

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **Case No. ADJ1177048 (SFO 0487779)**

4 **WANDA OGILVIE,**

5 *Applicant,*

6 vs.

7 **CITY AND COUNTY OF SAN FRANCISCO,**
8 **Permissibly Self-Insured,**

9 *Defendant(s).*

**ORDER GRANTING
RECONSIDERATION
AND
ORDER ALLOWING
AMICUS BRIEFS
(EN BANC)**

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

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

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

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

24 Preliminarily, in granting reconsideration, we conclude that our February 3, 2009 en banc
25 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.

1 A petition for reconsideration is properly taken only from a “final” order, decision, or
2 award. (Lab. Code, §§ 5900(a), 5902, 5903.) Generally, a “final” order is one “which determines
3 any substantive right or liability of those involved in the case.” (*Rymer v. Hagler* (1989) 211
4 Cal.App.3d 1171, 1180 (*Rymer*); *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)*
5 (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413] (*Pointer*)). Accordingly,
6 where – as here – the Appeals Board grants reconsideration, rescinds the decision of the WCJ, and
7 returns the matter to the WCJ for further proceedings and a new decision, the Appeals Board’s
8 action generally is not deemed a “final” order. (Cf. *Travelers Ins. Co. v. Workers’ Comp. Appeals*
9 *Bd. (Taylor)* (1983) 147 Cal.App.3d 1033, 1036, fn. 3 [48 Cal.Comp.Cases 774, 775, fn. 3]
10 (*Taylor*) (“a petition seeking review of a [WCAB] order which remands a matter to the trial judge
11 for further proceedings is ordinarily premature”).)

12 However, an interlocutory WCAB decision may be deemed a “final” order if it determines
13 a “threshold” issue. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1073-
14 1081 [65 Cal.Comp.Cases 650, 653-660] (*Maranian*); *Aldi v. Carr, McClellan, Ingersoll,*
15 *Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784 (Appeals Board en banc) (*Aldi*).) A
16 “threshold” issue has variously been described as “a substantial issue fundamental to the ... claim
17 for benefits,” “an issue critical to the claim for benefits,” or “an issue that is basic to the
18 establishment of the ... right[] to benefits.” (*Maranian, supra*, 81 Cal.App.4th at pp. 1070, 1075
19 [65 Cal.Comp.Cases at pp. 651, 655]; *Aldi, supra*, 71 Cal.Comp.Cases at p. 784.)² If a WCAB

21 ² Examples of “threshold” issues include: whether there was an industrial injury (*Pointer, supra*, 104
22 Cal.App.3d at pp. 533-534); whether an injury should be statutorily presumed to be compensable (*Maranian, supra*,
23 81 Cal.App.4th at pp. 1070, 1080-1081); whether there is an employment relationship between the injured claimant
24 and the defendant (*Taylor, supra*, 147 Cal.App.3d at p. 1036); whether the employee’s claim is barred by the statute of
25 limitations (*Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43
26 Cal.Comp.Cases 661]); whether the WCAB has personal or subject matter jurisdiction (*Rea v. Workers’ Comp.*
27 *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.)

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

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

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

13 Furthermore, in accordance with our broad powers on reconsideration (Lab. Code, § 133),
14 we will allow any interested persons or entities to file amicus curiae briefs on the issues addressed
15 by our en banc opinion in *Ogilvie*. Any such amicus briefs shall be filed by no later than 5pm on
16 Friday, May 1, 2009. All amicus briefs shall concurrently be served on all counsel for the parties
17 in *Ogilvie*. We are allowing the submission of amicus briefs because we are aware that our en
18 banc decision has been the subject of much comment and debate in the workers’ compensation
19 community and even the broader public. Therefore, we infer there may be significant interest in
20 filing amicus briefs. Also, we believe that amicus curiae briefs may aid our deliberations by
21 giving us a broader perspective on the issues, by assisting us in analyzing those issues, and by
22 helping to ensure that all sides of those issues are fairly and completely presented. (*In re Marriage*
23 *Cases* (2008) 43 Cal.4th 757, 792, fn. 10; *Preserve Shorecliff Homeowners v. City of San Clemente*
24 (2008) 158 Cal.App.4th 1427, 1435.) The amicus briefs shall not exceed 15 pages and they shall
25 comply with the form and size requirements of Rule 10845(a) (see § 10232(a)(1) through (a)(5)
26 and (a)(11)), except that the amicus briefs need not comply with the provisions of Rule 10845(a)
27 that relate to document folding and stapling, document cover sheets, and documents separator

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

8 After the period for filing amicus briefs has elapsed, counsel in the *Ogilvie* case will each
9 be given until 5pm on Thursday, May 21, 2009 to file a reply brief that responds to all of the
10 amicus briefs – that is, each counsel may file a single consolidated reply brief. The reply briefs
11 shall not exceed 15 pages and they shall comply with the form and size requirements of Rule
12 10845(a) (see § 10232(a)(1) through (a)(5) and (a)(11)), except, as above, they need not comply
13 with the provisions of Rule 10845(a) that relate to document folding and stapling, document cover
14 sheets, and documents separator sheets (see § 10232(a)(11) and (b)). The parties' replies to the
15 amicus briefs shall be served on opposing counsel, but the replies need not be served on amicus.

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

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

7 For the foregoing reasons,

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

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

13 **IT IS FURTHER ORDERED** that, after the period for the filing of amicus curiae briefs
14 has elapsed, each counsel for the parties in *Ogilvie* shall have until 5pm on Thursday, May 21,
15 2009 to file and serve a single consolidated reply brief in response to the amicus curiae briefs, in
16 accordance with the requirements set out above.

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

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1 any district office of the WCAB.

2 **WORKERS' COMPENSATION APPEALS BOARD**

3 /s/ Joseph M. Miller

4 **JOSEPH M. MILLER, Chairman**

5 /s/ James C. Cuneo

6 **JAMES C. CUNEO, Commissioner**

7 /s/ Frank M. Brass

8 **FRANK M. BRASS, Commissioner**

9 /s/ Ronnie G. Caplane

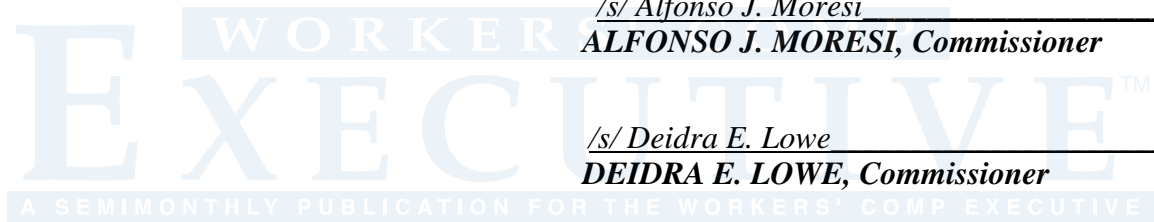
10 **RONNIE G. CAPLANE, Commissioner**

11 /s/ Alfonso J. Moresi

12 **ALFONSO J. MORESI, Commissioner**

13 /s/ Deidra E. Lowe

14 **DEIDRA E. LOWE, Commissioner**



15 **I CONCUR IN THE RESULT**

16 **(See attached Concurring Opinion)**

17 /s/ Gregory G. Aghazarian

18 **GREGORY G. AGHAZARIAN, Commissioner**

19
20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**
21 **4/6/2009**

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

24 **Wanda Ogilvie**

25 **Office of the City Attorney, Fox Plaza, 1390 Market Street, 7th Floor, San Francisco, CA**
26 **94102-5408**

27 **Law Office of Joseph C. Waxman, 114 Sansome Street, Ste. 1205, San Francisco, CA 94104**

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**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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