WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

OSCAR VILLALOBOS, *Applicant*

vs.

J.V. INDUSTRIAL COMPANIES, LTD.; ZURICH AMERICAN INSURANCE COMPANY, administered by BROADSPIRE, *Defendants*

Adjudication Number: ADJ2913113
Marina del Rey District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks removal in response to a February 3, 2025 Findings of Fact issued by a workers' compensation administrative law judge (WCJ), in which the WCJ found, based upon the stipulations of the parties, that applicant sustained injury arising out of and in the course of employment (AOE/COE), that applicant's weekly earnings rate was $1,547.00 at the time of his injury, and that defendant paid temporary and permanent disability benefits. The WCJ denied defendant's petition to suspend proceedings and further determined that the medical reports of Agreed Medical Evaluator (AME) Dr. Newton did not constitute substantial medical evidence.

Defendant contends that applicant's refusal to return for follow-up evaluation with the AME requires that benefits be suspended pursuant to Labor Code[1] section 4053.

We have received an Answer from applicant. The WCJ has filed a Report and Recommendation on Petition for Removal, recommending that we deny removal in this matter. We have considered the allegations of the Petition for Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, we will treat the petition as one seeking reconsideration, grant the Petition,

[1] All further references are to the Labor Code unless otherwise noted.

and applying the removal standard, rescind the Findings of Fact and return this matter to the trial level for further proceedings.

BACKGROUND

Applicant sustained injury to his head, neck, back, bilateral shoulders, right knee, psyche, bladder/urinary, hearing, penile disease, and in the form of sleep disorder, while employed as an insulator by J.V. Industrial Companies on January 27, 2008.

The parties have selected Peter Newton, M.D., to act as the AME in orthopedic medicine. Dr. Newton has evaluated applicant and issued two reports dated June 9, 2014, and July 14, 2014.

On September 5, 2024, defendant filed a Petition seeking to suspend proceedings pursuant to section 4053, averring applicant had unreasonably failed to attend scheduled reevaluations on September 11, 2023, and July 15, 2024.

On January 23, 2025, the parties proceeded to trial on the sole issue of "Defendant's Petition to Suspend Proceedings dated September 5, 2024." (Minutes of Hearing and Summary of Evidence (Minutes), dated January 23, 2025, at p. 3:2.) Applicant testified that he had refused to be reevaluated by Dr. Newton due to his perceived mistreatment by Dr. Newton at a prior evaluation in 2014. (*Id.* at p. 3:19.) The WCJ also heard testimony from applicant's spouse, and ordered the matter submitted the same day.

On February 3, 2025, the WCJ issued the Findings of Fact denying defendant's Petition to Suspend Proceedings. (Finding of Fact No. 1.) The WCJ further determined that the medical reports of AME Dr. Newton dated June 9, 2014 and July 14, 2014 were not substantial medical evidence. (Finding of Fact No. 2.) The accompanying Opinion on Decision explained that "[b]ased upon Applicant's and Applicant's wife's unrebutted and credible testimony (solely on the point that the interpreter was not allowed to be in the examination room, when Dr. Peter Newton conducted the physical examination of Applicant), it is found that Dr. Peter Newton's medical reports dated June 9, 2014 and July 14, 2014 do not constitute substantial medical evidence." (Opinion on Decision, at p. 1.) Because the reports were not deemed substantial evidence, the WCJ reasoned it would be inappropriate to require applicant to return to Dr. Newton and denied the Petition to Suspend Proceedings based on applicant's failure to submit to medical examination with Dr. Newton, accordingly. (Opinion on Decision, at p. 1.)

Defendant's Petition avers the Findings of Fact "effectively forces defendant to agree to a new medical/legal evaluator in violation of its rights under Labor Code §4062.2(f)." (Petition, at p. 3:20.) Defendant further contends that "the purpose of the [t]rial on January 23, 2025 was not to determine whether the existing reports of AME Dr. Newton constitute substantial medical evidence," and that even if the reports are deficient, the appropriate remedy is development of the record. (*Id.* at p. 6:1.) Accordingly, defendant requests that the Appeals Board grant removal and that we grant the Petition to Suspend Proceedings.

Applicant's Answer contends that the passage of more than 10 years since the last AME evaluation erodes defendant's assertion of prejudice arising out of selecting a new medical-legal evaluator and restarting the evaluation process, and that defendant has not met its burden of establish irreparable harm arising out of the WCJ's Findings of Fact.

The WCJ's Report observes that if the parties engage in good-faith selection of a new and unbiased AME, there is no prejudice to either party. The WCJ also finds defendant's argument that starting the medical-legal process anew with a replacement physician is prejudicial to be unpersuasive, as it has been more than 10 years since applicant's last AME evaluation and any physician at this time will need to review medical records generated since 2014. (Report, at p. 3.) Accordingly, the WCJ recommends we decline to grant removal in this matter.

DISCUSSION

I.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) 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. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id*. at p. 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, or similar 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. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes stipulated facts concerning employment, injury arising out of and in the course of employment, nature and extent of the injury, and insurance coverage. These are final orders subject to reconsideration and not removal. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650].)

Although the decision contains findings that are final, petitioner is only challenging an interlocutory finding/order relevant to defendant's petition seeking to suspend proceedings for compensation. Therefore, we will apply the removal standard to our review. (See *Gaona, supra,* 5 Cal.App.5th 658, 662.)

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 substantial 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).)

II.

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." 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 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." When the Appeals Board does not review the petition within 60 days due to irregularities outside the petitioner's control, and the 60-day period lapses through no fault of the petitioner, the Appeals Board must then consider whether circumstances exist to allow an equitable remedy, such as equitable tolling.

It is well-settled that the Appeals Board has broad equitable powers. (*Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board* (1978) 83 Cal.App.3d 413, 418 [43 Cal.Comp.Cases 785] citing *Bankers Indem. Ins. Co.* v. *Indus. Acc. Com*. (1935) 4 Cal.2d 89, 94-98 [47 P.2d 719]; see *Truck Ins. Exchange v. Workers' Comp. Appeals Bd. (Kwok)* (2016) 2 Cal.App.5th 394, 401 [81 Cal.Comp.Cases 685]; *State Farm General Ins. Co. v. Workers' Comp. Appeals Bd. (Lutz)* (2013) 218 Cal.App.4th 258, 268 [78 Cal.Comp.Cases 758]; *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [59 Cal.Comp.Cases 96].) It is an issue of fact whether an equitable doctrine such as laches applies. (*Kwok*, *supra*, 2 Cal.App.5th at p. 402.) The doctrine of equitable tolling applies to workers' compensation cases, and the analysis turns on the factual determination of whether an opposing party received notice and will suffer prejudice if equitable tolling is permitted. (*Elkins v. Derby* (1974) 12 Cal.3d 410, 412 [39 Cal.Comp.Cases 624].) As explained further below, only the Appeals Board is empowered to make this factual determination.[2]

In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493], the Appeals Board denied applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition

[2] Section 5952 sets forth the scope of appellate review, and states that: "Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence." (Lab. Code, § 5952; see Lab. Code, § 5953.)

was tolled during the period that the file was misplaced. (*Id.* at p. 1108.) Pursuant to the holding in *Shipley* allowing equitable tolling of the 60-day time period in section 5909, the Appeals Board acts to grant, dismiss, or deny such petitions for reconsideration within 60 days of receipt of the petition, and thereafter issues a decision on the merits.

"[I]t is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley*, *supra*, 7 Cal.App.4th at p. 1108.) All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635, fn. 22 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].)

If a timely filed petition is never acted upon and considered by the Appeals Board because it is "deemed denied" due to an administrative irregularity and not through the fault of the parties, the petitioning party is deprived of their right to a decision on the merits of the petition. (Lab. Code, § 5908.5; see *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) Just as significantly, the parties' ability to seek meaningful appellate review is compromised, raising issues of due process. (Lab. Code, §§ 5901, 5950, 5952; see *Evans*, *supra*, 68 Cal.2d 753; see also *Rea*, *supra*, 127 Cal.App.4th at p. 643.)

On December 11, 2024, the California Supreme Court granted review in *Mayor v. Workers' Compensation Appeals Bd.* (2024) 104 Cal.App.5th 713 [2024 Cal.App. LEXIS 531] ("*Mayor*"). One issue granted for review is the same issue present in this case, i.e., whether section 5909 is subject to equitable tolling. The Supreme Court noted the conflict present in the published decisions of the Courts of Appeal, and in its order granting review of *Mayor*, stated as follows:

> Pending review, the opinion of the Court of Appeal, which is currently published at 104 Cal.App.5th 1297, may be cited, not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, to choose between sides of any such conflict. (See *Standing Order Exercising Authority Under California Rules of Court, Rule 8.1115 (e)(3), Upon Grant of Review or Transfer of a Matter with an*

Underlying Published Court of Appeal Opinion, Administrative Order 2021-04-21; Cal. Rules of Court, rule 8.1115(e)(3) and corresponding Comment, par. 2.)

(Order Granting Petition for Review, S287261, December 11, 2024.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley*, *supra*, 7 Cal.App.4th at p. 1108.) The touchstone of the workers' compensation system is our constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.) "Substantial justice" is not a euphemism for inadequate justice. Instead, it is an exhortation that the workers' compensation system must focus on the *substance* of justice, rather than on the arcana or minutiae of its administration. (See Lab. Code, § 4709 ["No informality in any proceeding . . . shall invalidate any order, decision, award, or rule made and filed as specified in this division."].) When a litigant is deprived of their due process rights based upon the administrative errors of a third party, for which they bear no blame and over whom they have no control, substantial justice cannot be compatible with such a draconian result.

In keeping with the WCAB's constitutional and statutory mandate, all litigants before the WCAB must be able to rely on precedential authority, and all litigants must have the expectation that they will be treated equitably on issues of procedure and be accorded same or similar access to the WCAB. The Appeals Board has relied on the *Shipley* precedent for over thirty years, by continuing to consider all timely filed petitions for reconsideration on the merits, consistent with due process. Treating all petitions for reconsideration in the same or similar way procedurally promotes judicial stability, consistency, and predictability and safeguards due process for all litigants. We also observe that a decision on the merits of the petition protects every litigant's right to seek meaningful appellate review after receiving a final decision from the Appeals Board.

Only the Appeals Board is statutorily authorized to issue a decision on a petition for reconsideration. (Lab. Code, §§ 112, 115, 5301, 5901, 5908.5, 5950; see Cal. Code Regs., tit. 8, §§ 10320, 10330.) The Appeals Board must conduct de novo review as to the merits of the petition and review the entire proceedings in the case. (Lab. Code, §§ 5906, 5908, 5908.5; see Lab. Code, §§ 5301, 5315, 5701, 5911.) Once a final decision by the Appeals Board on the merits of the petition issues, the parties may seek review under section 5950, but appellate review is limited to review of the record certified by the Appeals Board. (Lab. Code, §§ 5901, 5951, 5952, 5953.)

Consequently, we apply the doctrine of equitable tolling pursuant to *Shipley* to this case. Here, the WCJ issued the Findings of Fact on February 3, 2025. Defendant filed its Petition for Removal on February 14, 2025, and the WCJ issued his Report on February 27, 2025, treating the Petition solely as one for removal. After transmission to the Appeals Board, the case was set up as one for removal, which unlike a petition for reconsideration has no statutory deadline for review. Upon review of the record by the Appeals Board panel on May 21, 2025, since only the Appeals Board is empowered to make the determination, the Petition for Removal was deemed a Petition for Reconsideration because of the final findings as to injury AOE/COE, employment, insurance coverage, rate of earnings, and payment of temporary and permanent disability benefits even though those findings were not challenged. Under the circumstances, the requirements for equitable tolling have been satisfied in this case.

Accordingly, our time to act on defendant's petition was equitably tolled until 60 days after May 21, 2025. The date 60 days from May 21, 2025, is Sunday, July 20, 2025. The next business day that is 60 days from May, 21, 2025, is Monday July 21, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[3] This decision is issued by or on July 21, 2025, so that we have timely acted on the petition as required by section 5909(a).

III.

These proceedings arise out of a dispute regarding the medical-legal process, and specifically, defendant's September 5, 2024 Petition seeking to bar applicant from maintaining proceedings for the collection of compensation pursuant to section 4053.

Section 4053 falls within Article 1 of Chapter 7 of the Labor Code. Article 1 commences with section 4050, which provides:

> Whenever the right to compensation under this division exists in favor of an employee, he shall, upon the written request of his employer, submit at reasonable intervals to examination by a practicing physician, provided and paid for by the employer, and shall likewise submit to examination at reasonable intervals by any physician selected by the administrative director or appeals board or referee thereof.

[3] 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.

(Lab. Code, § 4050.)

Section 4053 provides:

> So long as the employee, after written request of the employer, fails or refuses to submit to such examination or in any way obstructs it, his right to begin or maintain any proceeding for the collection of compensation shall be suspended.

(Lab. Code, § 4053.)

Defendant contends applicant's right to maintain the instant proceedings for the collection of compensation should be suspended because applicant refuses to submit to reevaluation by AME Dr. Newton.

The parties proceeded to trial on January 23, 2025, and submitted the issue of the defendant's petition to suspend proceedings, dated September 5, 2024, as the only issue for decision. (Minutes, at p. 3:2.) However, the WCJ's decision determined that the June 9, 2014, and July 14, 2014, reports of the AME did not constitute substantial medical evidence, and on that basis, denied defendant's petition to suspend proceedings. The Opinion on Decision explained that based on the credible testimony of applicant and his spouse, the interpreter was not allowed to be in the examination room during the AME's physical examination of applicant. (Opinion on Decision, at p. 1.) The WCJ concluded that "[i]t would be inappropriate to require the Applicant to return to Dr. Peter Newton, now that his reports are found to be inadmissible and as such, the Petition to Suspend Proceedings is DENIED."

Thus, the WCJ's decision to deny defendant's petition to suspend benefits was premised on his determination that the AME reports of Dr. Newton were not substantial evidence and were inadmissible as a matter of law.

We note in the first instance, however, that the issue of the substantiality of the reports of AME Dr. Newton was not among the issues submitted for decision by the parties at trial.

Parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is "one of 'the rudiments of fair play' assured to every litigant...." (*Id.* at p. 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, "the commission...must find facts and declare and enforce rights and liabilities - in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after

due process of law." (*Id.* at p. 577.) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

Section 5313 also requires the WCJ to "make and file findings upon all facts involved in the controversy and [make and file] an award, order, or decision stating the determination as to the rights of the parties … [and include] a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313.) The WCJ's decision "must be based on admitted evidence in the record" (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Bd. en banc)), and the decision must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *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]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) In *Hamilton*, we held that the record of proceedings must contain, at a minimum, "the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence." (*Hamilton, supra*, at p. 475.)

Accordingly, any decision regarding the substantiality of the medical-legal reporting in evidence should be based upon an adequate record after providing the parties an opportunity to be heard, in the same manner as any other order touching on the parties' due process rights. (Lab. Code § 5313; Cal. Code Regs., tit. 8, § 10382; *Hamilton, supra,* at p. 476; *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

Here, we believe that principles of due process and the necessity of a complete evidentiary record both require that the issue of the substantiality of the medical reporting of the AME be framed as an issue for decision, and that all parties be allowed the opportunity to present arguments and evidence responsive to the issue. To the extent that the issue was not framed with specificity in trial proceedings, and because the WCJ specifically premised the denial of defendant's petition to suspend proceedings based on assessment of the substantiality of the reporting of Dr. Newton, we will rescind the Findings of Fact and return the matter to the WCJ to conduct further proceedings consistent with this opinion. Once the WCJ has issued a new decision, any person aggrieved thereby may seek removal or reconsideration, as appropriate.

IV.

While we return this matter to the trial level for the WCJ to frame the relevant issues, create an adequate record, and file findings upon all facts involved in the controversy, we offer the following observations relevant to the issues at bar.

The WCJ's Opinion on Decision concludes that the reporting of Dr. Newton is not substantial evidence and is therefore *inadmissible*. (Opinion on Decision, at p. 1.) We observe, however, that the issue of the admissibility of the reporting of the AME was not framed for decision, and in any event, that even if a WCJ thoroughly discusses an issue in an opinion, statements in the opinion are not legally binding because only findings, orders, or an award are legally enforceable. (See Lab. Code, §§ 5313; 5806-5807 [setting forth the procedure for enforcement].)

Moreover, the Appeals Board has the discretionary authority under section 5701 to develop the record when the medical record is not substantial evidence. (See also Lab. Code, § 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we observed:

> [W]here the WCJ determines after trial or submission of a case for decision that the medical record requires further development, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. Each side should be allowed the opportunity to obtain supplemental or additional reports and/or depositions with respect to the area or areas requiring further development, i.e., the deficiencies, inaccuracies or lack of completeness previously identified by the WCJ and/or the Board. (*Tyler, supra*, 62 Cal. Comp.Cases at p. 928.) Only if the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, should other physicians be considered.

(*McDuffie, supra*, at p. 142.)

Accordingly, if a deficient medical-legal report cannot cure the need for development of the record, the report should generally remain in evidence unless the WCJ determines the report to be statutorily inadmissible. The weight accorded the evidence, including the weighing of medical-legal reporting in evidence, is a matter to be determined by the WCJ and by the Appeals Board. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312. 317 [35 Cal.Comp.Cases

500]; *Lundberg v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 436, 440 [33 Cal.Comp.Cases 656].) 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. (Lab. Code, § 3202.5.) Even in instances where a WCJ determines that a report has limited or no evidentiary weight with respect to the medical-legal conclusions reached by the evaluating physician, or because of other procedural or substantive deficiencies, the report may nonetheless contain information relevant to the determination of issues necessary to the adjudication of the claim. Examples of relevant information may include a record of presenting symptoms, medical histories, a review of medical records that later become lost or otherwise unavailable, records of diagnostic testing, and clinical observations.

Allowing deficient medical-legal reporting to remain in evidence while assigning it the appropriate evidentiary weight is consonant with well-established principles favoring the broad admissibility of evidence in workers' compensation proceedings. Indeed, "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' Comp. Appeals Bd.* (2008) 164 Cal.App.4th 173, 178 [73 Cal.Comp.Cases 763].) Similarly, the Appeals Board is broadly authorized to consider "[r]eports of attending or examining physicians." (Lab. Code, § 5703(a); *Valdez, supra*, at p. 1239.) Section 4064(d) provides the no party is prohibited from obtaining *any* medical evaluation or consultation at the party's own expense, and that *all* comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board except as provided in specified statutes. (Lab. Code, § 4064(d); *Valdez*, *supra*, at p. 1239.) Section 4062.3(a) further provides that any party may provide to the QME, subject to the restrictions set forth in the statute, any records prepared or maintained by the employee's treating physician or physicians and medical and nonmedical records relevant to determination of the medical issue. (Lab. Code, § 4062.3(a).) Finally, WCAB Rule 10682(c) (Cal. Code Regs., tit. 8, § 10682(c)), provides that a failure to comply with the specific minimum requirements set forth under the rule will not render the reporting inadmissible but will instead be considered in the weighing of the evidence. Taken together, these statutory, regulatory, and case law prescriptions underscore the importance of allowing for the full consideration of the entire evidentiary record, in furtherance of the substantial justice required in workers' compensation proceedings.

Consequently, even in those instances where a report does not meet minimum standards, it should generally remain in evidence and be accorded its appropriate evidentiary weight. (See also Cal. Code Regs., tit. 8, § 10682(c).)

We also observe that the parties to this matter have previously entered into an AME agreement. Section 4062.2(f) provides that the *parties* may enter into an AME agreement at any time but that "[a] panel shall not be requested pursuant to subdivision (b) on any issue that has been agreed to be submitted to or has been submitted to an agreed medical evaluator unless the agreement has been canceled by mutual written consent." (Lab. Code, § 4062.2(f).) By its own terms, however, the scope of subdivision (f) is limited to the *parties* and does not limit the WCJ's authority to direct development of the record under section 5701, to appoint a regular physician, or to order the issuance of an additional panel of Qualified Medical Evaluators. (See Cal. Code Regs., tit. 8, § 10955(a); *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654 [64 Cal.Comp.Cases 624]; *Hardesty v. McCord & Holdren, Inc.* (1976) 41 Cal.Comp.Cases 111 [WCJ is accorded wide latitude in the determination of discovery disputes at the trial level]; see also, Cal. Code Regs., tit. 8, § 32.6 [WCJ may order additional panel of Qualified Medical Evaluators based on finding that an additional evaluation is reasonable and necessary to resolve disputed issues under Labor Code sections 4060, 4061 or 4062.3].) Nor does section 4062.2(f) preclude the parties to an AME agreement from mutually selecting a successor AME.

Finally, insofar as the applicant alleges the AME evinced bias against him, we observe that Administrative Director (AD) Rule 40 permits an injured worker to discontinue a medical-legal evaluation as follows:

> That subject to section 41(g), the injured worker may discontinue the evaluation based on good cause. Good cause includes: (A) discriminatory conduct by the evaluator towards the worker based on race, sex, national origin, religion, or sexual preference, (B) abusive, hostile or rude behavior including behavior that clearly demonstrates a bias against injured workers, and (C) instances where the evaluator requests the worker to submit to an unnecessary exam or procedure.

(Cal. Code Regs., tit. 8, § 40(a)(2).)

Accordingly, a WCJ may order a replacement medical-legal evaluator if the existing evaluator reveals a bias against the injured worker that constitutes a disqualifying conflict of interest as defined by AD Rule 41(c)(3). (See Cal. Code Regs., tit. 8, §§ 31.5(a), 41(c)(3) and 41.5(d)(4); see also *Beecham v. Swift Transportation Services* (November 27, 2017,

ADJ10084731, ADJ10084732) [2017 Cal. Wrk. Comp. P.D. LEXIS 555].) In the event that any party to a medical-legal evaluation contends there is good cause to discontinue an evaluation due to the presence of bias, the parties should frame the issue for decision at trial with specificity.

In summary, we observe that the WCJ's decision denying defendant's Petition to Suspend Proceedings is based on the WCJ's determination that the reporting of the AME is not substantial evidence. However, because the issue of the substantiality of the AME reporting was neither raised nor submitted at trial, we are persuaded that principles of due process require that we rescind the resulting decision and allow the parties to address the issue in the first instance. We also note that rescission of the Findings of Fact will allow the WCJ and the parties to create a complete evidentiary record responsive to the issues submitted for decision. Accordingly, we will treat defendant's Petition as one seeking reconsideration, grant the petition, and applying the removal standard, rescind the Findings of Fact and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the decision of February 3, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of February 3, 2025 is **RESCINDED** and the matter **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 21, 2025

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

OSCAR VILLALOBOS
STOLL, NUSSBAUM & POLAKOV
SILVERII, CHEUNG & KUBIS

SAR/abs

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