WORKERS'COMPENSATIONAPPEALSBOARD

STATE OF CALIFORNIA

SHANE STREET, *Applicant*

vs.

JD2 INCORPORATED;
FEDERAL INSURANCE COMPANY C/O GALLAGHER BASSETT, *Defendants*

Adjudication Number: ADJ16197947 (IWADR00959)
Sacramento District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant JD2 Incorporated, insured by Federal Insurance Company c/o Gallagher Bassett (defendant), has petitioned for reconsideration of the Findings and Award (F&A), issued and served by the workers' compensation arbitrator (WCA) in this matter on September 24, 2024. In that decision, the WCA found that applicant, while employed as an ironworker from June [16], 2020 to June 16, 2021, sustained industrial injury to his cervical spine, thoracic spine, lumbar spine, bilateral shoulders, elbow and wrists, with the issue of injury to his respiratory system deferred. The WCA further found applicant's knowledge and first date of disability of his cumulative trauma pursuant to Labor Code[1] section 5412 was June 17, 2021. Finally, the WCA found and awarded applicant temporary total disability (TTD) for the period June 17, 2021 through June 15, 2023, at a rate to be adjusted by the parties.

Petitioner contends that the WCA erred in his determination of the date of injury per section 5412 and that the evidence supports a finding that the date of injury should be July 23, 2012 to July 23, 2013.[2] Petitioner further contends the submitted medical reporting is not substantial evidence and does not support a finding of injury arising out of and in the course of employment

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

[2] Section 5412 states: "The date of injury in cases of occupational diseases or cumulative injuries is the ***date*** upon which the employee first suffered disability therefrom and either know, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Cal. Lab. Code § 5412, Italics added.) Thus, the date of injury per section 5412 is as to a specific day and is distinguishable from the period of industrial exposure, or the period of liability per section 5500.5.

(AOE/COE). Petitioner also argues that the WCA's deferral of the respiratory claim of applicant is prejudicial to defendant, as applicant has had sufficient time to develop his claim for his respiratory and lung issues, but failed to do so.

We have received an Answer from applicant. The WCA prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have reviewed the allegations in the Petition for Reconsideration, the Answer, and the contents of the Report. Based upon our preliminary review of the record, we will grant defendant's Petition for Reconsideration, and we will order that this matter be referred to a Workers' Compensation Judge (WCJ) or designated hearing officer of the Appeals Board for a status conference. Our order granting defendant's 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.
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> (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 cases were transmitted to the Appeals Board on November 8, 2024, and 60 days from the date of transmission is Tuesday, January 7, 2025. This decision is issued by or on Tuesday, January 7, 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 cases 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. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Although we have not received a complete record of the proceedings as required by WCAB Rule 10990, our review of the Report and Recommendation shows that the Report was served by the WCA on November 5, 2024. Service of the Report and transmission of the case to the Appeals Board did not occur on the same day. Thus, we conclude that service of the Report did not provide accurate notice of transmission under section 5909(b)(2) because service of the Report did not provide actual notice to the parties as to the commencement of the 60-day period on November 8, 2024.

However, a notice of transmission was served by the district office on November 8, 2024, which is the same day as the transmission of the case to the Appeals Board on November 8, 2024. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1), and consequently they had actual notice as to the commencement of the 60-day period on November 8, 2024.

II.

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; 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.)

A petition for reconsideration of an arbitrator's decision or award made pursuant to a collective bargaining agreement per the provisions of sections 3201.5 and 3201.7 shall be subject to review by the appeals board in the same manner as provided for reconsideration of a final order, decision or award made and filed by a workers' compensation administrative law judge. (Lab. Code §§ 3201.5(a)(1) and 3201.7(a)(3)(A).)

Within 15 days after receiving the petition for reconsideration, the arbitrator or board of arbitrators shall perform one of the following actions:

(1) Rescind the entire order, decision or award, and initiate further proceedings within 30 days; or

(2) Rescind the order, decision or award and issue an amended order, decision or award. The time for filing a petition for reconsideration pursuant to Labor Code section 5903 will run from the filing date of the amended order, decision or award; or

(3) Submit to the Appeals Board an electronic copy of the complete record of proceedings, including:

(A) The transcript of proceedings, if any;

(B) A summary of testimony if the proceedings were not transcribed;

(C) The documentary evidence submitted by each of the parties;

(D) An opinion that sets forth the rationale for the decision; and

(E) A report on the petition for reconsideration, consistent with the provisions of rule 10962. The original arbitration record shall not be filed.

(Cal. Code Regs., tit. 8, § 10990(f)(3)(A)-(E); see also Lab. Code, §§ 3201.5(a)(1), 3201.7(a)(3)(A).)

The WCA initially issued a Findings and Award in this matter on May 18, 2024. Defendant filed a timely petition for reconsideration, and on August 12, 2024, we issued an Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration (Opinion and Order) returning the matter back to the WCA for further proceedings.

In that Opinion we stated:

As with a workers' compensation administrative law judge (WCJ), an arbitrator's decision must be based on admitted evidence and must be supported by substantial evidence. (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10566.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id*. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350] [a full and complete record allows for a meaningful right of reconsideration]; *Lewis v. Arlie Rogers & Sons* (2003) 69 Cal.Comp.Cases 490, 494, emphasis in original ["decision [must] be based on an ascertainable and adequate record," including "an orderly identification in the record of the evidence submitted by a party; and what evidence is admitted or denied admission."].) "An organized evidentiary record assists an arbitrator in rendering a decision, informs the parties what evidence will be utilized by the arbitrator in making a determination, preserves the rights of parties to object to proffered evidence, and affords meaningful review by the Board, or reviewing tribunal." (*Id*.)

Here, the WCA issued the Report on July 1, 2024. However, the record does not include the stipulations or the issues submitted for decision by the parties to the arbitration proceedings. (Cal. Code Regs., tit. 8, § 10914(c)(6).)

The Appeals Board may not ignore due process for the sake of expediency. (*Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 469 [83 Cal.Comp.Cases 1643] [claimants in workers' compensation proceedings are not denied due process when proceedings are delayed in order to ensure compliance with the mandate to accomplish substantial justice]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805] [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].) "Even though workers' compensation matters are to be handled expeditiously by the Board and its trial judges, administrative efficiency at the expense of due process is not permissible." (*Fremont Indem. Co. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 971 [49 Cal.Comp.Cases 288]; see *Ogden Entertainment Services v. Workers' Comp. Appeals Bd.* (*Von Ritzhoff*) (2014) 233 Cal.App.4th 970, 985 [80 Cal.Comp.Cases 1].)

The Appeals Board's constitutional requirement to accomplish substantial justice means that the Appeals Board must protect the due process rights of every person seeking reconsideration. (See *San Bernardino Cmty. Hosp. v. Workers'*

Comp. Appeals Bd. (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986] ["essence of due process is . . . notice and the opportunity to be heard"]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) In fact, "a denial of due process renders the appeals board's decision unreasonable..." and therefore vulnerable to a writ of review. (*Von Ritzhoff*, *supra*, 233 Cal.App.4th at p. 985 citing Lab. Code, § 5952(a), (c).) Thus, due process requires a meaningful consideration of the merits of every case de novo with a well-reasoned decision based on the evidentiary record and the relevant law.

We are unable to conduct meaningful review of the Petition or render a decision based on an incomplete record. Accordingly, as our decision after reconsideration, we will rescind the arbitrator's decision and return the matter to the trial level. When the WCA issues a new decision, any aggrieved person may timely seek reconsideration.

We offer the following nonbinding guidance to the parties upon return of this matter to the trial level. The WCA's Report indicates that the parties have framed the issue of injury AOE/COE but have not submitted the issue of injured body parts for decision. We observe, however, that any finding of injury AOE/COE must identify at least one body part which sustained injury. (Lab. Code, § 3600(a); *South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297–298 [80 Cal.Comp.Cases 489].) Therefore, the parties should consider framing for decision the body part or parts alleged to have been injured as an adjunct to the issue of injury AOE/COE.

The WCA's Report also notes that the parties have raised the issue of the period of liability pursuant to section 5500.5, which provides that for claims of cumulative injury filed or asserted after January 1, 1981, liability is limited to the applicant's employers in the one-year period prior to either "the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury," or the date of injury as determined pursuant to section 5412, whichever occurs first. (Lab. Code, § 5500.5(a).) In cases involving an alleged cumulative injury, the date of injury is governed by section 5412, which holds:

The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.

(Lab. Code, § 5412.)

Accordingly, a determination as to the period of liability pursuant to section 5500.5 necessarily requires two determinations: (1) the date of last injurious exposure, and (2) the date of injury pursuant to section 5412. Once both dates have been identified, the period of liability pursuant to section 5500.5 is the year preceding the earlier of the two dates. (Lab Code, § 5500.5(a).) Thus, and insofar as the parties wish to address issues of liability pursuant to section 5500.5, they should also frame the issue of the date of injury pursuant to section

5412. The WCA should then enter a finding as to both the date of injury pursuant to section 5412 and the period of liability pursuant to section 5500.5.

(Opinion and Order, 8/12/24.)

As noted, we had still not received the stipulations and issues that were the subject of the original arbitration hearing resulting in the May 18, 2024 F&A, and returned this matter back to the arbitrator for further proceedings.

However, instead of holding further proceedings with the parties in order to identify the stipulations as well as issues upon return to the arbitrator, the case was resubmitted for decision after receipt by the WCA of written legal responses to the points raised in our Opinion and Order. There do not appear to be any formal stipulations and issues referenced and agreed upon during the first trial of this matter, as the Opinion of the WCA notes that a summary of the testimony and Minutes of Arbitration was not prepared by the WCA at the April 22, 2024 arbitration hearing since a Transcript of Proceedings (Transcript) was ordered. (Opinion, pp. 1, 4.) Unfortunately, the Transcript also lacks the requisite stipulations and issues that we previously noted absent.

The stipulations and issues still do not appear to have been formalized at a noticed hearing, through a transcript of minutes of hearing and summary of evidence. Moreover, the F&A of September 24, 2024 as well as the Report indicates an Order issued by the WCA to the parties on August 21, 2024 to meet and confer as to relevant issues, and that although they did not do so, written responses were issued by both parties on September 5, 2024. (F&A, p. 2; Report, p. 2.)

Those additional documents do not appear to have been submitted to the appeals board as part of the complete record of proceedings.

As previously stated, the Appeals Board may not ignore due process for the sake of expediency, and the Appeals Board's constitutional requirement to accomplish substantial justice means that the Appeals Board must protect the due process rights of every person seeking reconsideration.

As with a workers' compensation administrative law judge (WCJ), an arbitrator's decision must be based on admitted evidence and must be supported by substantial evidence. (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Meaningful review of an arbitrator's decision requires that the "decision be based on an ascertainable and adequate record," including "an *orderly identification* in the record of the

evidence submitted by a party; and *what evidence is admitted or denied admission*." (*Lewis v. Arlie Rogers & Sons* (2003) 69 Cal.Comp.Cases 490, 494, emphasis in original.) "An organized evidentiary record assists an arbitrator in rendering a decision, informs the parties what evidence will be utilized by the arbitrator in making a determination, preserves the rights of parties to object to proffered evidence, and affords meaningful review by the Board, or reviewing tribunal." (*Id.*; see also *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753 [a full and complete record allows for a meaningful right of reconsideration].)

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. (Lab. Code, §§ 5701, 5906; *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 752; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; *McDonald v. Workers' Comp. Appeals Bd., TLG Med. Prods.* (2005) 70 Cal.Comp.Cases 797, 802.)

Section 5310 states in relevant part that: "The appeals board may appoint one or more workers' compensation administrative law judges in any proceeding, as it may deem necessary or advisable, and may refer, remove to itself, or transfer to a workers' compensation administrative law judge the proceedings on any claim. . . ." (See also Lab. Code, §§ 123.7, 5309.)

Here, it appears upon preliminary review that the issues raised and determined, as well as the existing record, may not be sufficient to support the findings of fact, award, and legal conclusions of the WCA as to applicant's injuries and claims; and further development of the record may be necessary. Thus, we will order the matter to a status conference before a WCJ at the Appeals Board.

III.

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"].)

Section 5901 states in relevant part that:

> "No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …"

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to sections 5950 et seq.

IV.

Accordingly, we grant defendant's Petition for Reconsideration, order that this matter be set for a status conference, 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.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued on September 24, 2024 by a workers' compensation arbitrator is **GRANTED**.

IT IS FURTHER ORDERED that this matter will be set for a Status Conference with a workers' compensation administrative law judge or assigned designee of the Appeals Board. Notice of date, time, and format of the conference will be served separately, in lieu of an in person appearance at the San Francisco office of the Appeals Board.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 7, 2025

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

SHANE STREET
EASON & TAMBORNINI
WAI, CONNOR & HAMIDZADEH
STOCKWELL, HARRIS, WOOLVERTON & FOX
MELISSA C. BROWN, ARBITRATOR (IWADR)

LAS/abs

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