WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

VICTOR TORRES ARRIAGA, ***Applicant***

vs.

DM CONSTRUCTION;
STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Numbers: ADJ13482875; ADJ13482367
Santa Rosa District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Joint Findings and Award (F&A) issued on June 10, 2025 by the workers' compensation administrative law judge (WCJ). The WCJ found in pertinent part that in ADJ13482367 applicant sustained injury to his lumbar spine and cervical spine on August 30, 2019 resulting in permanent disability of 19% after apportionment and in ADJ13482875 applicant sustained injury to his lumbar spine and cervical spine on July 13, 2020 resulting in permanent disability of 8% after apportionment. Additionally, applicant's former attorney is entitled to 15% of the amount awarded in connection with this decision based on his efforts in completing discovery and in full and final satisfaction of his lien.

Applicant contends that the evidence does not justify the findings of fact.

We have not received an answer from defendant. The WCJ filed a Joint Report and Recommendation on the Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the Petition for Reconsideration, the contents of the Report, and have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant the 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[1] section 5950 et seq.

I.

Preliminarily, we note 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 July 1, 2025 and 60 days from the date of transmission is Saturday, August 30, 2025, a weekend. The next business day that is 60 days from the date of transmission is Tuesday, September 2, 2025. (See Cal. Code Regs., tit. 8 § 10600(b).)[2] This decision was issued by or on September 2, 2025, so that we have timely acted on the petition as required by section 5909(a).

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

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

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. 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 WCJ, the Report was served on July 1, 2025, and the case was transmitted to the Appeals Board on July 1, 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 July 1, 2025.

II.

The WCJ stated following in the Report:

> **FACTS**
>
> The applicant sustained injuries on August 30, 2019 (ADJ13482367) and July 13, 2020 (ADJ13482875) during the course of his employment as a laborer for D&M Construction to his lumbar spine and cervical spine.
>
> The applicant was deemed Permanent and Stationary on June 21, 2022 by the QME Dr. Fujinaka. (Def. Exh. A.) Dr. Fujinaka issued an 8% Whole Person Impairment for the applicant's cervical spine and 8% Whole Person Impairment for the applicant's lumbar spine. (Def. Exh. A.) Upon request from the Court, Dr. Fujinaka clarified his apportionment opinion and reported that 70% of the permanent impairment, referable to the cervical and lumbar spine, is a direct result of the specific injury that occurred on August 30, 2019, with the remaining 30% due to the subsequent aggravation on July 13, 2020. (Def. Exh. E.)
>
> This matter proceeded to trial on March 18, 2025 and was submitted with no testimony. Applicant did not offer any trial exhibits.
>
> A Joint Findings and Award issued on June 10, 2025 awarding the applicant 19% permanent disability, after apportionment, for the August 30, 2019 injury and 8% permanent disability, after apportionment, for the July 13, 2020 injury. Judge Schaumberg found

that other than a supplemental report issued by Qualified Medical Evaluator Dr. Fujinaka at the request of the court, no significant efforts were taken to advance the case beyond the state it was in prior to the previous decision April 24, 2024. Applicant's former attorney was awarded 15% of the amount awarded in full and final satisfaction of his lien.

It is from this Award that petitioner seeks reconsideration.

DISCUSSION

Labor Code section 5902 (d) provides that

> "The petition for reconsideration shall set forth specifically and in full detail the grounds upon which the petitioner considers the final order, decision, or award made and filed by the appeals board, or a workers' compensation judge to be unjust or unlawful, and every issue to be considered by the appeals board... "
> (LC §5902.)

A petition for reconsideration... may be denied or dismissed if it is unsupported by specific references to the record and to the principles of law involved. (Cal. Code Regs., tit. 8 §10972.) Here, the petitioner asserts that the evidence does not justify the findings of fact. The petition makes no reference to the evidentiary record that would warrant a finding contrary to the WCJ. Absent elaboration or citation to the record, it is difficult to fully ascertain the petitioner's position.

Nonetheless, it merits repeating that the court's Joint Findings and Award is based on the Qualified Medical Evaluator Dr. Fujinaka, the only medical opinion in the record. As stated in the court's Opinion on Decision, the permanent disability is set forth below:

For the earlier date of injury *8130120* I9 (ADJ13482367)

Cervical spine:	70%[15.0l.0l.00-8[1.4]-11-480I-12-14] 10%
Lumbar spine:	70%[15.03.0l.00-8[1.4]-11-480I-12-14] 10%

10% combined with 10% is 19% Award is made on that basis.

For the later date of injury 7/12/2020 (ADJ13482875)

Cervical spine:	30%[15.01.01.00-8[1.4]-11-480I-12-14] 4%
Lumbar spine:	30%[15.03.01.00-8[1.4]-11-480I-12-14] 4%

4% combined with 4% is 8% permanent disability. Award is made on that basis.

(Opinion on Decision, 6/10/25.)

> No other medical report was submitted into the evidentiary record. Absent any evidence to the contrary, there is nothing in the petition to disrupt the court's finding.

(07/01/2025 Report, at pp. 1-4.)

III.

The purpose of utilizing the AMA The American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (2001) (AMA Guides) is to remove the extreme variances in the reporting of physicians. The guides are utilized in order to provide independent assessment of the whole person impairment (WPI) based on objective findings so that the WPI could be verified and repeated by different physicians regardless of who sought the evaluation without bias for or against any party. Accordingly, the language of section 4660(c) provides that "the schedule…shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." Furthermore, the language of section 4660(d) provides that the schedule shall promote consistency, uniformity, and objectivity. The AMA Guides states:

> If pain-related impairment appears to increase the burden of the individual's condition *slightly,* the examiner can increase the percentage found in step 1 by up to 3%. No formal assessment of pain-related impairment is required.

(AMA Guides, at p. 574.)

Next, it is settled law that when two industrial injuries combine to cause permanent disability, the permanent disability caused by each must be separately awarded, unless 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. (*Benson v. The Permanente Medical Group* (2007), 72 Cal.Comp.Cases 1620 (Appeals Board en banc), affirmed sub nom. *Benson v. Workers' Comp. Appeals Bd*. (2009), 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113].) Apportionment of permanent disability must address causation of disability and must constitute substantial evidence. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611, 620-621 (Appeals Board en banc).) To constitute substantial evidence "a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Id*. at 621.)

Defendant holds the burden of proof on apportionment of permanent disability. (Lab. Code, § 5705; see also *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc), *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450 [45 Cal.Comp.Cases 170].) To meet this burden, defendant "must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment." (*Gay v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo*, *supra*, at p. 620.)

Lastly, the Appeals Board has exclusive jurisdiction over fees to be allowed or paid to applicants' attorneys. (*Vierra v. Workers' Comp. Appeals Bd*. (2007) 154 Cal.App.4th 1142, 1149 (*Vierra*).) In calculating attorney's fees, our basic statutory command is that the fees awarded must be "reasonable." (Lab. Code, §§ 4903, 4906(a) & (d).) Pursuant to section 4906, in determining what constitutes a "reasonable" attorney's fee, the Board must consider four factors: (1) the responsibility assumed by the attorney; (2) the care exercised in representing the applicant; (3) the time involved; and (4) the results obtained by the attorney. (Lab. Code, § 4906(d); see also Cal. Code Regs., tit. 8, § 10844.) Further, an attorney shall not request, demand or accept any money from a worker for the purpose of representing the worker before the Workers' Compensation Appeals Board or in any related appellate procedure related until the fee has been approved or set by the Workers' Compensation Appeals Board or an appellate court. (Cal. Code Regs., tit. 8, § 10840; see also *Bentley v. Industrial Acci. Com*. (1946) 75 Cal.App.2d 547, 549 [11 Cal.Comp.Cases 204] [Attorneys appearing in workers' compensation matters may not contract for fees in excess of those awarded by the Appeals Board].)

All decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [54 Cal.Comp.Cases 349].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. *(Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].) To constitute substantial evidence "… a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo*

v. Marshalls (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

Based on our review, we are not persuaded that the record is properly developed on the issues of award of permanent disability including the 1% add-ons for pain, apportionment, or award of fees to applicant's former attorney in satisfaction of his lien. The Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261, 264-265].)

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

IV.

In addition, 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 [32 Cal.Comp.Cases 431]; *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 Labor Code sections 5950 et seq.

V.

Accordingly, we grant applicant'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.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the decision of June 10, 2025 is **GRANTED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 2, 2025

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

VICTOR TORRES ARRIAGA
LAW OFFICE OF ROBERT A. WYMAN
STATE COMPENSATION INSURANCE FUND

SL/abs

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