

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

MARCOS MARTINEZ, *Applicant*

vs.

**THE BURCHELL NURSERY INC.; STAR INSURANCE COMPANY,
administered by MEADOWBROOK INSURANCE, *Defendants***

**Adjudication Numbers: ADJ15031118; ADJ6861827
Lodi District Office**

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

Defendant Dave Wilson Nursery seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on February 10, 2025, wherein the WCJ found in pertinent part that applicant did not sustain a cumulative trauma injury arising out of and in the course of employment (AOE/COE) in case number ADJ15031118.

Defendant contends that:

1. The WCJ erred and violated defendant's due process rights when he excluded from evidence the reports and deposition transcript of Qualified Medical Evaluator, Dr. James Shaw, which were properly obtained in case number ADJ6861827, against Dave Wilson Nursery.
2. The WCJ erred when he excluded the reports of primary treating physician, Dr. Jeff Jones, from evidence, because defendant listed "Various" reports of applicant's primary treating physician from Boomerang Health as evidence for trial and there is no evidence that applicant or co-defendant were prejudiced by the failure to disclose the reports with specificity.
3. Dr. David Broderick's opinion does not constitute substantial evidence to support the WCJ's finding that Applicant did not sustain a cumulative trauma injury during his employment with Burchell Nursery, because it is internally inconsistent, Dr. Broderick fails to explain his opinion, and Dr. Broderick's opinion is inconsistent with the medical record.

4. Dr. Shaw's reporting constitutes substantial evidence to establish that applicant sustained a cumulative trauma injury during his employment with Burchell Nursery.

We received an Answer from defendant Burchell Nursery.

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 on our review of the record, and for the reasons discussed below, we will grant defendant's Petition, rescind the Findings and Order issued on February 10, 2025, and return the matter to the trial level for further proceedings consistent with this decision.

BACKGROUND

We will briefly review the relevant facts.

In case number ADJ6861827, applicant claimed injury to the lumbar spine while employed by defendant Dave Wilson Nursery as a farm worker on March 23, 2009. An Award of medical care issued in case number ADJ6861827.

On August 13, 2021, defendant Dave Wilson Nursery filed an application for adjudication (case number ADJ15031118) seeking reimbursement from applicant's employer Burchell Nursery for treatment expenses. Dave Wilson Nursery claimed that medical evidence supports a cumulative trauma claim while applicant was employed by defendant Burchell Nursery as a farm worker, during the period from May 1, 2018 to May 1, 2019.

On January 6, 2025, the matter went to trial in case number ADJ15031118 on the sole issue of injury arising out of and in the course of employment. No witnesses were called. As relevant here, the following were offered as exhibits but not admitted into evidence:

With respect to Exhibit 2, Report of primary treating physician (PTP) Jeff Jones, M.D., dated April 3, 2018; Exhibit 3, PTP Report of Dr. Jones, dated May 29, 2018; and Exhibit 6, PTP Report of Dr. Jones, dated August 3, 2020, the WCJ determined that Exhibits 2, 3, and 6, "were not disclosed on the Pre-Trial Conference Statement and in violation of Labor Code Section 5502."

With respect to Exhibit 4, Report of Qualified Medical Evaluator (QME) James B. Shaw, M.D., dated May 30th, 2019; Exhibit 5, Deposition transcript of QME Dr. Shaw, volume 1, dated June 3, 2020; Exhibit 7, QME Report of Dr. Shaw, dated July 3, 2021; and Exhibit 8, QME Report

of Dr. Shaw, dated August 11, 2023, the WCJ determined that: “Dr. Shaw was obtained as a panel qualified medical examiner for the alleged specific injury and was not obtained through the 4062.2 process in the ADJ at issue.”

(Minutes of Hearing and Summary of Evidence (MOH/SOE), January 6, 2025 trial, pp. 3-5.)

DISCUSSION

I.

Former Labor Code section¹ 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 17, 2025, and 60 days from the date of transmission is May 16, 2025. This decision is issued by or on May 16, 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

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

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 17, 2025, and the case was transmitted to the Appeals Board on March 17, 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 17, 2025.

II.

The determination of compensability, the existence or extent of permanent impairment, and limitations, if any, resulting from an injury all require a medical evaluation. (Lab. Code, §§ 4060, et seq.) Statutory and case law favor the admissibility of medical reports. (See, e.g., Lab. Code, §§ 4062.3, 4064(d), 5703(a), 5708.)

Here, the WCJ excluded the PTP Reports of Dr. Jones, dated April 3, 2018 (offered as Exhibit 2), May 29, 2018 (offered as Exhibit 3), and August 3, 2020 (offered as Exhibit 6), on the basis that they were not disclosed on the Pre-Trial Conference Statement and are thus in violation of section 5502. (MOH/SOE, pp. 3-4.)

Sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *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].)

The Appeals Board is accorded generous flexibility by sections 5708 and 5709 to achieve substantial justice with relaxed rules of procedure and evidence. (*Barr v. Workers' Compensation Appeals Bd.* (2008) 164 Cal. App. 4th 173, 178 [73 Cal.Comp.Cases 763].) In determining whether to admit evidence, we are governed by the principles of section 5708, which states that the Appeals Board “shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this

division.” (Lab. Code, § 5708.) Although the Appeals Board is not bound by it, the Evidence Code defines relevant evidence as “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) This definition has been characterized as “manifestly broad.” (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843.)

The WCJ also excluded the QME Reports of Dr. Shaw, dated May 30, 2019 (offered as Exhibit 4), dated July 3, 2021 (offered as Exhibit 7), dated August 11, 2023 (offered as Exhibit 8), as well as the deposition transcript of QME Dr. Shaw, volume 1, dated June 3, 2020 (offered as Exhibit 5) for the following reasons: 1) Dr. Shaw was obtained as a PQME for the alleged specific injury and was not obtained through the 4062.2 process in this matter (ADJ15031118), and 2) the AME Dr. Broderick reviewed these materials in ADJ15031118, and would they would therefore be cumulative in nature. MOH/SOE, pp. 4-5.)

The language of section 4062.3(a) is fairly expansive with respect to what medical records may be provided to the qualified medical evaluator. With respect to what medical records may be provided to a qualified medical evaluator, section 4062.3 provides in relevant part, as follows:

(a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:

(1) Records prepared or maintained by the employee’s treating physician or physicians.

(2) Medical and nonmedical records relevant to determination of the medical issue.

(Lab. Code, § 4062.3(a) [emphasis added].)

Defendant relies extensively on panel decisions, including *Lorenz v. Encino Hosp. Med. Ctr.*, 2014 Cal. Wrk. Comp. P.D. LEXIS 410.² Although panel decisions are not binding, the statutory underpinnings in *Lorenz* are instructive here:

Section 4064(d) states in pertinent part that:

“All comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board except as provided in Section 4060, 4061, 4062, 4062.1, or 4062.2.”

² Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].)

Additionally, section 4062.3(j) requires the medical evaluator to “address **all contested medical issues arising** from **all injuries reported on one or more claim forms** prior to the date of the employee’s initial appointment with the medical evaluator.” (Lab. Code, § 4062.3(j) [emphasis added]; see also Lab. Code, § 4064(a) [“Each comprehensive medical-legal evaluation shall address all contested medical issues arising from all injuries reported on one or more claim forms...”].)

Where, as here, defendant puts at issue the extent of permanent impairment, the nature and/or number of the injuries, and thus the causation of the permanent impairment, it is unclear how a comprehensive medical-legal evaluation report from a previous medical evaluator is not a medical record under section 4062.3(a)(2). Here, there is no dispute that Dr. Shaw was obtained as a QME in case number ADJ6861827 as to applicant’s specific injury of March 23, 2009 and there is no contention that Dr. Shaw was improperly selected as a QME.

In *Valdez v. Workers’ Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, the California Supreme Court considered the admissibility of medical reports:

[T]he comprehensive medical evaluation process set out in section 4060 et seq. for the purpose of resolving disputes over compensability does not limit the admissibility of medical reports. Section 4062.3, subdivision (a) permits any party to provide the evaluator with “[m]edical and nonmedical records relevant to determination of the medical issue.”

(*Valdez v. Workers’ Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, 1239 [78 Cal.Comp.Cases 1209].)

The Court went on to state:

Under section 4064, subdivision (d), “no party is prohibited from obtaining any medical evaluation or consultation at the party’s own expense,” and “[a]ll **comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board ...**,” except as provided in specified statutes. The Board is, in general, broadly authorized to consider “[r]eports of attending or examining physicians.” (§ 5703, subd. (a).) **These provisions do not suggest an overarching legislative intent to limit the Board’s consideration of medical evidence.**

(*Id.*)

When deciding a medical issue, such as whether the applicant sustained a cumulative trauma injury, the WCJ must utilize expert medical opinion. (See *Insurance Company of North America v. Workers’ Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905, 911 [46 Cal.Comp.Cases 913].)

Here, AME Dr. Broderick, is addressing “contested medical issues arising from all injuries reported on one or more claim forms” and the records and reports from applicant’s primary treating physician and other medical legal evaluators certainly seem relevant to the determination of the issues central to the matter before us. (Lab. Code, §§ 4062.3, 4064; *Valdez, supra.*) To be substantial evidence, a medical opinion must be well-reasoned, based on an adequate history and examination, and it must disclose a solid underlying basis for the opinion. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Bd. en banc); see also *E.L. Yeager Construction v. Workers’ Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687].)

We note that the matter was submitted without testimony (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 6, 2025 trial, p. 1) and remind all involved that judgments on the pleadings are not permitted in Workers’ Compensation. (Cal. Code Regs., tit. 8, § 10515.)

A WCJ’s decision must be based on admitted evidence and must be supported by substantial evidence (Lab. Code, §§ 5903, 5952(d); *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc); *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] (*Garza*); *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Hamilton supra*, at 476, citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

Here, the limited evidentiary record bars a meaningful review of the WCJ’s Findings and Order. Therefore, we must return this matter to the trial level for further proceedings.

Accordingly, we grant defendant’s Petition, rescind the Findings and Order issued by the WCJ on February 10, 2025, and return the matter to the trial level for further proceedings consistent with this opinion. Upon return to the trial level, we recommend that the WCJ consider what further development of the record is appropriate.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued by the WCJ on February 10, 2025 is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 16, 2025

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

**MARCOS MARTINEZ
OCCUPATIONAL INJURY LAW CENTER
MICHAEL SULLIVAN AND ASSOCIATES
GILSON DAUB**

JB/pm

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