WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PATRICIA ABRAHAM, *Applicant*

vs.

NORCAL HARVESTING, LLC; INSURANCE COMPANY OF THE WEST, administered by ICW GROUP, and RAMCO ENTERPRISES; permissibly self-insured through CAL FARM MANAGEMENT, INC. administered by INTERCARE HOLDINGS INSURANCE SERVICES, *Defendants*

Adjudication Numbers: ADJ11001947, ADJ13566980
Salinas District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant Ramco Enterprises (Ramco) seeks reconsideration of the Joint Findings of Fact, Award and Order issued and served by the workers' compensation administrative law judge (WCJ) in this matter on October 2, 2024. In that decision, the WCJ found, as is relevant, that applicant sustained industrial injury arising out of and in the course of employment (AOE/COE) to her cervical spine during the period from June 24, 2019 to June 24, 2020 (ADJ13566980), and further sustained injury AOE/COE on June 14, 2016 to her left shoulder, left elbow, cervical spine including the neck, and right knee (ADJ11001947). The WCJ further found that based upon the qualified medical evaluator (QME) Pamela Kirkwood, D.C., applicant's permanent disability and need for future medical treatment is inextricably intertwined as between both injuries.

The WCJ issued a combined award of permanent disability, after apportionment, of 76%, based upon the medical reporting of QMEs Nanci Price, D.C., and Pamela Kirkwood, D.C., and ordered defendant Ramco to administer applicant's award, with the right to seek reimbursement and/or contribution from co-defendants Norcal Harvesting.

Petitioner contends that the WCJ erred in finding applicant to be 100% permanently totally disabled based upon the reporting of the PQME, as he failed to consider apportionment to applicant's various dates of injury under both Labor Code[1] sections 4663 and 4664.

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

Petitioner requests the petition be granted, and the record further developed as to apportionment and applicant's petition to reopen case ADJ8045352.

Applicant filed a response recommending the petition be denied.

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

We have considered the Petition for Reconsideration, the Answer, and 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 defendant's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on November 14, 2024, and 60 days from the date of transmission is January 13, 2025. This decision is issued by or on January 13, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code 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 14, 2024, and the case was transmitted to the Appeals Board on November 14, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 14, 2024.

Turning to the merits, preliminarily, we note the following in our review:

The Minutes of Hearing and Summary of Evidence (MOH/SOE) dated February 8, 2023, list two claims for applicant: 1) A claimed cumulative trauma (CT) injury claim ending June 24, 2020 to the neck, back, shoulders, arms, elbows, hands, knees and feet (ADJ13566980); and 2) An admitted injury on June 14, 2016 to the left elbow, left forearm, and right knee, with a claim to the neck, left arm, left hand, and left shoulder (ADJ11001947).

The issues to be determined were injury AOE/COE as to the CT ending June 24, 2020, permanent and stationary date, permanent disability, apportionment, and attorney fees. Also at issue in the specific date of injury was earnings, whether the medical reporting of Nanci Price, D.C., constitutes substantial medical evidence, whether defendant is entitled to additional discovery, and whether defendant is entitled to credit for all permanent disability advances (MOH/SOE, 2/8/23, p. 2-4.)

The Joint Findings of Fact, Award and Order of the WCJ in this matter found, in pertinent part, that applicant sustained injury AOE/COE to his cervical spine while employed during the period June 24, 2019 to June 24, 2020, but not to her shoulder, arms, elbows, hands, knees or feet. The WCJ further found the cervical spine disability as a result of the CT to be 14%. In applicant's specific injury claim of June 14, 2016, the WCJ found industrial injury to the left shoulder, left elbow, cervical spine including the neck and right knee. Relying on the medical reporting of Nanci Price, the Qualified Medical Evaluator (QME), the WCJ determined the permanent disability for both injuries should be combined, totaling 76%. She further found Dr. Price's reporting sufficient to rebut the Combined Value Chart (CVC). Defendant Insurance Company of the West (ICW) was ordered to administer benefits and was allowed credit for benefits paid related to the cervical spine injury found in applicant's CT case.

II.

We first address defendant's contentions that the WCJ erred in adding rather than combining applicant's disabilities herein. The Permanent Disability Rating Schedule (PDRS) is prima facie evidence of an injured employee's permanent disability. (Lab. Code, § 4660; cf. *Ogilvie v. Workers' Comp. Appeals Bd.* (2011)197 Cal.App.4th 1262, 1274–1277 [76 Cal.Comp.Cases 624] (*Ogilvie*).) The PDRS provides that the ratings for multiple body parts arising out of the same injury are "generally" combined using the Combined Values Chart (CVC), which is appended to the PDRS. (2005 PDRS, at p. 1-10.) Yet, because it is part of the PDRS, the CVC is rebuttable and a reporting physician is not precluded from utilizing a method other than the CVC to determine an employee's whole person impairment so long as the physician's opinion remains within the four comers of the AMA Guides. (Lab. Code, § 4660; *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808, 818–829 [75 Cal.Comp.Cases 837].)

In *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 [2024 Cal. Wrk. Comp. LEXIS 23] (Appeals Board en banc) we held that where an applicant seeks to rebut the CVC, they must establish the following:

1. The ADLs impacted by each impairment to be added, and

2. Either:

a. The ADLs do not overlap, or

b. The ADLs overlap in a way that increases or amplifies the impact on the overlapping ADLs.

(*Id.* at pp. 688-689.)

Our en banc decision in *Vigil* issued on June 10, 2024, and is mandatory authority on all WCJs and WCAB panels. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, § 11425.60(b).)

Pursuant to our analysis in *Vigil*, the salient inquiry is whether the physician's medical opinion is framed in terms of reasonable medical probability, is not speculative, is based on pertinent facts and on an adequate examination and history, and sets forth reasoning in support of its conclusions. (*Vigil, supra*, 89 Cal.Comp.Cases at p. 693.) This approach is consonant with the requirement that any award, order, or decision of the Board be supported by substantial evidence *in the light of the entire record*. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

With respect to the issue of a combined rating for the applicant's cervical spine, we note that in B*enson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113, 133] (*Benson*), the Court of Appeal held that pursuant to reform legislation of 2005, sections 4663 and 4664 require apportionment to each distinct industrial injury causing permanent disability. (*Id.* at p. 117.) This is because the "plain language of section 4663, subdivision (c) … calls for a physician to make an apportionment determination 'by finding what approximate percentage of the permanent disability *was caused by the direct result of injury arising out of and occurring in the course of employment* and what approximate percentage of the permanent disability *was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries*.'" (*Id.* at p. 123, italics original.) Thus, based on the legislative history and the Appeals Board's contemporaneous interpretation of the statute,

"apportionment is required for each distinct industrial injury causing a permanent disability, regardless of the temporal occurrence of permanent disability or the injuries themselves." (*Id.* at p. at p. 132.) However, the Court of Appeals in *Benson* also observed that:

> [T]here may be limited circumstances … when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability. In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified. (See § 4663, subd. (c); *Kopping v. Workers' Comp. Appeals Bd.*, supra, 142 Cal.App.4th at p. 1115 ["the burden of proving apportionment falls on the employer because it is the employer that benefits from apportionment"].)

(*Benson, supra*, at p. 133.)

Thus, the court determined that defendant bears the burden of establishing apportionment, and that under certain circumstances an evaluating physician will be unable to parcel out, with reasonable medical probability, the approximate percentages of disability arising out of each claimed injury. In such cases, the defendant has not met its burden of establishing valid apportionment as between the various claimed industrial injuries. (See also *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170].) *Torres v. Automobile Club of So. Cal.* (1997) 15 Cal.4th 771, 779 [937 P.2d 290, 63 Cal.Rptr.2d 859]; *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41 Cal.Comp.Cases 42].)

III.

It is well established that decisions by the Appeals Board 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. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*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, § 10787.) "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]).)

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 existing record is sufficient to support the decision, order, award, legal conclusions, and/or recommendations of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above, given the multiple injury claims and the prior award of the applicant.

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 Labor Code sections 5950 et seq.

V.

Accordingly, we grant defendant'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 defendant's Petition for Reconsideration of the Joint Findings of Fact, Award and Order issued on October 2, 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/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 13, 2025

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

PATRICIA ABRAHAM
DILLES LAW GROUP
YRULEGUI & ROBERTS
LAW OFFICES OF JANE WOODCOCK

LAS/abs

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