WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EMILY BERRETT, *Applicant*

vs.

ADVENTIST HEALTH-HANFORD, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT, *Defendants*

Adjudication Numbers: ADJ18291836; ADJ17467273
Fresno District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact, Order (F&O) issued on July 10, 2026 by a workers' compensation administrative law judge (WCJ) wherein the WCJ found in pertinent part that the employer did not furnish medical treatment; applicant's claim is barred by Labor Code section 5405; applicant failed to establish that defendant is estopped from asserting section 5405; applicant failed to meet her burden of proving that she sustained injury arising out of and in the course of her employment (AOE/COE); and, that applicant's testimony was not credible. The WCJ ordered that applicant take nothing by reason of her claim.

Applicant contends that the WCJ's finding of credibility was made in error based on the WCJ's mistaken belief that applicant changed her testimony at trial from that made in deposition; that applicant's statute of limitations was tolled pursuant to section 5402, subdivision (a), and *Mihesuah* because after reporting her workplace injury to a supervising employee of defendant, thereby complying with section 5402, applicant received medical treatment for the injury through her employer provided group health insurance; despite being notified of a workplace injury through a supervising employee, defendant never provided applicant with a claim form and notice of her potential right to workers' compensation benefits and therefore, her statute of limitations was tolled pursuant to *Reynolds*; and, applicant's credible testimony, defendant's failure to impeach or rebut applicant's testimony, along with the reporting of Agreed Medical Evaluator (AME) Moses Jacob, M.D., that she was a credible historian, meets her burden of proof to establish injury AOE/COE.

Defendant filed an Answer to Petition for Reconsideration (Answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), recommending denial.

We have reviewed the record in this case, the allegations of the Petition for Reconsideration and the Answer, as well as the contents of the Report. Based on our preliminary review of the record, we grant applicant's Petition for Reconsideration. Our order granting applicant's Petition for Reconsideration is not a final order, and a final decision after reconsideration will be ordered 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. BACKGROUND

The WCJ provided the following "Procedural and Factual Background" and grounds for the WCJ's credibility finding against applicant in the Report:

> The matter proceeded to trial on June 15, 2026, on the issues of whether the applicant sustained injury arising out of and in the course of employment and whether the claim was barred by the statute of limitations under LC § 5405. Applicant filed her Application for Adjudication on October 2, 2023, alleging a specific injury on October 15, 2017. (Defendant's Exhibit C.) Defendant denied the claim and asserted, among other defenses, lack of industrial injury and the statute of limitations.
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> At trial, the applicant testified that she injured her back while working in the emergency room on October 15, 2017, and that she believed the injury was work related when it occurred. The applicant further admitted that she did not report the injury to Human Resources, did not complete an incident report, and did not file a workers' compensation claim until October 2, 2023. The applicant also testified that she knew how to report a workplace injury and had been trained regarding workplace injury reporting procedures.
>
> The applicant testified that she discussed her condition with coworkers and supervisors. However, the defense witness' testimony did not corroborate applicant's account that a work injury was reported or that she was discouraged from filing a claim. Janice Goudeau testified that she was aware the applicant had back problems in 2017 but did not know how the condition occurred, did not recall the applicant reporting a work injury, and would not advise an employee not to report a workplace injury. Tyler Healey testified that he recalled applicant had some type of injury, but had no recollection that applicant reported

a workers' compensation injury and would never advise the applicant not to file a claim. Anthony Stephens likewise testified that he had no recollection of the applicant reporting a work-related injury and that, if a coworker were injured at work, he would advise the coworker to file a workers' compensation claim.

The evidence also established that the applicant treated outside the workers' compensation system for years following the alleged injury, obtained extensive care through personal medical providers, underwent multiple surgeries, and received treatment through private or nonindustrial coverage. (Defendant's Exhibits D and E.) The subpoenaed medical records reflected repeated denials that applicant's condition was work related. (Defendant's Exhibits D and E.)

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The applicant argues on reconsideration that the Opinion on Decision confused Janice Goudeau with Jennifer West and therefore incorrectly concluded applicant changed her testimony on a material issue. Even assuming the applicant consistently identified Jennifer West rather than Janice Goudeau as the supervisor to whom she claims she spoke, reconsideration should still be denied.

The credibility determination did not rest solely on that one point. Rather, the decision was based on the totality of the record, including applicant's admitted six-year delay in filing despite claiming contemporaneous knowledge that the injury was work related, her admitted failure to report the injury to Human Resources or complete an incident report despite knowing reporting procedures, the absence of corroborating witness testimony that a work injury was reported, and the medical records reflecting repeated denials that the condition was work related.

...

The applicant also argues that Jennifer West was listed as a defense witness and not called, and that her testimony therefore should be presumed to have supported the applicant. That contention is speculative and unsupported by the trial record. No evidence was admitted establishing what Jennifer West would have said if called to testify. The burden remained on the applicant to prove injury arising out of and in the course of employment under LC § 3202.5. The nonappearance of a witness did not shift that burden and did not compel the undersigned to accept applicant's version of events.

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Finally, applicant argues that the Agreed Medical Evaluator (AME), Dr. Moses Jacob (Applicant's Exhibit 1), found her history credible and that this compels a finding of industrial injury. It does not. The applicant bore the burden of proving injury arising out of and in the course of employment under LC § 3202.5. The WCJ remained the trier of fact as to witness credibility and the

> weight to be given on the evidence. A medical opinion that relies on applicant's history does not require a finding of industrial injury where the underlying factual history is not found persuasive.
>
> Here, review of the record included the AME's reports, but also the admitted medical records reflecting repeated denials that the condition was work related. Considering the record as a whole, the applicant did not meet her burden of proving industrial injury.

(Report, pp. 1-4, 6.)

The WCJ concluded, based in large part on his negative assessment of applicant's credibility, that applicant did not sustain an injury AOE/COE and that defendant never received notice of the alleged workplace injury pursuant to section 5401 and therefore, was never under a duty pursuant to section 5402 to provide applicant with a DWC-1 claim form and notice of her potential eligibility for workers' compensation benefits. (Report, pp. 5-6.)

As a result of finding that the defendant was not notified of the alleged workplace injury and was not under a duty to provide a claim form and notice of rights, the WCJ also found that applicant's statute of limitations was not tolled pursuant to section 5405, subdivision (c), based on the provision of medical treatment for the alleged workplace injury through employer provided health insurance (*Mihesuah v. Workmen's Comp. Appeals Bd.* (1972) 29 Cal.App.3d 337 [37 Cal.Comp.Cases 790]); nor equitably tolled based on defendant's failure to provide applicant with a DWC-1 claim form and notice of rights pursuant to *Permanente Medical Group v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 64 [50 Cal.Comp.Cases 411] and *Reynolds v. Workmen's Comp. Appeals Bd. (Reynolds)* (1974) 12 Cal.3d 762 [39 Cal.Comp.Cases 768]. (Report, p. 5.)

I. THE ORDER GRANTING RECONSIDERATION IS TIMELY

Petitions for reconsideration filed on or after July 14, 2026, are subject to Labor Code section 5909, which states 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.
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> (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.

(Lab. Code, § 5909.)

Under Labor Code section 5909, subdivision (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 August 13, 2026, and 60 days from the date of transmission is October 12, 2026. This decision is issued by or on October 12, 2026, so that we have timely acted on the Petition as required by Labor Code section 5909, subdivision (a).

Labor Code section 5909, subdivision (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 (b)(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, subdivision (b)(2) provides that service of the Report shall be notice of transmission.

Here, according to the proof of service for the Report, the Report was served on August 13, 2026, and the case was transmitted to the Appeals Board on August 13, 2026. 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 August 13, 2026.

II. GROUNDS FOR GRANTING RECONSIDERATION

We first highlight some of the legal principles that may be relevant to our review of this matter. Based on our initial review, it appears that all of the WCJ's findings of fact are subject to rescission and either new findings of fact and order, or rescission and return to the trial level for further development of the record. (See eg., Lab. Code, § 5903, subd. (a), (c).)

First, in workers' compensation proceedings, when a WCJ's credibility determinations are based on substantial evidence, they are "entitled to great weight because of the [WCJ's] 'opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand...' [Citation.]" (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500]; also see *Meiner v. Ford Motor Co*. (1971) 17 Cal.App.3d 127, 140-141.) However, "the Appeals Board is entitled to reject the [WCJ's] findings on credibility matters if substantial evidence supports contrary findings..." (*Garza, supra*, 3 Cal.3d at 318-319.)

In this case, it appears that the WCJ's negative assessment of applicant's credibility may need to be rescinded as it does not appear to be based on substantial evidence, and there is substantial evidence to support a contrary finding. Applicant's testimony in this matter appears unrebutted and unimpeached, and the Appeals Board must accept as true the intended meaning of testimony both uncontradicted and unimpeached. (*LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal. 3d 627, 639 [35 Cal.Comp.Cases 16]; *McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal. 2d 408, 413 [33 Cal.Comp.Cases 660].) Given a defendant's "failure to introduce any contradictory evidence," the finder of fact "must assume the accuracy of [applicant's] testimony." (*McAllister*, *supra*, 69 Cal.2d at p. 416.) In addition, the remaining grounds for the WCJ's negative credibility finding against applicant are based on an inaccurate assessment of what constitutes "notice or knowledge of an alleged work injury," and may not ultimately persuade should the WCJ's negative credibility finding against applicant be rescinded and evidentiary weight thereby given to her testimony that she was dissuaded from pursuing workers' compensation by a supervising employee, and to the opinions of the AME.

It is also our preliminary finding that the WCJ misstates the law related to how an employer can receive notice of a workplace injury. (See Report, p. 5.) An employer is required to provide a claim form to an employee within one day of notice or knowledge of an alleged work injury. (Lab. Code, § 5401(a).) An employer can receive "notice or knowledge of an alleged work injury" via service by the injured worker or someone on his/her behalf. (Lab. Code, § 5400.) "Service" includes, "[k]nowledge of an injury, obtained from any source, on the part of an employer...or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts..." (Lab. Code, § 5402(a).) Thus, the duty of notification arises when the employer has "'...*actual or constructive knowledge* of any work-

related injury...'" (*California Insurance Guarantee Association v. Workers' Comp. Appeals. Bd. (Carls)* (2008) 163 Cal.App.4th 853, 863-864, fn. 8 quoting [73 Cal.Comp.Cases 771] *Permanente Medical Group v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 64 [50 Cal.Comp.Cases 411], emphasis added in *Carls*.) If it is found that defendant received "actual or constructive knowledge" of applicant's alleged workplace injury, and given the factual circumstances of this matter, then the issue of section 5405, subdivision (c) tolling under *Mihesuah* and equitable tolling under *Martin* and *Reynolds* both need further evaluation and may need to be developed.

Next, the Supreme Court found in *Reynolds* that "when an employer fails to perform its statutory duty to notify an injured employee of his workers' compensation rights, and the injured employee is unaware of those rights from the date of injury through the date of the employer's breach, then the statute of limitations will be tolled until the employee receives actual knowledge that he may be entitled to benefits under the workers' compensation system." (*Martin*, *supra*, 39 Cal.3d at p. 63 citing to *Reynolds*, *supra*.) Thus, "...the remedy for breach of an employer's duty to notify is a tolling of the statute of limitation if the employee, without that tolling, is prejudiced by that breach." (*Martin*, *supra*, 39 Cal.3d at 64.) "An employee would be prejudiced without the tolling if he has no knowledge that his injury might be covered by workers' compensation before he receives notice from the employer." (*Ibid*.) In the context of establishing *an applicant's knowledge* for purposes of equitable tolling, "...prejudice means ignorance, and ignorance is presumed until the employee is given the requisite notice or otherwise gains *actual* knowledge that [s]he may be entitled to workers' compensation." (*Carls*, *supra*, 163 Cal.App.4th at 860 citing *Martin*, *supra*, 39 Cal.3d at 65, 67, fn. 8, emphasis added.) *Actual* knowledge of the "...potential eligibility for a particular injury..." cannot be proven by showing an injured worker's "...general awareness of the existence of the workers' compensation system..." or "...past experience with workers' compensation..." (*Carls*, supra, 163 Cal.App.4th at 863 referencing *Reynolds*, *supra*.)

If it is found that defendant received "actual or constructive knowledge" of applicant's alleged workplace injury, the employer in this case may have had constructive, if not *actual knowledge* of a potential work-place injury and thus had the duty to provide a DWC-1 claim form and to notify applicant of their workers' compensation rights at that time. However, there were no findings by the WCJ and no evidence in the record to establish whether the required notices and a DWC-1 claim form were ever provided to applicant, and as a result of the WCJ's negative

credibility finding against applicant, there was no discussion of when applicant had actual knowledge that the alleged injury may be eligible for workers' compensation benefits. Therefore, issues under *Martin*, *Reynolds*, and *Carls* need further evaluation and may need to be developed.

Finally, the WCJ failed to properly assess the burdens of proof related to injury AOE/COE *and* the statute of limitations issues. (Report, pp. 4, 6.) It is the employee's burden to demonstrate by a preponderance of the evidence that he or she sustained a compensable injury. (Lab. Code, §§ 3600(a), 3202.5, 5705.) "Even if, arguendo, the issue is debatable...all reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee." (*California Compensation & Fire Co. v. Workers' Comp. Appeals Bd. (Schick)* (1968) 68 Cal.2d 157, 161.) There does not appear to be an evaluation of all the evidence related to AOE/COE in this matter, including the reporting of the AME, because of the WCJ's negative credibility finding against applicant. Here, although defendant was in the position to produce a supervising employee to whom applicant claimed to have reported the alleged workplace injury, defendant did not do so. Witness testimony that they simply "do not recall" cannot be relied on for purposes of rebuttal or impeachment. *Unless* defendant can rebut or impeach applicant's testimony, corroborating testimony would be unnecessary. Therefore, the record in this matter on the issue of whether the alleged injury is AOE/COE will need further evaluation and/or further development.

Accordingly, the WCJ's decision is subject to rescission and either new findings of fact and order, or rescission and return to the trial level for further development of the record.

III. THIS IS NOT A FINAL DECISION AND JURISDICTION OF THE APPEALS BOARD IS CONTINUING

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. I.A.C.* (*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. I.A.C.* (*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. I.A.C.* (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 removed the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. . . .

(Lab. Code, § 5901.)

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.

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. **While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquires as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov.**

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact, Order issued on July 8, 2026, 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/ PAUL F. KELLY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 12, 2026

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

EMILY BERRETT
GROVE LAW FIRM
ALBERT AND MACKENZIE

AJF/mc

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