WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WANDA OGILVIE, ***Applicant,*** **vs.** **CITY AND COUNTY OF SAN FRANCISCO, Permissibly Self-Insured,** ***Defendant(s).***	**Case No. ADJ1177048 (SFO 0487779)** **ORDER GRANTING RECONSIDERATION AND ORDER ALLOWING AMICUS BRIEFS (EN BANC)**

On February 3, 2009, the Appeals Board issued an en banc decision on the issue of rebutting the diminished future earning capacity (DFEC) portion of the 2005 Schedule for Rating Permanent Disabilities.

On February 19, 2009, applicant, Wanda Ogilvie, filed a timely petition for reconsideration.

On March 2, 2009, defendant, the City and County of San Francisco, also filed a timely petition for reconsideration (which also included an answer to applicant's petition).

For the reasons that follow, we will grant both petitions for reconsideration. We also will give any interested person or entity until 5pm on Friday, May 1, 2009 to file an amicus curiae brief and to serve that brief on both counsel in the *Ogilvie* case.[1] Then, each counsel in the *Ogilvie* case shall have until 5pm on Thursday, May 21, 2009 to file a single consolidated reply brief that responds to <u>*all*</u> of the amicus briefs. These time limitations for filing mean that a brief must be <u>*received*</u> by the Appeals Board by the applicable deadline, and not merely posted by that deadline. (Cal. Code Regs., §§ 10845(a), 10230(a).) Untimely briefs will <u>*not*</u> be considered.

Preliminarily, in granting reconsideration, we conclude that our February 3, 2009 en banc decision constitutes a "final" order.

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[1] The addresses for counsel are set forth beneath the service declaration at the end of this opinion.

A petition for reconsideration is properly taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) Generally, a "final" order is one "which determines any substantive right or liability of those involved in the case." (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180 (*Rymer*); *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413] (*Pointer*).) Accordingly, where – as here – the Appeals Board grants reconsideration, rescinds the decision of the WCJ, and returns the matter to the WCJ for further proceedings and a new decision, the Appeals Board's action generally is not deemed a "final" order. (Cf. *Travelers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Taylor*) (1983) 147 Cal.App.3d 1033, 1036, fn. 3 [48 Cal.Comp.Cases 774, 775, fn. 3] (*Taylor*) ("a petition seeking review of a [WCAB] order which remands a matter to the trial judge for further proceedings is ordinarily premature").)

However, an interlocutory WCAB decision may be deemed a "final" order if it determines a "threshold" issue. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1073-1081 [65 Cal.Comp.Cases 650, 653-660] (*Maranian*); *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784 (Appeals Board en banc) (*Aldi*).) A "threshold" issue has variously been described as "a substantial issue fundamental to the … claim for benefits," "an issue critical to the claim for benefits," or "an issue that is basic to the establishment of the ... right[] to benefits." (*Maranian*, *supra*, 81 Cal.App.4th at pp. 1070, 1075 [65 Cal.Comp.Cases at pp. 651, 655]; *Aldi*, *supra*, 71 Cal.Comp.Cases at p. 784.)[2] If a WCAB

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[2] Examples of "threshold" issues include: whether there was an industrial injury (*Pointer*, *supra*, 104 Cal.App.3d at pp. 533-534); whether an injury should be statutorily presumed to be compensable (*Maranian*, *supra*, 81 Cal.App.4th at pp. 1070, 1080-1081); whether there is an employment relationship between the injured claimant and the defendant (*Taylor*, *supra*, 147 Cal.App.3d at p. 1036); whether the employee's claim is barred by the statute of limitations (*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]); whether the WCAB has personal or subject matter jurisdiction (*Rea v. Workers' Comp. Appeals Bd.* (*Milbauer*) (2005) 127 Cal.App.4th 625, 642 [70 Cal.Comp.Cases 312] (*Milbauer*); *Dept. of Justice v. Workers' Comp. Appeals Bd.* (*Jones*) (1989) 213 Cal.App.3d 194, 198 [54 Cal.Comp.Cases 298]); whether the defendant can be relieved of some or all of its workers' compensation liability by receiving credit for monies the employee received outside the workers' compensation system (*Graham v. Workers' Comp. Appeals Bd.* (1989) 210 Cal.App.3d 499, 503 [54 Cal.Comp.Cases 160]; *Kosowski v. Workers' Comp. Appeals Bd.* (1985) 170 Cal.App.3d 632, 636 [50 Cal.Comp.Cases 427]); and whether an expert witness should be permitted to testify. (*Grupe Co. v. Workers' Comp. Appeals Bd.* (*Ridgeway*) (2005) 132 Cal.App.4th 977, 980-981 [70 Cal.Comp.Cases 1232].) Also, dismissing a party, rejecting an affirmative defense, terminating liability, or determining insurance coverage may constitute "threshold" issues. (*Maranian*, *supra*, 81 Cal.App.4th at p. 1075; *Rymer*, *supra*, 211 Cal.App.3d at p. 1180.)

decision resolves a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Milbauer*, *supra*, 127 Cal.App.4th at p. 642 [70 Cal.Comp.Cases at p. 326]; *Aldi*, *supra*, 71 Cal.Comp.Cases at p. 784.)

Here, the question of whether the DFEC portion of the 2005 Schedule may be rebutted is a "threshold" issue that is "fundamental," "critical," and "basic" to the issue of permanent disability benefits. Therefore, we will treat our February 3, 2009 decision as a "final" order. (Cf. *Aldi*, *supra*, 71 Cal.Comp.Cases at p. 784.)

Having determined that our February 3, 2009 decision is a "final" order, we will grant the parties' petitions for reconsideration. Taking into consideration the statutory time constraints for acting on the petitions (Lab. Code, § 5909), we conclude that reconsideration must be granted to afford us a sufficient opportunity to study the issues raised in the petitions so that we may issue a just and reasoned decision.

Furthermore, in accordance with our broad powers on reconsideration (Lab. Code, § 133), we will allow any interested persons or entities to file amicus curiae briefs on the issues addressed by our en banc opinion in *Ogilvie*. Any such amicus briefs shall be filed by no later than 5pm on Friday, May 1, 2009. All amicus briefs shall concurrently be served on all counsel for the parties in *Ogilvie*. We are allowing the submission of amicus briefs because we are aware that our en banc decision has been the subject of much comment and debate in the workers' compensation community and even the broader public. Therefore, we infer there may be significant interest in filing amicus briefs. Also, we believe that amicus curiae briefs may aid our deliberations by giving us a broader perspective on the issues, by assisting us in analyzing those issues, and by helping to ensure that all sides of those issues are fairly and completely presented. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 792, fn. 10; *Preserve Shorecliff Homeowners v. City of San Clemente* (2008) 158 Cal.App.4th 1427, 1435.) The amicus briefs shall not exceed 15 pages and they shall comply with the form and size requirements of Rule 10845(a) (see § 10232(a)(1) through (a)(5) and (a)(11)), except that the amicus briefs need not comply with the provisions of Rule 10845(a) that relate to document folding and stapling, document cover sheets, and documents separator

sheets (see § 10232(a)(11) and (b)). This is because we will order that these briefs be filed directly with the Appeals Board, and not with any district office. The Appeals Board will process these documents and scan them into EAMS. Any amicus brief not complying with all of these requirements shall not be accepted for filing or deemed filed and shall be discarded without notification to the filing person or entity. We note that, for the benefit of any potential amicus, we have posted copies of applicant's petition for reconsideration and of defendant's petition for reconsideration/answer on our website at http://www.dir.ca.gov/wcab/wcab_info_wcc.htm.

After the period for filing amicus briefs has elapsed, counsel in the *Ogilvie* case will each be given until 5pm on Thursday, May 21, 2009 to file a reply brief that responds to *all* of the amicus briefs – that is, each counsel may file a single consolidated reply brief. The reply briefs shall not exceed 15 pages and they shall comply with the form and size requirements of Rule 10845(a) (see § 10232(a)(1) through (a)(5) and (a)(11)), except, as above, they need not comply with the provisions of Rule 10845(a) that relate to document folding and stapling, document cover sheets, and documents separator sheets (see § 10232(a)(11) and (b)). The parties' replies to the amicus briefs shall be served on opposing counsel, but the replies need not be served on amicus.

Any brief, whether filed by a party or by an amicus, which requests that the Appeals Board take judicial notice of legislative history shall comply with *all* of the following requirements: (1) the brief shall append a copy of the matter to be judicially noticed or explain why it is not practicable to do so; (2) the body of the brief shall *quote* the specific language of legislative history that the party or amicus seeks to be judicially noticed and considered and it shall specifically identify where in the document the quoted language appears (e.g., "Sen. Com. on Labor and Industrial Relations, Analysis of Sen. Bill No. 714 (2003-2004 Reg. Sess.) as amended Apr. 21, 2003, pp. 1-2") (cf. Cal. Code Regs., tit. 8, § 10842(b)); and (3) the body of the brief shall explain why the matter to be judicially noticed is relevant. The appended legislative history documents shall not count toward the page limitations set out above, however, the requisite quoted language and explanation of its relevance shall count toward the page limitations. We shall consider only those requests for judicial notice of legislative history that strictly adhere to all of

these requirements. We impose these requirements so that: (1) the parties and amici focus only on the most important elements of legislative history; (2) we are not deluged with a tsunami of requests for judicial notice of legislative history documents that have only minimal relevance to our deliberations; and (3) we and the parties are assured of having ready access to the legislative history documents. A failure to comply with any one these requirements may result in the denial of the request for judicial notice.

For the foregoing reasons,

IT IS ORDERED that the petitions for reconsideration filed by applicant and defendant are **GRANTED**.

IT IS FURTHER ORDERED that any interested person or entity shall have until 5pm on Friday, May 1, 2009 to file and serve an amicus curiae brief, in accordance with the requirements set out above.

IT IS FURTHER ORDERED that, after the period for the filing of amicus curiae briefs has elapsed, each counsel for the parties in *Ogilvie* shall have until 5pm on Thursday, May 21, 2009 to file and serve a single consolidated reply brief in response to the amicus curiae briefs, in accordance with the requirements set out above.

IT IS FURTHER ORDERED that pending the issuance of a further Decision After Reconsideration (En Banc), all further correspondence, objections, motions, requests and communications shall be filed only with the Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102) or its Post Office Box address (P. O. Box 429459, San Francisco, California 94142-9459) and shall not be filed with

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any district office of the WCAB.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Joseph M. Miller
JOSEPH M. MILLER, Chairman

/s/ James C. Cuneo
JAMES C. CUNEO, Commissioner

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

/s/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

I CONCUR IN THE RESULT
(See attached Concurring Opinion)

/s/ Gregory G. Aghazarian
GREGORY G. AGHAZARIAN, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
4/6/2009

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

Wanda Ogilvie
Office of the City Attorney, Fox Plaza, 1390 Market Street, 7th Floor, San Francisco, CA 94102-5408
Law Office of Joseph C. Waxman, 114 Sansome Street, Ste. 1205, San Francisco, CA 94104

NPS/bea

CONCURRING OPINION OF COMMISSIONER AGHAZARIAN

I concur with the decision to grant reconsideration in the *Ogilvie* case and to allow supplemental briefing, including the solicitation of amicus curiae briefs. However, I would go further and, in accordance with the Appeals Board's broad powers on reconsideration (see Lab. Code, § 133), I would stay the legal effect – including the binding precedential effect (see Cal. Code Regs., tit. 8, § 10341) – of our February 3, 2009 joint en banc decision, pending the issuance of our further joint en banc opinion.

We cannot now determine, with certainty, whether or not we will affirm, rescind, alter, or amend our February 3, 2009 decision. Therefore, I believe it would be best to place the parties to these cases – as well as parties in other cases that otherwise would be bound by our February 3, 2009 decision – back in the position they would have been before that decision. In my view, by failing to stay the legal effect of our February 3, 2009 decision, there could be a substantial adverse impact on the workers' compensation system, if our further decision should happen to arrive at a different result than our February 3, 2009 decision. This is because, in the interim, medical-legal and other costs might be unnecessarily accrued, incurred or wasted. This would be inconsistent with SB 899, which was intended to reduce the costs of the workers' compensation system. (See, e.g., *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1329 [72 Cal.Comp.Cases 565, 578] (SB 899 was adopted as "an urgency measure designed to alleviate a perceived crisis in skyrocketing workers' compensation costs").) Also, proceedings at the trial level might take place unnecessarily or have to be repeated, thereby possibly delaying the provision of permanent disability benefits. This would be inconsistent with the mandate of Article XIV, section 4, of the California Constitution to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance [sic] of any character."

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Accordingly, until we issue our further decision, I would stay our February 3, 2009 decision.

/s/ Gregory G. Aghazarian
GREGORY G. AGHAZARIAN, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
4/6/2009

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