challenges the lack of final findings on multiple other issues. Because no final findings were made on those challenged issues, they are not properly the subject of a petition for reconsideration.

When the petitioner challenging a hybrid decision disputes the WCJ’s determination regarding interlocutory issues, then the Appeals Board will consider those issues under the removal standard applicable to non-final decisions.

Here, the February 4, 2025 F&O and OOD include threshold findings as well as findings on interlocutory issues. Applicant apparently seeks reconsideration of the WCJ’s order of deferral on issues of temporary disability, permanent disability, apportionment, right to a supplemental job displacement voucher, and EDD lien. These are all interlocutory issues. As such, we apply the removal standard for our review. (See *Gaona, supra.*)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers’ Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit.

8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).) Here, we are not persuaded that significant prejudice or irreparable harm would result if removal was denied and/or that reconsideration would not be an adequate remedy.

Further, we agree with the WCJ that the issues of temporary disability, permanent disability, apportionment, right to a supplemental job displacement voucher, and EDD lien are not yet ripe for reconsideration and should be deferred, pending further development of the record. Given that the order deferring these issues was indicated in the OOD, but not the F&O, we will rescind the F&O and substitute it with a new Findings, Award, and Order (FA&O) which includes the WCJ's order of deferral of these issues.

III.

Turning now to applicant's contentions regarding the section 5402(b) presumption and applicant's occupational group, applicant argues that section 5402(b) applies to all claimed body parts. (Petition, pp. 1, 3, 14.) Section 5402(b) states that, "If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division." (Lab. Code, § 5402(b).) Notwithstanding applicant's failure to raise this issue at trial, the parties have already stipulated to injury AOE/COE to the cervical spine, lumbar spine, bilateral shoulders, bilateral knees, bilateral lower extremities, and hernia. (Pretrial Conference Statement, February 29, 2024; Minutes of Hearing, August 7, 2024.) With respect to psyche, which appears to be the only disputed body part, the WCJ found injury AOE/COE in the February 4, 2025 F&O. As such, the issue of a section 5402(b) presumption is moot.

Applicant further contends that the occupational group number should be somewhere in the vicinity of 480 and 380 based upon applicant's job duties. (Petition, pp. 2, 14.) Per the February 4, 2025 OOD, applicant was found to fall under "Occupational Group No. 480" for "construction laborer." (OOD, p. 6.) The issue of applicant's occupational group is therefore similarly moot. This finding, however, is not listed within the actual F&O. As such, we will also include this additional finding in the FA&O.

IV.

Applicant also requests an order for a replacement psychiatry panel given Dr. Glaser's passing and the WCJ's order for further development of the record, including "a PQME

reevaluation with David Glaser, M.D.” (Petition, p. 14; F&O, p. 2.) Administrative Director (AD) Rule 31.5(a) outlines the process for QME replacement panel requests and enumerates 16 circumstances under which a party may request a replacement QME panel from the Medical Director. (Cal. Code Regs., tit. 8, § 31.5(a).) They include, as applicable here, the unavailability of a QME “who previously reported in the case.” (Cal. Code Regs., tit. 8, § 31.5(a)(3).) Under the circumstances, we will therefore defer the issue of a re-evaluation for applicant’s injury to psyche.

V.

As a final point, we underscore that all parties before the WCAB are expected to comply with statutory and decisional law and the WCAB’s Rules of Practice and Procedure and refrain from conduct that is frivolous or without merit under section 5813 and WCAB Rule 10421 (Cal. Code Regs., tit. 8, § 10421). We admonish applicant’s attorneys Clayton Perry and the Clayton Perry Law Office for Injured Workers, APC, for their conduct, which borders on frivolous, in bringing this meritless Petition. We note that our decision to grant applicant’s Petition is not based upon the arguments raised by applicant, but rather, for the purpose of rescinding the F&O so that we may substitute it with a FA&O which reflects all of the WCJ’s findings, awards, and orders, as outlined in both the F&O and OOD. Although we do not impose sanctions this instance, we remind applicant’s attorney that an offending party may be subject to sanctions pursuant to the above-referenced statutes. Future compliance with the Appeals Board’s rules is therefore expected.

VI.

Accordingly, applicant’s Petition is granted, and the F&O is rescinded and substituted with a new FA&O which reflects a finding of injury AOE/COE to the additional body parts of the cervical spine, lumbar spine, bilateral shoulders, bilateral legs, bilateral knees, and hernia, as well as an award of future medical to the above referenced body parts (with the exception of the bilateral legs), and an order for additional discovery in the form of a reevaluation by Dr. Simpkins and an updated report from Dr. Sherman, and deferral of all other issues including future medical for psyche, temporary disability, permanent disability, applicability of section 4658(d), apportionment, right to a supplemental job displacement voucher, attorney’s fees, penalties, and the EDD lien.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the February 4, 2025 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that February 4, 2025 Findings and Order is **RESCINDED** and **SUBSTITUTED** with a new Findings, Award, and Order, as provided below, and that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

FINDINGS OF FACT

1. Applicant, while employed by Peterberg Construction, Inc. as a construction laborer (occupational group number 480), during the period from January 14, 1980 through April 18, 2012, sustained injury arising out of and in the course of employment to the cervical spine, lumbar spine, bilateral shoulders, bilateral knees, bilateral lower extremities, hernia, and psyche.
2. Applicant's average weekly earnings, based upon applicant's earning capacity at the time of termination, pursuant to Labor Code section 4453(c)(4), is \$500 per week (40 hours per week at \$12.50 per hour).

AWARD

AWARD IS MADE in favor of Manuel Agurto against Peterberg Construction insured by Praetorian Insurance Work Comp Program and administered by Athens Administrators for future medical treatment reasonably required to cure or relieve from the effects of the injury to the cervical spine, lumbar spine, bilateral shoulders, bilateral knees, and hernia.

ORDER

IT IS HEREBY ORDERED that the issues of temporary disability, permanent disability, applicability of Labor Code section 4658(d), apportionment, right to a supplemental job displacement voucher, attorney's fees, penalties, the EDD lien, and future medical for psyche are deferred, pending further development of the record.

IT IS FURTHER ORDERED that an AME re-evaluation be scheduled with Dr. Albert Simpkins, Jr., and an updated report be requested from PQME, Dr. James Sherman. The issue of a medical-legal re-evaluation for applicant's injury to psyche is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 5, 2025

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

**MANUEL AGURTO
THE CLAYTON PERRY LAW OFFICE FOR INJURED WORKERS
H&R LAW GROUP**

RL/cs

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