**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**ANDRES DE JESUS GARCIA, *Applicant***

**vs.**

**SLATER'S 50/50; SECURITY NATIONAL INSURANCE COMPANY administered by AMTRUST NORTH AMERICA, *Defendants***

**Adjudication Number: ADJ19947925**
**Pomona District Office**

# OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the March 12, 2025 Findings and Award (F&A) wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant is not entitled to a new primary treating physician (PTP) as both the original PTP, Robert Innocenzi, D.O, in a report dated October 15, 2015, and panel qualified medical evaluator (PQME), Armin Visteh, M.D., in a report dated July 20, 2023, found that the applicant had reached maximum medical improvement (MMI) with no need for future medical care.

Applicant contends that he is entitled to "either a change of PTP within the medical provider network (MPN) or the ability to seek a second opinion within the MPN" pursuant to WCAB Rules 9767.6(e) and 9767.7 and Labor Code[1] sections 4616.3 and 4616.4. (Petition, pp. 4-5.) Applicant further contends that the case of *Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd.* (*Rushing*) (2000) 80 Cal.App.4th 1041, 1043 [65 Cal.Comp.Cases 477] is "dead" as "the law has undergone reforms since that decision was made." (Petition, p. 4.)

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the

[1] All further statutory references will be to the Labor Code unless otherwise indicated.

record, we will grant applicant's 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 section 5950 et seq.

**I.**

Preliminarily, former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected under the Events tab 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 March 18, 2025, and 60 days from the date of transmission is May 17, 2025, which is a Saturday. The next business day that is 60 days from the date of transmission is Monday, May 19, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision was issued by or on May 19, 2025, so that we have timely acted on the petition as required by section 5909(a).

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

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 shall constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on March 18, 2025, and the case was transmitted to the Appeals Board on March 18, 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 March 18, 2025.

**II.**

We provide the relevant facts of the case below:

Applicant claimed that, while employed by defendant as a dishwasher on August 10, 2015, he sustained an industrial injury to his right eye.

Applicant designated ophthalmologist, Dr. Robert A. Innocenzi Jr., as his PTP. In a report dated October 15, 2015, Dr. Innocenzi discharged applicant from care, without permanent disability or need for future medical treatment. (Exhibit A, p. 2.)

Thereafter, the parties proceeded with discovery and retained Dr. Armin Vishteh as the ophthalmology PQME. Dr. Vishteh evaluated the applicant, and in a corresponding report dated July 20, 2023, Dr. Vishteh indicated that no further ophthalmic care was needed for applicant's injury of August 10, 2015 to the right eye. (Joint Exhibit 1, p. 5.)

On January 8, 2025, applicant filed a Declaration of Readiness to Proceed to an Expedited Hearing requesting authorization for treatment by a new PTP, Dr. Wayne Martin, from defendant's MPN.

On March 4, 2025, an expedited hearing was held on the issues of need for further medical treatment; whether applicant has a right to a second opinion; whether applicant is barred from any

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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.

additional treatment, transfer of care, or opinion pursuant to case law and based upon the findings of the PQME; and whether the statute of limitations prohibits additional benefits or care.

On March 12, 2025, the WCJ issued a F&A which held, in relevant part, that applicant does not require further medical treatment to cure or relieve from the effects of the injury; is not entitled to a new PTP, as both the original PTP, Dr. Robert Innocenzi, in a report dated October 15, 2015, and the PQME, Dr. Visteh, in a report dated July 20, 2023, found applicant had reached MMI with no need for future medical; is not entitled to a second opinion as applicant's avenue for contesting the report of Dr. Innocenzi was to proceed with a QME evaluation; and the statute of limitations is inapplicable as defendant agreed to proceed with the QME process in 2023.

**III.**

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

Section 4600 requires the employer to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600(a).) If an employer has established an MPN, injured workers are generally limited to treatment with a physician from within that MPN. (Lab. Code, §§ 4600(c), 4616 et seq.) Pursuant to WCAB Rule 9767.6(e), at any point in time after the initial medical evaluation with the MPN physician, "the covered employee may select a physician of his or her choice from within the MPN." (Cal. Code Regs., tit. 8, § 9767.6(e).)

Further, pursuant to WCAB Rule 9767.7(a), "[i]f the covered employee disputes either the diagnosis or the treatment prescribed by the primary treating physician or the treating physician, the employee may obtain a second and third opinion from physicians within the MPN." (Cal. Code Regs., tit. 8, § 9767.7(a).) This coincides with section 4616.3(c), which similarly states that "[i]f an injured employee disputes either the diagnosis or the treatment prescribed by the treating physician, the employee may seek the opinion of another physician in the medical provider network. If the injured employee disputes the diagnosis or treatment prescribed by the second physician, the employee may seek the opinion of a third physician in the medical provider network." (Lab. Code, § 4616.3(c).) Section 4616.4(b) further notes that "[i]f, after the third physician's opinion, the treatment or diagnostic service remains disputed, the injured employee may request an MPN independent medical review regarding the disputed treatment or diagnostic

service still in dispute after the third physician's opinion in accordance with section 4616.3." (Lab. Code, § 4616.4(b).)

Here, applicant contends that he is entitled to "either a change of PTP within the MPN or the ability to seek a second opinion within the MPN" pursuant to WCAB Rules 9767.6(e) and 9767.7 and Labor Code sections 4616.3 and 4616.4. (Petition, pp. 4-5.) As noted above, Dr. Innocenzi, in his October 15, 2015 report, discharged applicant from care, with no permanent disability or need for future medical. Applicant, however, disputes that he has reached maximum medical improvement and argues that further medical treatment is necessary with respect to his injury.

Pursuant to section 9785(b):

> (b)(2) An employee may designate a new primary treating physician of his or her choice pursuant to Labor Code §§ 4600 or 4600.3 provided the primary treating physician has determined that there is a need for:
>
> (A) continuing medical treatment; or
>
> (B) future medical treatment. The employee may designate a new primary treating physician to render future medical treatment either prior to or at the time such treatment becomes necessary.
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> (b)(3) If the employee disputes a medical determination made by the primary treating physician, including a determination that the employee should be released from care, the dispute shall be resolved under the applicable procedures set forth at Labor Code sections 4060, 4061, 4062, 4616.3, or 4616.4.

(Lab. Code, § 9785(b)(2)-(3).)

In *Rushing*, the Court of Appeal held that in cases wherein the PTP has found the applicant permanent and stationary and releases the applicant to return to work without the need for future medical treatment, the applicant is considered discharged and must comply with sections 9785(b), 4061, and 4062 for a change in the PTP. (*Rushing*, *supra*, at p. 1043.)

Sections 4061 and 4062 pertain to the QME panel process. Pursuant to section 4061(b), "[i]f either the employee or employer objects to a medical determination made by the treating physician concerning the existence or extent of permanent impairment and limitations or the need for future medical care, and the employee is represented by an attorney, a medical evaluation to determine permanent disability shall be obtained as provided in Section 4062.2." (Lab. Code, § 4061(b).)

Here, it is unclear from our preliminary review which of the above statutes are most applicable to the facts of this case. 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. Appeals Bd.* (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Bd. 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 8 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. …
>
> (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.

**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 March 12, 2025 Findings and Award 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/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ PAUL F. KELLY, COMMISSIONER**

**JOSEPH V. CAPURRO, COMMISSIONER**
**CONCURRING NOT SIGNING**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**MAY 19, 2025**

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

**ANDRES DE JESUS GARCIA**
**PEREZ LAW**
**LAW OFFICES OF NATALIE KAPLAN**

**RL/*cs***

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