WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RODRIGO PORTILLO, *Applicant*

vs.

TALTECH CONSTRUCTION INC;
STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ10841110
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Lien claimant, Physical Rehabilitation Services, seeks reconsideration of the January 25, 2025 Findings of Fact issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant, while allegedly employed during the period from April 27, 2016 through Marcy 27, 2017, as a laborer, claims to have sustained industrial injury to his shoulders, arms, legs, hands, lumbar, and knees. The WCJ further found that the dates of service provided by the lien claimant were in the delay period, that employment was not established, and that defendant is not liable for the treatment provided by lien claimant.

Lien claimant contends that the WCJ erred in failing to find defendant liable for the cost of medical treatment provided during the delay period under Labor Code[1] section 5402 where defendant issue a defective denial letter and failed to investigate the basis for the denial.

We did not receive an answer. The WCJ issued a Report and Recommendation recommending that we deny reconsideration.

We have considered the Petition for Reconsideration 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 lien claimant'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

[1] All further statutory references are to the Labor Code, unless otherwise noted.

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, we note that 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 27, 2025 and 60 days from the date of transmission is April 28, 2025. This decision is issued by or on April 28, 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. 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 February 27, 2025, and the case was transmitted to the Appeals Board on February 27, 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 27, 2025.

II.

The WCJ provided the following discussion in the Report:

> II. FACTS
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> The matter proceeded to lien trial on the issues of employment and whether defendant was liable for treatment provided by the lien claimant during the delay period. Minutes of Hearing, October 31, 2024, page 2, lines 20-22. Petitioner submitted a total of eight exhibits, which included medical reports, EOR/EOBs, and payment reports. Id. at page 3, lines 3- 21. Defendant submitted three exhibits, consisting of the delay and denial letters for the claim. Id. at page 3, lines 24-25, page 4, lines 1-4. No testimony was submitted by either party.
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> The undersigned issued a Findings of Fact and Opinion on Decision, on January 22, 2025. It was determined that employment was not established, and thus, that defendant was not liable for the treatment provided by petitioner during the delay period.
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> Following the decision and findings, petition filed their Petition for Reconsideration. Defendant has not filed a response.
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> III. DISCUSSION
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> A. PETITIONER DID NOT MEET ITS BURDEN AND IS NOT ENTITLED TO PAYMENT
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> The case itself involves a denied cumulative trauma pled from April 27, 2016 through March 27, 2017, while the applicant was allegedly employed by TalTech Construction, to various orthopedic body parts. Minutes of Hearing, October 31, 2024, page 2, lines 12-15.
>
> SCIF submitted as evidence the delay and denial letters sent to the applicant. Defense Exhibit A, May 11, 2017, is the delay letter sent to the applicant, advising that defendant needed to obtain information in order to "determine if you are eligible for any workers' compensation benefits." Defense Exhibit A.

SCIF then sent a denial letter to the applicant on July 21, 2017, indicating that they cannot pay benefits because the applicant is not an employee, and that there is no record of the applicant having been employed by TalTech Construction.

L.C. § 5402 (c) provides as follows:

"Within one working day after an employee files a claim form under Section 5401, the employer shall authorize the provision of all treatment, consistent with Section 5307.27, for the alleged injury and shall continue to provide the treatment until the date that liability for the claim is accepted or rejected. Until the date the claim is accepted or rejected, liability for medical treatment shall be limited to ten thousand dollars ($10,000)." (emphasis added)

In the case herein, while the parties stipulated that the treatment provided by lien claimant took place during the delay period, it was not established by lien claimant that the applicant was an actual "employee" as required by L.C. § 5402(c). None of the exhibits submitted by lien claimant established that the applicant was in fact an employee.

Therefore, it was found that employment was not established, and that defendant is not liable for the treatment provided by lien claimant during the delay period.

Petitioner argues that they have already met their burden of proof because they "provided services during the delay period," and that this then shifted the burden on defendant to "prove otherwise why payment is not due to PTP provider during delay period." Petition for Reconsideration, page 8, lines 15-16, 24-25.

Petitioner further quotes from various labor codes, 4603.3 and 5402, as support for payment for their lien. Petition for Reconsideration, page 9, and 11. However, petitioner is ignoring the fact that those labor codes refer to payment being made by the "employer."

Petition did not submit any evidence or witness statements to establish employment, and thus it was found they are not entitled to payment.

(Report, at pp. 2-4.)

The May 18, 2017 Primary Treating Physician's Comprehensive Initial Chiropractic Evaluation states the following:

HISTORY OF INJURY AS PROVIDED BY PATIENT:

Mr. Rodrigo Portillo is a 55-year-old right-hand-dominant male who sustained a industrial injuries in a specific injury on March 27, 2017 and in continuous trauma occurring from April 27, 2016 to March 27, 2017, while performing his

usual and customary job duties for Taltech Construction Inc., as a Painter and Laborer.

The patient states that on or about April of 2016, during the course of his employment, he began to develop pain in his legs, arms, shoulders and left knee which he attributes to performing strenuous and physically demanding job duties which included painting residential and commercial buildings, using paint brushes, rollers and spray guns to paint, preparing surfaces to be painted, patching up holes, sanding down walls, climbing ladders, loading and unloading and cleaning his tools and work area; building scaffolds, climbing and working off scaffolds that were three stories high; load and unload material and supplies included drywall, plywood, wood, lift and carried ladders; finishing; spray color; use pressure washers; sanders, hand sanders, scrappers, sand papers; climbing and descend scaffolds and ladders; moving and transporting ladders and equipment that weighed up to 300 pounds, assisted; operating a commercial painting machine. He performed prolonged kneeling and crawling when needed in order to perform work on the lower portions of walls.

He states that he did not report his injuries resulting from the continuous trauma claims to his employer because, “they do not care.”

On March 27, 2017, the patient was instructed to open the garage door at a residential home. He opened the door grabbing it from the bottom and forcefully lifted it up when it fell. The door was not completely installed, securely and safely and he did not know that the door was loose. It did not have the large springs that hold the door in place. He pushed it upward with force and the door went essentially to the end of the track and since it was not restrained by the large springs, it bounced back from the end of the track and came down hard as it was closing. He attempted to keep it from slamming closed and he left hand finger became caught between the panes/panels. The weight of the door brought him to the ground on his knees and crushed his left hand fingers and then he fell back landing on his back. His fingers were cut and began bleeding profusely. The patient yelled out for help until someone heard him and came to his aid. The patient was disoriented and weak from losing so much blood. His hand was bandaged and he waited for someone from the company office to arrive and take him to an industrial clinic. He was briefly examined and told to go to the hospital as his injuries were too severe for them to handle. He was transported by 'Alam' from the company.

He was then driven to St. Joseph Medical Center where he was examined in the emergency room by the doctor on duty. He recalls having undergone x-rays of the left hand only as that was the worst area of pain and injury. Both the left middle and left ring fingers were fractured. He states the lacerations were stitched but no other procedures were performed. An injection of pain and numbing medication were administered. Medication was prescribed. He was

taken off work and instructed to follow up with his doctor. The patient relates the hospital used his private insurance to bill for his treatment.

The patient was referred to a community clinic with the use of MediCal where he was examined and referred to a hand specialist. He was examined two weeks later, but states that during the exam the doctor grabbed his left hand trying to force his fingers into a fist and he states that this cause severe pain. The patient yelled due to pain and states that he did not return to the office.

In pain and in need of medical attention the patient consulted legal counsel.

He presents to my office today for a comprehensive chiropractic evaluation.

As a result of the fall due to the specific injury, he is also claiming low back pain and bilateral lower extremity radiation of pain. This pain became most noticeable approximately 2 weeks following his fall.

JOB DESCRIPTION:

The patient began employment with Taltech Construction Inc., in early 2016. He worked eight hours a day, six days a week.

His job duties at the time of injury included: painting residential and commercial buildings, using paint brushes, rollers and spray guns to paint, preparing surfaces to be painted, patching up holes, sanding down walls, climbing ladders, loading and unloading and cleaning his tools and work area; building scaffolds, climbing and working off scaffolds that were three stories high; load and unload material and supplies included drywall, plywood, wood, lift and carried ladders; finishing; spray color; use pressure washers; sanders, hand sanders, scrappers, sand papers; climbing and descend scaffolds and ladders; moving and transporting ladders and equipment that weighed up to 300 pounds, assisted; operating a commercial painting machine.

The physical activities included prolonged standing and walking, as well as continuous fine maneuvering of his hands and fingers, and repetitive bending, stooping, squatting, kneeling, twisting, turning, forceful pulling and pushing, forceful gripping and grasping, lifting and carrying 80+ pounds, torquing, reaching below, at and above shoulder levels, climbing and descending ladders.

CURRENT WORK STATUS:

The patient is currently not working. He last worked on March 27, 2017. He is currently not receiving disability/unemployment benefits.

EMPLOYMENT HISTORY:

> The patient worked with this employer for 13-14 months. Prior to this employer, he worked for Ultra Construction for four years as a painter. He has worked as a painter for 11 years. Prior to that he worked in construction for three years.
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> (Report of Arbi Mirzaians, D.C., 5/18/17, at pp. 2-4, lien claimant's Exhibit 3.)

III.

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

California has a no-fault workers' compensation system. With few exceptions, all California employers are liable for the compensation provided by the system to employees injured or disabled in the course of and arising out of their employment, "irrespective of the fault of either party." (Cal. Const., art. XIV, § 4.) The protective goal of California's no-fault workers' compensation legislation is manifested "by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.'" (Lab. Code, §§ 3351, 5705(a); *S. G. Borello & Sons, Inc. v. Dept. of Ind. Relations* (1989) 48 Cal. 3d 341,354 [54 Cal.Comp.Cases 80].)

An "employee" is defined as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." (Lab. Code, § 3351.) Any person rendering service for another, other than as an independent contractor or other excluded classification, is presumed to be an employee. (Lab. Code, § 3357.) Once the person rendering service establishes a prima facie case of "employee" status, the burden shifts to the hirer to affirmatively prove otherwise. (*Cristler v. Express Messenger Sys. Inc*. (2009) 171 Cal.App.4th 72, 84 [74 Cal.Comp.Cases 167]; *Narayan v. EGL, Inc*. (2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724].)

Under this authority, applicant bears the initial burden of proving that he rendered service for defendants, whereupon the burden shifts to defendant to rebut the employment presumption with proof that applicant did not work "under any appointment or contract of hire or apprenticeship." (Lab. Code, § 3351; *Parsons v. Workers' Comp. Appeals Bd*. (1981) 126 Cal.App.3d 629, 638 [46 Cal.Comp.Cases 1304].) Where a lien claimant, rather than the injured worker, litigates the issue of entitlement to payment for industrially-related medical treatment, the lien claimant stands in the shoes of the injured worker and the lien claimant must establish injury by preponderance of evidence. (*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd*.

(*Martin*) (1985) 39 Cal.3d 57, 67 [50 Cal.Comp.Cases 411]; *Kunz v. Patterson Floor Coverings, Inc.* (2002) 67 Cal.Comp.Cases 1588, 1592 (Appeals Board en banc opinion); Lab. Code, §§ 3202.5, 5705.) In other words, after applicant, or a lien claimant, establishes a prima facie case that the applicant rendered service for defendant, the burden shifts to defendant and it must show by a preponderance of the evidence that those services were rendered in an excluded status such as that of an independent contractor. (*California Compensation Ins. Co. v. Workers' Comp. Appeals Bd. (Hernandez)* (1998) 63 Cal.Comp.Cases 844 (writ den.); *Lara v. Workers' Comp. Appeals Bd*. (2010) 182 Cal.4th 393, 402 [75 Cal.Comp.Cases 91].)

Section 5402(c) states:

> Within one working day after an employee files a claim form under Section 5401, the employer shall authorize the provision of all treatment, consistent with Section 5307.27, for the alleged injury and shall continue to provide the treatment until the date that liability for the claim is accepted or rejected. Until the date the claim is accepted or rejected, liability for medical treatment shall be limited to ten thousand dollars ($10,000).
>
> (Lab. Code, § 5402(c).)

Here, it is unclear from our preliminary review that the WCJ applied the employment presumption or the respective burdens of proof correctly. 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 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 lien claimant'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 lien claimant'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/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 28, 2025

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

AV MANAGEMENT AND COLLECTION SERVICES
PHYSICAL REHABILITATION SERVICES
STATE COMPENSATION INSURANCE FUND

PAG/bp

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