WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MAURICIO GARCIA, *Applicant*

vs.

KERN HIGH SCHOOL DISTRICT; permissibly self-insured, administered by SELF-INSURED SCHOOLS OF CALIFORNIA, *Defendants*

Adjudication Number: ADJ16211996
Bakersfield District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on December 31, 2024, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and in the course of employment (AOE/COE) in the form of COVID-19 infection.

Defendant contends that although defendant stipulated that applicant's COVID was presumptively AOE/COE pursuant to Labor Code section[1] 3212.88, the presumption was rebutted because applicant failed to prove the source of the COVID. Defendant also contends that the opinions of Stewart A. Lonky, M.D., Panel Qualified Medical Evaluator (PQME) in internal medicine and pulmonology, are not substantial medical evidence upon which the WCJ can rely.

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report with respect thereto.

Based upon our preliminary review of the record, we will grant defendant'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

[1] All statutory references are to the Labor Code unless otherwise stated.

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.

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 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 February 6, 2025, and 60 days from the date of transmission is April 7, 2025. This decision is issued by or on April 7, 2025, 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 act on a petition. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

Here, according to the proof of service for the Report by the WCJ, the Report was served on February 6, 2025, and the case was transmitted to the Appeals Board on February 6, 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 February 6, 2025.

II.

Preliminarily, we note the following, which may be relevant to our review:

Applicant claimed injury in the form of exposure to COVID-19 while employed as a warehouse worker by defendant on September 7, 2021.

The WCJ's Report provides the following background:

> Applicant Mauricio Garcia commenced employment with Petitioner Kern High School as a warehouse worker on April 22, 1997. Restrictions were imposed in response to the Covid-19 pandemic. Initially, for approximately three weeks ending in August 2021, work at the warehouse was limited to six hours per day with only two workers in the warehouse. Masks and hand sanitizer were provided and social distancing of commuting to work in separate vehicles, eating lunch separately and working six feet apart was enforced. Applicant's Exhibit 01: QME report of Stewart Lonky, M.D. 4/01/2022 p. 1.
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> However, as a new school term began in August 2021, the workplace restrictions were relaxed. Mask use became voluntary, and workers were allowed to resume eating lunches together, driving together, and working within six feet of each other. Eight-hour days, five day weeks, and full staffing resumed. Applicant's Exhibit 01: QME report of Stewart Lonky, M.D. 4/01/2022 pp. 1-2.
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> In mid-August 2021, Applicant's spouse tested positive. She was also employed by Petitioner Kern High School District. Applicant's spouse isolated herself by living in separate trailer for ten days. She had no complications and returned to work thereafter. Applicant's Exhibit 01: QME report of Stewart Lonky, M.D. 4/01/2022 p. 3.
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> On September 7, 2021, Applicant notice a slight cough while working. When his shift was completed, he obtained Covid-19 testing, which was positive. Applicant's daughter tested the same day, and was also positive, with symptoms emerging later. Applicant's son tested positive two days later (September 9, 2021), but remained asymptomatic. Applicant's Exhibit 01: QME report of Stewart Lonky, M.D. 4/01/2022 p. 3. The next day (September 10, 2021) Samuel Rufus and Kandra Kammerzell, co-employees also working in the warehouse, tested positive for Covid-19. Joint Exhibit A: Co-employee Test Results 9/10/2021.

Applicant's condition worsened. He sought urgent care on September 13, 2021. He was transferred to Bakersfield Memorial Hospital, where he remained until November 22, 2021. He was thereafter

transferred to Barlow Respiratory Hospital in Los Angeles where he remained until January 8, 2022. He received tracheotomy, ventilation and therapy. He was then transferred to Encompass Health Rehabilitation Hospital of Bakersfield during the period from January 8, 2022 to January 20, 2022 where he received physical, speech and occupational therapy. Applicant' Exhibit 01: QME Report of Stewart Lonky, M.D. 4/01/2022 pp. 3-4.

While hospitalized, Applicant initiated the present claim. Defendant's Exhibit A: DWC-1 Claim Form 11/09/2021. Petitioner denied the claim within the time allowed. Defendant's Exhibit B: Notice of Denial of Claim 12/14/2021.

Stewart Lonky, M.D., is serving as a Qualified Medical Evaluator in the fields of Internal Medicine and Pulmonary Medicine. He provided an initial QME evaluation on April 1, 2022. Applicant's Exhibit 01: Report of Stewart Lonky, M.D. Dr. Lonky obtained Applicant's history, examined him, and reviewed the available medical records. He noted that Applicant has not worked since September 7, 2021, and had been on a feeding tube from October until a couple of weeks prior to the April 2022 examination. Applicant had been released from Encompass Health Rehabilitation Hospital relying on continuous oxygen and using a walker and wheelchair for mobility. Applicant's Exhibit 01: Report of Stewart Lonky, M.D. 4/01/2022 pp. 4-5.

Dr. Lonky considered and rejected the possibility that Applicant's spouse was the source of his Covid-19 infection. He noted that Applicant's wife isolated herself and was separated from him for at least ten days and possibly as many as three weeks. "This makes it unlikely but not impossible that his wife was the source of his infection of SARA-CoV-2." Applicant's Exhibit 01: Report of Stewart Lonky, M.D. 4/01/2022 p. 16.

A workplace exposure was considered more likely because several workers became ill within a three-day span which was "more palatable and realistic that assuming that he did not develop symptoms until a few weeks after his wife became ill. This would be highly unusual." Applicant's Exhibit 01: Report of Stewart Lonky, M.D. 4/01/2022 p. 16. Dr Lonky concluded that:

> It is my opinion, with reasonable medical probability, that if it can be established that other workers became ill on September 7th, 8th and 9th, along with Mr. Garcia, it would be accurate to conclude that this SAR-Cov-2 infection occurred during his employment. Applicant's Exhibit 01: Report of Stewart Lonky, M.D. 4/01/2022 p. 16.

Applicant was considered temporarily totally disabled, unable to work for more than a few minutes. He was considered to be improving but also in need of further testing and evaluation, including an AME/QME quality evaluation in neurology. Applicant's Exhibit 01: Report of Stewart Lonky, M.D. 4/01/2022 pp. 16-17. Dr. Lonky warned that one of the issues for Applicant was "whether or not long-term anticoagulation will be necessary. This would, in and of itself, constitute an impairment according to the AMA Guides." Applicant's Exhibit 01: Report of Stewart Lonky, M.D. 4/01/2022 p. 18.

An Application for Adjudication was filed, with venue initially assigned to Santa Barbara District Office. Defendant sought and obtained a change of venue to Bakersfield. Application for Adjudication of Claim 5/24/2022; Petition for Change of Venue 6/21/2022; Order Changing Venue 7/25/2022.

PQME Dr. Lonky provided a supplemental report on May 8, 2023. He described his review of additional records including a CT scan of Applicant's chest. Applicant's prior tracheotomy was noted. Applicant was considered to be improving, so much so that pulmonary function studies were considered premature. Dr. Lonky recommended further treatment followed by re-evaluation. Applicant's Exhibit 02: Report of Stewart Lonky, M.D. 5/08/2023.

The present case came on for Status Conference regarding various discovery disputes. These disputes were apparently considered resolved when the parties agreed that the Lab.C. §3212.88 presumption was applicable. Applicant's Exhibit 02: Minutes of Hearing 7/19/2023.

PQME Dr. Lonky reevaluated Applicant and reported again on January 13, 2024. A history consistent with Dr. Lonky's prior evaluation was provided. Applicant was still off work, still in treatment, and receiving Social Security Disability benefits. Applicant's Exhibit 04: Report of Stewart Lonky, M.D. 1/13/2024 p. 3. Extensive medical records were reviewed. Applicant's Exhibit 04: Report of Stewart Lonky, M.D. 1/13/2024 p. 6-62.

After re-examining Applicant, Dr. Lonky opined that "This gentleman is much improved from when I initially evaluated him but is far from being capable of returning to any form of work at this time." Additional evaluations in orthopedics and psychiatry were recommended, although Dr. Lanky indicated that the mental health examination should wait until "he is capable of interacting on a meaningful level with psychiatric evaluation." Applicant's Exhibit 04: Report of Stewart Lonky, M.D. 1/13/2024 pp. 64-65.

Dr. Lonky re-affirmed his prior opinions that Applicant's infection did not come from his wife and was work-related:

> However, given the fact that multiple people at work became ill with SARS-CoV-2 virus simultaneously with this patient, it is still reasonably medically

> probable that Mr. Garcia had his infection developed during his employment. Therefore, it is my opinion that his SARS-CoV-2 infection and all of its complications are industrial in nature. Applicant's Exhibit 04: Report of Stewart Lonky, M.D. 1/13/2024 p. 66.

Dr. Lonky deferred estimation of permanent impairment to the results of additional testing, including pulmonary function testing, a CT scan, glucose intolerance testing for potential diabetes and blood pressure evaluation. In the interim, Dr. Lonky opined that Applicant "is currently temporarily totally disabled from an internal medicine and pulmonary perspective alone." Applicant's Exhibit 04: Report of Stewart Lonky, M.D. 1/13/2024 pp. 66-67.

The present case came to Trial on October 4, 2024. Among other things, the QME reports of Dr. Lonky were received into evidence and it was stipulated that the Lab.C. §3212.88 presumption was applicable. Minutes of Hearing/Summary of Evidence 10/04/2024 p.2 lines 21-22 (Admitted Fact #6), p. 2 line 42 to p. 3 line (QME reports).

Applicant testified credibly at Trial. He confirmed that previously imposed restrictions had been lifted by August-September 2021. More than one worker rode together unmasked in delivery trucks. Employees were back to using a common break room and restrooms. There were "outside people" in the warehouse, including tradesmen and delivery drivers for about 20 people a day in addition to the assigned warehouse work crew. Summary of Evidence 10/04/2024 p. 4 lines 9-36.

Applicant credibly confirmed the history of his wife's prior infection and isolation in a "fifth wheel" trailer for 12 days. He "remained negative" at that time. Summary of Evidence 10/04/2024 p. 4 lines 31-36. Applicant credibly testified that he provided QME Dr. Lonky with an accurate history regarding how he and his wife got sick. He also confirmed the prior history regarding his children and co-employees. Summary of Evidence 10/04/2014 p. 5 lines 1-22.

Brandi Rodriquez also testified at Trial. She was Petitioner's Assistant Director for Purchasing and Warehouse, with responsibilities including supervision of Applicant and other members of the warehouse staff. She confirmed that workplace restrictions were imposed in response to the Covid- 19 pandemic, including social distancing and masking. Summary of Evidence 1-/-4/2024 p. 5 line 30 to p. 6. She confirmed Applicant's testimony that there was a common open break room and that people other than the warehouse group of employees were regularly present. Summary of Evidence 10/04/2024 p. 6 lines 34-41, p. 7 lines 20-26.

Ms. Rodriquez credibly testified that Applicant was the first employee of the warehouse group to report testing positive.[] The report was made at 5:45 p.m. on September 7, 2021. No one else in the warehouse group was out sick at the

time. However, other employees began to "drop like flies." Within a very short period time, all but three of the sixteen people in the group reported infections. Summary of Evidence 10/04/2024 p. 6 lines 13-20.

Ms. Rodriquez acknowledged that she did not have medical training. Summary of Evidence 10/04/2024 p. 7 line 29.

Petitioner provided a post-Trial brief. Petitioner argued that 1) Applicant did not contract Covid-19 at the worksite (Defendant's Post Trial Points and Authorities to Support a "Take-Nothing" Order 10/27/2024 p. 2 line 17 to p. 3 line 12) and 2) While Defendant admits to an outbreak under Labor Code [3212.88], the evidence shows that the presumption is rebutted because this outbreak was cause by the Applicant because he was Patient Zero ((Defendant's Post Trial Points and Authorities to Support a "Take-Nothing" Order 10/27/2024 p. 3 line 13 to p. 5 line 21.

Following submission for decision, Findings of Fact, Award and Orders issued. Applicant was found to have sustained an industrial injury and to be in need of further medical treatment. A general award of future medical case issued. Attorneys' fees and other issues were deferred. Findings of Fact, Award & Orders 12/31/2024 p. 2 (Findings of Fact #1 and #3), p. 3 (Award & Orders).

(Report, pp. 3-8.)

Discussion: Petitioner's first argument is "Applicant did not contract Covid-19 at the worksite." Petition for Reconsideration 1/21/2025 p.3 line 20 to p. 4 line 15. Petitioner urges that there is "zero evidence to support the applicant contacted Covid-19 while at work. The applicant has not provided any positive test of any co-worker or third-party person he came in contact with while at work before his positive test on 9/7/2021." Petition for Reconsideration 1/21/2025 p. 3 line 27 to
p. 4 line 4.

The first problem with the first argument of the present petition is that "zero evidence" is sufficient when the relevant fact is presumed. Applicant correctly points out that:

> The parties stipulated that the presumption of LC 3121.88 applies in this case. Consequently, to rebut this presumption, the defense must do more than simply offer an alternative theory of causation. It must affirmatively demonstrate that work was not the source of Mr. Garcia's COVID-19 infection. Answer 1/29/2025 p. 3 lines 6-10.

The second problem with the first argument of the pending petition is that the claim of "zero evidence" is inappropriate. The expert medical opinion of Dr. Lonky is not zero evidence. He opined that industrial causation was medically

probable. Applicant's Exhibit 01: Report of Stewart Lonky, M.D. 4/01/2022 p. 16. His affirmation of the same result after review of the extensive treatment records is also not zero evidence. Applicant's Exhibit 04: Report of Stewart Lonky, M.D. 1/13/2024 p. 66.

A petitioner for reconsideration is not entitled to rely on sweeping and self-serving generalizations. Every petition for reconsideration is required to fairly state all of the material evidence and to support its own evidentiary claims "by specific references to the record." Thus, Petitioner may disagree with the QME. Petitioner may dispute the substantiality of the QME's opinion. But Petitioner may not properly report "zero evidence" despite the QME reports. A failure to fairly state all of the material evidence is a basis for denying a petition for reconsideration. WCAB Rule 10945 {a &b}.

The third problem with the first argument of the pending petition is that it relies on a false assumption. Petitioner's "Patient Zero" argument necessarily assumes that Applicant was the first person in the workplace to be infected because he was the first person to report a positive test result. The undersigned PWCJ pointed out:

> It is also worth noting that COVID infections do not appear to conform to a regular and orderly pattern of infection, infectiousness, symptomology and diagnosis via testing. Many people are infected and infectious without being symptomatic or otherwise aware of the infection and, therefore, do not seek diagnosis via testing. Likewise, some people are infected, infectious and even symptomatic without obtaining testing. And the time- lags between these steps reportedly can vary according to the individual and/or the particular version of COVID involved. The bottom line is that it is simply not the case that the first employee with positive COVID test was probably the first infected and infectious., i.e. the "zero patient." Findings of Fact, Award and Order 12/31/2024 p. 5 (Opinion on Decision).

Moreover, Applicant was the first person to report a positive test only as to the warehouse working group under the supervision of Ms. Rodriquez. Kern High School District had lots of other employees many of who may have had positive test results before Applicant. One of them, Applicant's wife, did. And the relevant workplace was not limited to Petitioner's employees but was visited regularly by delivery drivers and other vendors, any one of whom could have been the "Patient Zero" Applicant correctly so contends. Answer 1/27/29025 p. 4 line 14 to p. 5 line 15.

The fourth problem with the first argument of the pending petition is that it escalates the standard of proof. Applicant was not obligated to prove his claim of an industrial infection to a scientific certainty or even by "clear and convincing" evidence. The applicable standard is preponderance of the evidence meaning "that evidence that, when weighed with that opposed to it,

has more convincing force and the great probability of truth." Lab.C. §3202.5. Under the applicable legal standard, it was not Applicant's obligation to go "tracking microbes" to demonstrate from whom he received the virus at what time in what part of the workplace. It was enough that an industrial infection was more likely than not.

The second argument of the pending petition is "While Defendant admits to an Outbreak under Labor Code 3212.88, the evidence shows that the presumption is rebutted because this outbreak was caused by the Applicant because he is Patient Zero." Petition for Reconsideration 1/21/2025 p. 4 line 16 to p. 6 line 26.

The first problem with the second argument of the pending petition is that it contradicts the first argument regarding the burden of proof. In the first argument, Petitioner contends that Applicant did not meet his burden of proof because he did not show the transmittal of the Covid-19 virus from an identified person at a particular time in the workplace. See, Petition for Reconsideration 1/21/2025 p. 3 line 20 to p. 4 line 15. But if that was somehow the actual standard, then Petitioner cannot be said to have refuted the Lab.C §3212.88 presumption. Petitioner did not show transmittal of the virus to Petitioner by a specified person at a specified time outside workplace.

This contradiction demonstrates that requiring a travel log for microscopic organisms is impractical and unreasonable regardless of which party has burden of proof. There are good reasons why preponderance of the evidence is the applicable standard.

The second problem with the second argument of the pending petition is that Petitioner's assumption that Applicant must have been Patient Zero because he was the first person in the warehouse working group to report a positive test. As discussed above, this assumption is untenable in light of the non-lineal progression of Covid-19 infections and the abundance of other potential Patient Zeros (employees and non-employees) from outside the warehouse working group.

The third problem with the second argument of the pending petition is that express medical support for the identification of Applicant as Patient Zero is lacking. Notwithstanding WCAB Rule 10945, Petitioner does not point to such evidence. It does not appear that the QME or any other medical professional so indicated. Petitioner had an ample opportunity to seek such evidence by presenting its Patient Zero theory to the QME, by either deposition or supplemental report. Petitioner did not do so. In the absence of such evidence, Applicant's correctly denounced that Petitioner's Patient Zero theory as "speculation, surmise, guess and conjecture.". See, Answer 1/29/2025 p. 3 line 19 to p. 4 line 4.

> The third argument of the pending petition is "The PQME report from Dr. Stewart Lonky is not substantial evidence because. Petition for Reconsideration 1/21/2025 p. 6 line 27 to p. 8 line 2 (sentence fragment in original). Petitioner appears to be arguing that PQME Lonky's expert opinion is insubstantial because Dr. Lonky did not identify Applicant as Patient Zero.
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> Not only does the third argument beg the very question in dispute, it partakes of the previously- discussed problems with Petitioner's Patient Zero theory.

(Report, pp. 9-12.)

III.

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

Sections 3212 through 3213 contain a series of statutory presumptions regarding the industrial nature of various injuries. Sections 3212.86, 3212.87, and 3212.88 were enacted pursuant to Senate Bill (SB) 1159 as urgency statutes - necessary for the immediate preservation of the public peace, health, or safety, on September 17, 2020. In broad terms section 3212.86 applies to the time frame from March to July 2020; section 3212.87 applies to front-line workers; and section 3212.88 applies to workers not described in section 3212.87, who meet certain criteria. Here, applicant tested positive for COVID-19 on September 7, 2021.

Section 3212.88 sets forth a presumption of compensability if a worker contracted COVID-19 during an outbreak at the worker's specific place of employment and certain other conditions are met. (Lab. Code, § 3212.88(a)-(b)). It is applicant's burden to establish the presumption. This may be shown by stipulation of the parties, testimony, or documentary evidence. Specifically the applicant must establish:

> (1) That they tested positive for COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction.
>
> (2) The day referenced in paragraph (1) was on or after July 6, 2020.
>
> (3) The positive test occurred during a period of an outbreak at the employee's specific place of employment.

(Lab. Code, § 3212.88(b).)

Here, the parties stipulated that applicant sustained injury AOE/COE in the form of exposure to COVID-19. The parties also stipulated that the section 3212.88 presumption is

applicable. It is undisputed that applicant tested positive for COVID-19 on September 7, 2021, after completing a shift, and that several co-workers tested positive in the ensuing days. Based on the parties' stipulations, together with trial testimony, medical reporting by QME Dr. Lonky, and other documentary evidence, the WCJ found that the section 3212.88 presumption applies.

This presumption is disputable and may be controverted by other evidence. (Lab. Code, § 3212.88(e)(1)d.) Unless controverted, however, the Appeals Board is bound to find in accordance with the presumption. (*Id*.) Thus, if the presumption applies, the burden shifts to the defendant to establish, by a preponderance of the evidence, that applicant's COVID-19 related injury is not entitled to a presumption of compensability pursuant to section 3212.88. (Lab. Code, §§ 3202.5, 5705.) Section 3212.88(e)(2) provides that "Evidence relevant to controverting the presumption may include, but is not limited to, evidence of measures in place to reduce potential transmission of COVID-19 in the employee's place of employment and evidence of an employee's nonoccupational risks of COVID-19 infection." (Lab. Code, § 3212.88(e)(2).)

We note, however, that a defendant's successful rebuttal of the presumption of compensability does not bar a claim of industrial causation. In the absence of the presumption, it becomes the applicant's burden to establish industrial causation by a reasonable medical probability. (Lab. Code, § 3212.88(e)(1); see Lab. Code, §§ 3600(a), 3202.5; *McAllister v. Workers' Comp. Appeals Bd*. (1968) 69 Cal. 2d 408, 416 [33 Cal.Comp.Cases 660.) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Worker's Comp. Appeals Bd*. (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

Here, it is unclear from our preliminary review of the evidence, the legislative intent with respect to the COVID-19 presumptions, and section 3212.88 in particular, whether the section 3212.88 presumption applies.

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. 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 after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

For the foregoing reasons,

IT IS ORDERED that applicant'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/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 7, 2025

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

MAURICIO GARCIA
GHITTERMAN, GHITTERMAN & FELD
HANNA BROPHY

JB/*pm*

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