

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

MORDECHAI COHEN, *Applicant*

vs.

**AIRGAS INC.; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
*Defendants***

**Adjudication Number: ADJ9042051
San Francisco District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant filed a Petition for Reconsideration (Petition) in response to the Findings and Orders (F&O) dated May 11, 2026 in which the workers' compensation administrative law judge (WCJ) found in pertinent part that applicant, while employed by defendants on June 10, 2010 sustained injury arising out of and in the course of employment (AOE/COE) to the bilateral knees, low back, left shoulder, hips, and left ankle, and claims to have sustained injury to the neck and lower torso, and further that at the time of the injury, applicant's earnings were \$724.80 per week.

Applicant contends that good cause exists to set aside, amend, or decline enforcement of the stipulation at trial as to earnings.

Defendant filed an Answer. The WCJ's Report and Recommendation (Report) recommends that reconsideration be denied.

We have reviewed the allegations in the Petition, the Answer, and the contents of the Report. After review of the record and for the reasons discussed below, we will grant the Petition for Reconsideration, amend the F&O to defer the issue of earnings, otherwise affirm the F&O, and return this matter to the trial level for the WCJ for further proceedings consistent with this decision.

I.

Former Labor Code section 5909¹ 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. (Former 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.

(Lab. Code, § 5909.)

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 June 17, 2026, and 60 days from the date of transmission is Sunday, August 16, 2026. The time limit is also extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600(b).) Here, August 16, 2026, is a Sunday which by operation of law means this decision is due by the next business day, which is Monday, August 17, 2026. This decision issued by or on August 17, 2026, 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 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

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

act on a petition. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

According to the proof of service, the Report was served on June 17, 2026, and the case was transmitted to the Appeals Board on June 17, 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 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 June 17, 2026.

II.

As found by the WCJ, applicant, while employed by defendants on June 10, 2010 sustained injury AOE/COE to the bilateral knees, low back, left shoulder, hips, and left ankle, and claims to have sustained injury to the neck and lower torso.

The following limited review is provided only as necessary to understand our decision.

Preliminarily, we note this case was previously before us resulting in an April 11, 2022 Opinion and Order Dismissing Petition for Reconsideration and a September 22, 2025 Opinion and Orders Denying Petition for Disqualification, Granting Petition for Removal and Decision After Removal.

On January 22, 2026, the minutes from the mandatory settlement conference (MSC), at which applicant appeared in pro per, had comments which include “[a]pplicant confirmed that he wants to proceed on his petitions to disqualify PQME Sabsovich and his claim for temporary total disability.” (Minutes, p. 2.) The supplement to the minutes had orders including:

Defendant shall prepare a pretrial conference statement and mail it to applicant on or before 1/30/26. Applicant is to fill out his portion of the pretrial conference statement and return it to defendant on or before 2/17/26. Applicant may wish to talk with Information and Assistance for help in drafting his portion of the pretrial conference statement.

(Minutes, p. 2.)

At the next MSC on February 26, 2026, applicant again appeared in pro per, and the WCJ signed the parties’ pretrial conference statement (PTCS), which included a stipulation that earnings were \$742.80 per week. (PTCS, PDF p. 2.) On the PTCS issues page, however, the earnings box was marked as at issue with the notation employee claims “Subject to Proof.” There was no entry

from defendant. Good cause to replace the PQME was also listed as an issue. The WCJ ordered that discovery is open and that “[d]espite what is listed on the issues page and attachment, the only issues being set for trial are applicant's petition to disqualify the PQME and claim for additional TTD. All other issues are deferred.” (PTCS, PDF p. 6.)

The case was tried on April 8, 2026. Applicant again appeared in pro per. The Minutes of Hearing and Summary of Evidence (MOH) reflect a stipulation that “[a]t the time of injury, the employee's earnings were \$724.80 per week.” (MOH, p. 2, lns 17-19.) The MOH also shows:

The carrier has paid compensation as follows: Temporary disability at the rate of \$715.67 per week for the period of January 15, 2007 through January 16, 2007, and June 22, 2007 through January 21, 2008; temporary disability at the rate of \$483.20 per week for the period of January 22, 2008 through April 6, 2009.

(MOH, p. 2, lns 21-25.) The two issues for trial were listed as temporary disability “from April 7, 2009 to the present and continuing” and the Petition to Disqualify the Panel QME Dr. Sabsovich. (MOH, p. 2, lns 33-38.) Exhibits were admitted. (MOH, pp. 3 -10.) Applicant testified with respect to the petition to disqualify PQME Dr. Sabsovich. (MOH, p. 11, ln 8 et seq.)

On May 12 2026, the F&O issued findings that in part found the applicant sustained injury to various body parts, that “earnings were \$724.80 per week,” and that applicant did not meet his burden of proof to disqualify PQME Dr. Sabsovich. The WCJ ordered applicant’s petition to disqualify PQME Dr. Sabsovich denied. (F&O pp. 1-2.) In the accompanying Opinion on Decision the WCJ does not discuss earnings except to note under “Stipulated Facts” that “the employee's earnings were \$724.80 per week.” (Opinion on Decision, p. 2.)

On June 5, 2026, applicant’s attorney filed a Notice of Representation and Request for Service. On the next day, June 6, 2026, they filed a Petition for Reconsideration challenging the findings as to average weekly earnings and indemnity rate.² The Petition states reconsideration was sought because:

[T]he evidence does not justify the findings of fact and that the findings of fact do not support the order, decision, or award to the extent the decision enforces or relies on the stipulated AWE and corresponding indemnity rates without determining whether good cause exists to relieve Applicant from the stipulation.

² It appears applicant filed two copies of the June 6 2026 Petition. As the petitions appear identical, we disregard the second petition. (See Cal. Code Reg., tit. 8, §10940(b): “No duplicate copies shall be filed with any district office or with the Appeals Board.”)

(Petition, p. 1, ln 25 to p. 2, ln 2.) The Petition also states: “[T]he wage calculation appears to have averaged in an exceptional mid-2006 period of missing, low, or zero earnings that may not reflect Applicant's earning capacity at the time of injury.” (Petition, p. 2, lns 6-8.) Attached to the Petition were four exhibits.

In the June 17, 2026 Report the WCJ states:

[T]he parties stipulated to the applicant’s earnings at the time of the injury, therefore it was not one of the issues that were tried. Petitioner did not ask to be relieved of that stipulation at the time of trial, nor did I find any reason to set aside that stipulation after reviewing the evidence.

(Report, p. 3.)

On June 26, 2026, applicant filed a Request for Leave to File Supplemental Verification of Petition for Reconsideration.

It is from the May 12 2026 F&O that the applicant seeks reconsideration.

III.

1.

As a preliminary matter, we accept applicant’s Request for Leave to File Supplemental Verification of Petition for Reconsideration, and the verification included with the request is deemed to have been filed with the Petition for Reconsideration. In granting the petition to file a late verification, we note that while section 5902 requires verification of a petition for reconsideration, failure to verify a petition for reconsideration is not a jurisdictional defect that mandates dismissal. (*Mullane v. I.A.C.* (1931) 118 Cal.App. 283, 286.) However, a petition for reconsideration may be dismissed if the petitioner fails to correct the defect or offer a compelling reason for not doing so within a reasonable time after receiving notice of the lack of verification. (See *Lucena v. Diablo Auto Body, Liberty Mut. Ins.* (2000) 65 Cal.Comp.Cases 1425, 1425-1426.)

In this case, applicant cured the defect within a reasonable time by filing a request for leave to file verification with verification on June 26, 2026. This filing was within nine days of the WCJ’s Report, which constituted notice of the defect. Thus, we utilize our discretion to adjudicate based on substance rather than form and accept the supplemental pleading. (Cal. Code Reg., tit. 8, § 10964(a).)

2.

Regarding the attachments to the Petition, we note WCAB Rule 10945 states:

(1) Copies of documents that have already been received in evidence or that have already been made part of the adjudication file shall not be attached or filed as exhibits to petitions for reconsideration, removal, or disqualification or answers. Documents attached in violation of this rule may be detached from the petition or answer and discarded.

(Cal. Code Regs., tit. 8, § 10945(c)(1), emphasis added.)

Here, the exhibits attached to the Petition are all either copies of documents already received into evidence or are part of the adjudication file. As such, we do not consider the exhibits attached to the Petition. While there appears to be no valid reason for attaching documents, we also note applicant's counsel filed a Notice of Representation on June 5, 2026 and the Petition for Reconsideration on the following day. We infer that error may have occurred due to the exigency of filing the petition. We remind counsel, however, to be familiar with the WCAB Rules in advance of any filing to avoid being subject to possible sanctions in the future. (See Lab. Code, § 5813 and Cal. Code Reg., tit. 8, § 10421(b)(4).)

IV.

At trial, the MOH reflects a stipulation that “[a]t the time of injury, the employee’s earnings were \$724.80 per week.” (MOH, p. 2, lns 17-19.) In the Petition the now represented applicant requests to be relieved of this stipulation. In these proceedings only two issues were tried: Applicant’s petition to disqualify the PQME and the claim for an additional temporary disability period. (Minutes, p. 2; PTCS, PDF p. 6; MOH, p. 2, lns 33-38.) All other issues were deferred. (PTCS, PDF p. 6.)

While the parties may stipulate to the facts in controversy, the stipulations are not enforceable until a WCJ makes findings based on the stipulations; the WCJ is not bound by the parties’ stipulations and may make further inquiry into the matter “to determine the matter in controversy.” (Lab. Code, § 5702.) Generally, stipulations further the public policies of settling disputes and expediting trials. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1119 [65 Cal.Comp.Cases 1].) As noted by the WCJ, applicant “*did not ask to be relieved of that stipulation at the time of trial.*” (Report, p. 3, emphasis added.) However, we emphasize the importance of ascertaining the substantial rights of the parties in a benefit delivery system, especially where an applicant is proceeding without legal counsel.

We note “there are certain safeguards in place to protect workers from unknowingly releasing their rights.” (*Camacho v. Target Corp.* (2018) 24 Cal.App.5th 291, 301 [83 Cal.Comp.Cases 1014].) “To safeguard the injured worker from entering into unfortunate or improvident releases as a result of, for instance, economic pressure or bad advice, the worker’s knowledge of and intent to release particular benefits must be established separately from the standard release language of the form.” (*Id.* at p. 301, citing with approval language from *Claxton v. Waters* (2004) 34 Cal.4th 367, 373 [69 Cal.Comp.Cases 895].)

Under section 5904, if a party does not raise an issue upon reconsideration, the failure to do so may be considered a waiver, so that here applicant properly filed the Petition as one for reconsideration. However, for the purposes of justice the Petition may also be construed as to set aside the stipulation as to earnings. (*Rubio v Workers’ Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 200-201 [50 Cal.Comp.Cases 160].) A timely request in a workers’ compensation claim seeking to set aside a stipulation should not be viewed more narrowly than such request under the Code of Civil Procedure which allows the court to consider such a request that is due to “the party’s mistake, inadvertence, surprise, or excusable neglect.” (Cal. Code Civ. Proc., § 473(b).) Further, practice before the Appeals Board is governed by the Labor Code and the Board’s Rules of Practice and Procedure, not by the Code of Civil Procedure. This is because the Board may make inquiry in the manner “which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division.” (Lab. Code, § 5708.)

In returning this case we are mindful that the parties to a workers’ compensation proceeding retain the fundamental rights to due process and fair hearing. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing includes, but is not limited to, the opportunity to offer evidence in rebuttal. (*Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].) Indeed, no finding shall be made contrary to a stipulation of the parties without first giving the parties notice and an opportunity to be heard. (Cal. Code Regs., tit. 8, § 10835(b).)

The WCJ’s “findings and the decision must be served upon all the parties together with a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) The WCJ, therefore, is required to refer to the evidence in the opinion on decision and clearly designate the evidence that forms the basis of the decision. (Section

5313; *Hamilton, supra*, at p. 476.) A decision must be based on admitted evidence in the record and must be supported by substantial evidence. (*Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310].) It is especially important for the WCJ to identify the evidence relied on and the reasoning behind a decision so the parties may be afforded meaningful review if requested. (See, Lab. Code, §§ 5903 and 5952.)

Although the F&O includes a finding that earnings were \$724.80 per week, the Opinion on Decision does not discuss this finding except to note it was based on the parties' stipulation as to earnings. (Opinion on Decision, p. 2.) Notably, applicant submitted no wage documentation as evidence and provided no testimony as to earnings, while defendant submitted wage documentation including a benefits statement (Exhibit Q) and a wage statement worksheet (Exhibit R). Unfortunately, the record here does not clearly disclose if the WCJ reviewed any evidence beyond the wage statement nor how the wage statement supported any wage calculation.

To be clear, although the workers' compensation system bears the hallmarks of an adversarial system, it is in fact a benefit delivery system. In such a system it is incumbent on all parties, including the WCJ, to seek to provide benefits properly. A stipulation of the parties, no matter how convenient, does not necessarily relieve the WCJ from conducting review of the record to determine if the stipulations are appropriate in the case at bar. Even when presented with a stipulation entered into by the parties, a WCJ is still authorized to "make the further investigation necessary to enable [the WCJ] to determine the matter in controversy." (Section 5702.) This is because the Board may not leave matters undeveloped where it is clear further evidence is required. (*Kuykendall v. WCAB* (2000) 79 Cal.App.4th 396, 404 [65 Cal.Comp.Cases 264].) We therefore amend the F&O to defer the issue of earnings and return this case to the WCJ for further proceedings to consider the issue of whether the parties should be held to the agreement made at trial or whether substantial evidence supports that a different rate is appropriate.

Although we express no opinion as to the ultimate resolution of any issue in this matter, in considering the issue, it will be important to keep in mind the statutory framework for determining earnings. Section 4453 provides in relevant part:

- (1) Where the employment is for 30 or more hours a week and for five or more working days a week, the average weekly earnings shall be the number of working days a week times the daily earnings at the time of the injury.

(4) Where the employment is for less than 30 hours per week, *or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied*, the average weekly earnings shall be taken at 100 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his or her injury, due consideration being given to his or her actual earnings from all sources and employments.

(Lab. Code, §§ 4453(c)(1) and (c)(4), emphasis added.)³

Here we can find no indication in the record as to how many hours per week applicant worked and note the wage statement in evidence indicates “Hourly rate not provided.” The wage statement does not clarify why hours and days worked per week nor hourly rate were not available. Further, there is no explanation in the record for what appears to be reduced or missing wages between June 12, 2006 and August 20, 2006. (Exhibit R.)

Further, applicant sustained injury on January 12, 2007, and defendant paid temporary disability at \$715.67 per week for periods through January 21, 2008 before reducing temporary disability payments down to \$483.20 per week. (MOH, Findings of Fact 1 and 6, pp. 1-2.) It would appear the defendant originally had wage information supporting a higher benefit rate.

It is unclear on the current record if defendant obtained the required “[d]ocumentation sufficient to determine the injured worker's average weekly earnings.” Such documentation is of course required “[u]nless the claims administrator accepts liability to pay the maximum temporary disability rate.” (Cal. Code Reg., tit. 8, §10101.1(j).)

Finally, we note that on return it may be necessary to further develop the record as to applicant’s earnings capacity.

V.

Following our independent review of the record occasioned by applicant’s Petition, we are persuaded that due process requires returning this case for further proceedings to address applicant’s request to be relieved of the stipulation at trial regarding earnings, and as appropriate, to determine the issue of applicant’s earnings based on substantial evidence.

Accordingly, we grant applicant’s Petition for Reconsideration, affirm the May 11, 2026 F&O, except that we amend it to defer the issue of earnings, and return the case to the trial level for further proceedings consistent with this opinion.

³ Subsection two of section 4453(c) involves work for two or more employers while subsection three addresses work at an irregular rate, neither of which on the surface appear to apply to this case. (Lab. Code, §§ 4453(c)(2) and (c)(3).)

For the foregoing reasons,

IT IS ORDERED that applicant's June 5, 2026 Petition for Reconsideration is **GRANTED**.

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the May 11, 2026 Findings and Orders issued by the WCJ is **AFFIRMED** except that finding of fact five is **AMENDED** as follows:

FINDINGS OF FACT

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5. The issue of earnings is deferred.

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IT IS FURTHER ORDERED the matter is **RETURNED** to the WCJ for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 17, 2026

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

**MORDECHAI COHEN
LEVITZ LEGAL GROUP
THOMAS KINSEY, LLP**

PS/oo

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