WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BLONG XIONG, *Applicant*

vs.

FRESNO COUNTY EOC;
CYPRESS INSURANCE CO. by BERKSHIRE HATHAWAY HOMESATE COMPANIES, *Defendants*

Adjudication Number: ADJ11221407
Fresno District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant Fresno County EOC (FCEOC) seeks reconsideration of the October 10, 2025 Findings and Award issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found defendant/employer FCEOC violated Labor Code[1] section 132a when the employer terminated applicant's employment as a bus driver despite having a valid department of transportation (DOT) medical certification and further found that the applicant's work restriction would not preclude applicant from performing work pursuant to the employer's job description. Based on this finding, the WCJ awarded applicant $10,000 recovery pursuant to section 132a and lost wages in an amount to be adjusted by the parties.

Defendant contends that the WCJ erred in failing to adequately address evidence pertaining to inaccurate statements on applicant's medical certification forms and for applicant's failure to engage in the employer's interactive process.

We received an Answer from defendant. The WCJ issued a Report and Recommendation by Workers' Compensation Judge on Petition for Reconsideration (Report) recommending that we deny applicant's Petition for Reconsideration, noting that defendant's initial Petition for

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

Reconsideration was timely filed but did not meet the standards required pursuant to WCAB Rule 10945(a).[2]

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 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."

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[2] WCAB Rule 10945(a) sets forth the required content of petitions for reconsideration, removal, disqualification and answers:

> Every petition for reconsideration, removal or disqualification shall fairly state all of the material evidence relative to the point or points at issue. Each contention shall be separately stated and clearly set forth. A failure to fairly state all of the material evidence may be a basis for denying the petition.

(Cal. Code Regs., tit. 8, § 10945(a).)

Here, according to Events, the case was transmitted to the Appeals Board on November 14, 2025, and 60 days from the date of transmission is January 13, 2026. This decision is issued by or on Tuesday, January 13, 2026, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to 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 workers' compensation administrative law judge, the Report was served on November 14, 2025, and the case was transmitted to the Appeals Board on November 14, 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 November 14, 2025.

II.

On March 1, 2018, applicant filed an Application for Adjudication of Claim (Application) claiming he sustained industrial injury to his spine on February 2, 2018 while employed by defendant as a transit driver when an intoxicated driver violently crashed into his vehicle. (Application, p. 3.)

The parties settled the matter by Stipulations with Request for Award (Stipulations) for 16% permanent disability to the neck and back with open medical treatment based on a report dated December 14, 2018, by panel qualified medical evaluator Victor Kerenyi, D.C. (Applicant's Exh. D[3], Stipulations, January 29, 2019, at p. 7.) An Award issued approving same issued on January 30, 2019.

[3] We note that the WCJ has designated applicant's exhibits alphabetically and defendant's numerically. The Division of Workers' Compensation Workers' Compensation Appeals Bord Policy and Procedure Manual section 1.40(f) advises that "When proposed exhibits are offered at trial for admission into the record, the proposed exhibits shall be organized and labeled to specify which party is offering the exhibit (e.g., Applicant using 1,2,3 et seq., and Defendant using A, B, C, et seq.). Exhibits shall be grouped by doctor in reverse chronological order (e.g., the latest report to be designated as an exhibit first)." (P&P Manual 2013 revision, section 1.40, at p. 19.)

On March 25, 2019, applicant filed a Petition for Discrimination per section 132a, alleging that the defendant employer discriminated against applicant by way of both harassing and refusing to accept applicant's DOT medical Examiner's Certificate. Defendant filed an Answer, refuting the allegations made. Thereafter, the case was set for trial on May 22, 2025 on the issue of applicant's petition for violation of section 132a. Exhibits were offered by the parties, and testimony was taken from both applicant and defense witnesses. Applicant's exhibits were admitted into evidence, and defendant's exhibits 1 through 17 were marked for identification only, with admissibility to be determined thereafter. (MOH/SOE, 5/22/25, p. 4.) Testimony was completed on August 14, 2025, and the matter was thereafter submitted. On October 10, 2025, the WCJ issued the F&A in which it was found that defendant violated section 132a and awarded benefits in connection therewith. It is from this F&A that defendant seeks reconsideration.

III.

We highlight the following legal principles that may be relevant to our review of this matter:

> Section 132a, provides, in pertinent part, that:
>
> It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment.
>
> (1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($ 10,000), together with costs and expenses not in excess of two hundred fifty dollars ($ 250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.

For section 132a cases, the seminal case *Department of Rehabilitation v. Workers' Comp. Appeals Bd. (Lauher)* (2003) 30 Cal. 4th 1281 [135 Cal. Rptr. 2d 665], provides that the injured worker has the initial burden of proof to show by a preponderance of the evidence that, as the result of the industrial injury, the employer engaged in conduct detrimental to the injured worker.

> "[T]o warrant an award [pursuant to section 132a] the employee must establish at least a prima facie case of lost wages and benefits caused by the discriminatory acts of the employer." (*Dyer v. Workers' Comp. Appeals Bd*. (1994) 22 Cal.App.4th

> 1376, 1386 [28 Cal. Rptr. 2d 30].) The employee must establish discrimination by a preponderance of the evidence (*Western Electric Co. v. Workers' Comp. Appeals Bd.* (1979) 99 Cal. App. 3d 629, 640 [160 Cal. Rptr. 436]), at which point the burden shifts to the employer to establish an affirmative defense (*Barns v. Workers' Comp. Appeals Bd*. (1989) 216 Cal. App. 3d 524, 531 [266 Cal. Rptr. 503]).

Lauher, supra, 30 Cal. 4th 1281, 1298 [135 Cal. Rptr. 2d 665, 676].

Pursuant to *Lauher*, supra, the injured worker must also show that harm they suffered was not visited upon other employees.

> An employer thus does not necessarily engage in "discrimination" prohibited by section 132a merely because it requires an employee to shoulder some of the disadvantages of his industrial injury. By prohibiting "discrimination" in section 132a, we assume the Legislature meant to prohibit treating injured employees differently, making them suffer disadvantages not visited on other employees because the employee was injured or had made a claim.

Lauher, supra, 30 Cal. 4th 1281, 1298 [135 Cal. Rptr. 2d 665, 676]. If a prima facie case is made, the burden shifts to the employer to establish an affirmative defense.

With respect to the applicant's industrial injury, the WCJ notes the following:

> The applicant was treating Dr. Dawson, who provided a return-to-work slip dated 8/8/2018, noting that he could return with no limitations, full work OK. (Exhibit G.) The applicant returned to work without any work restrictions. (MOH/SOE 8/14/2025, p.2:8-9.) (Exhibit M.) The applicant worked from 2/8/2019 as a bus driver without any restrictions.
>
> The applicant saw Dr. Kerenyi as a QME doctor who issued a report dated 12/14/2018, finding the following work preclusions:
>
> > "It is my opinion Mr. Xiong's work-related injury results in a disability precluding very heavy work, which contemplates he has lost approximately one-quarter of his pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling and climbing or other activities involving comparable effort." (Exhibit E, Pg. 32)

(Report, p. 3.)

In addition, on January 2, 2019, Dr. Kerenyi issued a Physician's Return-to-Work & Voucher Report indicating that applicant is permanent and stationary with permanent disability and outlining work restrictions including no lifting or carrying more than 45 lbs., a limit of four to six hours of sitting, bending, climbing, or twisting, and a limit of six to eight hours of standing,

walking, squatting, reaching, crawling, driving, grasping, pushing, or pulling. (Applicant's Exh. B.)

The job description for a school bus transit driver who transports children and performs janitorial duties describes physical demands as follows: sit and talk or hear; frequently walk and use hands; occasionally stand, climb or balance, stoop, kneel, crouch or crawl; frequently lift and move up to 10 lbs. and occasionally lift up to 20 lbs. (Exh. A, p. 3.) In reference to applicant's job description and the QME's work restrictions, the employer's witnesses, Tom Blackmore, a Transit Supervisor, and Jennifer Andrade, HRIS manager, both testified that the QME's work restriction would not prevent the applicant from returning to work. (Report, p. 6; MOH/SOE, dated May 22, 2025, p. 6:10-11; MOH/SOE dated June 24, 2025, p. 4:1-2.)

Further, as a school bus driver, applicant is required to maintain current certifications including a Department of Transportation (DOT) medical certification. The employer's operations manual setting forth the policy on "Certification Expiration" states:

> It is the policy of FCEOC Transit Systems to require that all drivers maintain current certifications (medical Examination Report-DL51, CPR, First Aid, VDDP, School Bus, CDL). Every driver is responsible to assure that his/her certificates are kept current within 60 days prior to expiration dates.
>
> Policy
> - FCEOC will attempt to notify drivers 60 days prior to certification expirations have the ultimate responsibility to keep current is up to the driver [sic]
> - It is the drivers responsibility to schedule their recertification prior to expiration with the FCEOC Transit systems.
> - Drivers will not be allowed to drive if their certificates expire.
>
> Failure to obtain proper certification may be cause for disciplinary action up to and termination [sic].

(Exh. N, p. 11.)

In addition, further guidelines for employees are set forth per the employer's "DOT Medical Procedure" as follows:

> DOT Medical Procedure
>
> Applicants for an original or renewal certificate to drive a schoolbus shall submit a report of a medical examination of the applicant given not more than two years prior to the date of the application by a physician licensed to practice medicine, a

licensed advanced practice registered nurse qualified to perform a medical examination, a licensed physician assistant, or a licensed doctor of chiropractic listed on the most current National Registry of Certified Medical Examiners, as adopted by the United States Department of Transportation. The report shall be on a form approved by the department.

Schoolbus drivers, within the same month of reaching 65 years of age and each 12th month thereafter, shall undergo a medical examination.

A DOT physical exam is valid for up to 24 months. The medical examiner may also issue a medical examiner's certificate for less than 24 months when it is desirable to monitor a condition, such as high blood pressure.

EOC Transit will pay for the DOT physical when you go to our pre-approved DOT examiner.

If you do not want to go to EOC Transit Systems approved medical examiner, you may choose another examiner at your cost, that is on most current National Registry of Certified Medical Examiners.

1. Drivers will receive a renewal letter from DMV that notifies them that their medical exam and certificate will expire. This letter expresses that the exam should be turned in 4 weeks prior to the expiration date.

2. If you do not receive a renewal letter from DMV. It is still your responsibility to make sure you have a valid medical exam and certificate on file with DMV and EOC Transit Systems

3. After a driver receives the renewal letter they are to notify a supervisor and get an approval letter to be seen by our approved DOT examiner.

4. Drivers are responsible for getting their DOT medical renewals done prior to the expiration date.

5. After the Exam, driver is to bring the 4 page medical and certificate to a supervisor. The supervisor will copy the exam and certificate and place it in the drivers file.

6. The driver will take the exam and certificate to DMV. DMV will update their medical in their system.

7. The driver will ask the DMV for a receipt. This will be turned in to a supervisor and then placed in their file along with the exam and certificate. This is proof that the DOT exam was taken to DMV.

(*Id*., pp. 12-13.)

As set forth by the WCJ:

> The applicant needed to renew his DOT medical certification to drive the bus. His certification was scheduled to expire on 4/29/2019. The employer scheduled the applicant with Atlas Healthcare Medical Group to perform the medical examination for said certification on 2/8/2019. The doctor disqualified the applicant based on the permanent work restrictions in the applicant's documents. (Exhibit L, p. 29) The doctor did not complete the examination.

(Report, p. 3.)

In our preliminary review, we observe that the employer's policy and procedure provide that it is the *employee's responsibility* to maintain current certifications and to renew required certificates "within 60 days prior to expiration dates." Applicant attended three evaluations. The first evaluation with Atlas Healthcare Medical Group was scheduled by the employer for February 8, 2019, and the evaluator issued a disqualification on the same date. (Exh. L, p. 29.) The second and third evaluators were selected by the applicant and took place on February 25, 2019 and on March 1, 2019. Here, the record is unclear why the employer scheduled the first medical examination on February 8, 2019, even though the applicant had sufficient time to schedule an evaluation on his own before the expiration of his certification on April 29, 2019.

Petitioner disputes the finding of the WCJ that at the time of the termination, the applicant had a valid DOT medical certification and argues that the certification contains inaccurate information provided by applicant regarding his neck and back problems associated with his work injury and maintains that it could refuse the certification. (Exh. K; Report, p. 5.)

IV.

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].)

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].)

Based on our preliminary review, we are not persuaded that the record is properly developed as to whether, as a direct result of his industrial injury, applicant was treated differently by defendant than any other co-worker, and/or whether the existing record is sufficient to support the decision, order, award, and legal conclusions of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above. Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

V.

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.

VI.

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 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/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 13, 2026

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

BLONG XIONG
GOLDBERG & IBARRA
SAGASER, WATKINS & WIELAND
BERKSHIRE HATHAWAY
DUNCAN CASSIO
FRESNO COUNTY EOC

TD/bp

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