WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DORA SOSA and GERARDO SOSA, as Guardian Ad Litem, *Applicant*

vs.

WEST COAST COMPUTER EXCHANGES, INC.; EVEREST NATIONAL INSURANCE COMPANY, administered by AMERICAN CLAIMS MANAGEMENT, INC., *Defendants*

Adjudication Numbers: ADJ6840627; ADJ8645103
Sacramento District Office

OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact, Awards and Orders (F&O) issued on December 19, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) on January 25, 2005, applicant sustained injury arising out of and in the course of employment to the head, including cognitive impairment (brain), neck, right shoulder, and psyche; (2) Everest National was the workers' compensation insurer at the time of injury; (3) applicant's average weekly wage was $480.00 at the time of injury; (4) defendant was not shown to have paid any temporary disability indemnity to applicant; (5) Dr. Schneider was the appropriate specialist/PQME for the purpose of evaluating applicant's cognitive brain impairment and psychiatric sequela; (6) applicant's last day of work for defendant was January 9, 2006; (7) applicant was shown to be temporarily partially or totally disabled from January 10, 2006 through April 23, 2017; (8) the appropriate rate for payment of temporary disability indemnity was $453.33 per week; Employment Development Department (EDD) provided benefits from January 17, 2006 through December 31, 2006 at the weekly rate of $291.00; (10) the appropriate date for commencement of permanent disability indemnity payments was April 24, 2017; (11) applicant has 65% permanent partial disability as a result of her industrial injury; (12) applicant is entitled to increased temporary disability indemnity pursuant to Labor Code section 4650(d); (13) applicant reasonably required 24 chiropractic treatments for her industrial injury; and (14) the stipulations of the parties at trial are adopted and incorporated herein.

The WCJ issued an award in accordance with these findings.

Defendant contends that the WCJ erroneously found that (1) applicant's injury resulted in permanent partial disability of 65% because QME Dr. Schneider's reporting misapplied the AMA Guides; (2) applicant was entitled to temporary disability indemnity at a rate of $453.33 per week because the parties stipulated that the rate was $320.00 per week; (3) applicant was temporarily disabled from January 10, 2006 through April 23, 2017 because the record lacks substantial medical evidence demonstrating that she was temporarily disabled for the period; (4) applicant was entitled to reimbursement for self-procured chiropractic treatment because the treatment was not authorized under Utilization Review; and (5) EDD was entitled to recover its lien because it paid applicant benefits for a nonindustrial knee injury.

We received an Answer.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition 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 record, we will grant defendant's Petition. Our order granting the Petition 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 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 Labor Code 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, Labor Code section 5909 was amended to state in relevant part:

> (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 Labor Code 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 January 16, 2025, and 60 days from the date of transmission is March 17, 2025. This decision is issued by or on March 17, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 January 16, 2025, and the case was transmitted to the Appeals Board on January 16, 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 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 January 16, 2025.

II.

We turn first to defendant's contention that the WCJ erroneously found that applicant's injury resulted in permanent partial disability of 65% because QME Dr. Schneider's reporting misapplied the AMA Guides. Specifically, defendant argues that QME Dr. Schneider's reporting deviated from the Guides and failed to rebut the presumption that applicant's cognitive impairment should be rated strictly under the Guides.

In *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084, 1086 (Appeals Board en banc) (*Almaraz/Guzman II*).), the Appeals Board stated that "when determining an injured employee's WPI, it is not permissible to go outside the four comers of the AMA Guides; however, a physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment. (*Id.* at p. 1086.)

In *Milpitas Unified School District v. Workers' Comp. Appeals Bd*. (2010) 187 Cal.App. 4th 808 [75 Cal.Comp.Cases 837] (*Almarez/Guzman III*), the Court found that the overarching goal of rating permanent impairment is to achieve accuracy, stating:

> The Guides itself recognizes that it cannot anticipate and describe every impairment that may be experienced by injured employees. The authors repeatedly caution that notwithstanding its "framework for evaluating new or complex conditions," the "range, evolution, and discovery of new medical conditions" preclude ratings for every possible impairment. (Guides § 1.5, p. 11.) The Guides ratings do provide a standardized basis for reporting the degree of impairment, but those are "consensus-derived estimates," and some of the given percentages are supported by only limited research data. (Guides, pp. 4, 5.) The Guides also cannot rate syndromes that are "poorly understood and are manifested only by subjective symptoms." (Ibid.)
>
> To accommodate those complex or extraordinary cases, the Guides calls for the physician's exercise of clinical judgment to assess the impairment most accurately. (*Id*. at pp. 822-823.)

In other words, a physician "is not inescapably locked into any specific paradigm for evaluating WPI under the Guides, [and . . . is not] relegate[d] . . . to the role of taking a few objective measurements and then mechanically and uncritically assigning a WPI that is based on a rigid and standardized protocol and that is devoid of any clinical judgement. Instead, the AMA Guides expressly contemplates that a physician will use his or her judgment, experience, training, and skill is assessing WPI." (*Id*., at p. 853.)

Here, our preliminary review reveals that Dr. Schneider reported that applicant sustained a traumatic brain injury which resulted in cognitive brain impairment and psychiatric sequela which diminished her ability to perform activities of daily living and excluded her from participating in the labor market. Applicant's traumatic brain injury and consequent injury to the psyche received a permanent disability rating of 55%. The WCJ combined this permanent disability rating with the

permanent disability rating received for applicant's injury to the right shoulder and cervical spine to find that applicant sustained permanent partial disability of 65%.

Although inquiry is required as to whether QME Dr. Schneider's reporting comports with the foregoing authorities, this record raises an additional issue which could result in a finding that applicant sustained permanent total disability. Specifically, our preliminary review shows that the WCJ's finding of a traumatic brain injury resulting in permanent partial disability may require application of Labor Code section 4662(a)(4), which provides a conclusive presumption of total permanent disability in the event that an applicant sustains a brain injury which results in permanent mental incapacity. Hence, we will order that a final decision after reconsideration is deferred pending further review of the merits of this issue.

We next address defendant's contention that the WCJ erroneously found that applicant was entitled to temporary disability indemnity at a rate of $453.33 per week because the parties stipulated that the rate was $320.00 per week.

Here again our preliminary review raises issues not addressed in the record. On one hand the parties stipulated at trial that applicant's average weekly wage was $480.00, warranting indemnity rates of $320.00 per week for temporary disability indemnity and $220.00 per week for permanent disability indemnity. On the other hand, the parties raised for trial the issue of whether applicant's earnings were $640.00 per week based on Labor Code sections 4661.5 and 4453(c)(l) or $480.00 per week, and the WCJ admitted evidence into the record regarding applicant's compensation, including overtime and bonuses.

After considering the evidence, the WCJ found a rate of temporary disability indemnity of $453.33 per week based upon an average weekly wage calculation supported by the current minimum wage of $16.50 per hour. But Appeals Board panels have repeatedly rejected decisions applying current minimum wage laws to determine an applicant's earning capacity. (See, e.g., *Varas v. Teresa Lobatos, Allstate Insurance*, 2023 Cal. Wrk. Comp. P.D. LEXIS 146 (amending the WCJ's decision applying current minimum wage of $16.04 per hour to the applicant's 1992 injury in order to set earning capacity at $641.60 per week to set temporary disability at the current statutory minimum rate of $242.86 per week.) Hence, we will order that a final decision after reconsideration is deferred pending further review of the merits of this issue.

We turn next to defendant's contention that the WCJ erroneously found that applicant was temporarily disabled from January 10, 2006 through April 23, 2017, because the record lacks substantial medical evidence demonstrating that she was temporarily disabled for the period.

Our preliminary review does not reveal argument from defendant or a record from the WCJ regarding the legal basis for finding a temporary disability period in excess of the 104 weeks statutory limit allowed after commencement of temporary disability payments. (See Lab. Code, § 4656(c)(1).) We also note that if the 104-week limit of Labor Code section 4656(c)(1) restricts the period for which applicant is entitled to temporary disability indemnity, then the WCJ's finding that the appropriate date for commencement of permanent disability payments was April 24, 2017, would be in error. Hence, we will order that a final decision after reconsideration is deferred pending further review of the merits of this issue.

Turning to defendant's argument that the WCJ erroneously found that applicant was entitled to reimbursement for self-procured chiropractic treatment because the treatment was not authorized under Utilization Review, we note that the parties raised the issue of "[l]iability for self-procured medical treatment" without reference to Utilization Review and without submitting Utilization Review documents for admission in evidence. It is thus unclear whether a Request for Authorization (RFA) was submitted and, if so, whether defendant reserved its right to retrospective Utilization Review by issuing a written decision complying with AD Rule 9792.9(b)(1). (Cal. Code Regs., tit. 8, § 9792.9(b)(1).) Hence, we will order that a final decision after reconsideration is deferred pending further review of the merits of this issue.

Lastly, as to defendant's argument that EDD may not recover on its lien because it paid benefits for a nonindustrial injury, we note that if our inquiry as to whether QME Dr. Schneider's reporting constitutes substantial medical evidence as to the period of temporary disability, EDD would be entitled to recover its lien irrespective of whether or not EDD paid benefits for a nonindustrial injury. (See Labor Code § 4904.) Hence, we will order that a final decision after reconsideration is deferred pending further review of the merits of this issue.

III.

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313.) "It is the responsibility of the parties and the WCJ to ensure

that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id.* at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]).)

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924] ["The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims."]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261]; *Rucker v. Workers' Comp. Appeals Bd*. (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id*. at p. 404.)

Here, it is unclear from our preliminary review whether the existing record is sufficient to support the findings, awards, 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, given the numerous issues which have not been fully addressed.

IV.

Finally, we observe that 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 [62 Cal.Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commission*ers (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"].)

Labor Code section 5901 states in relevant part:

> "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, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

V.

Accordingly, we grant defendant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition 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 the Petition for Reconsideration of the Findings of Fact, Awards and Orders issued on December 19, 2024 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/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 17, 2025

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

DORA SOSA
LAW OFFICE OF SHANNON DOLAN
LLARENA, MURDOCK, LOPEZ & AZIZAD
EMPLOYMENT DEVELOPMENT DEPARTMENT

SRO/*cs*

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