

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**AUSTIN CHAMPION, *Applicant***

**vs.**

**LADELL INC. dba JOHNSON AIR;  
ZURICH SAN FRANCISCO, *Defendants***

**Adjudication Number: ADJ12803585  
Fresno District Office**

**OPINION AND ORDER  
GRANTING RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

**It has come to the attention of the Appeals Board that the decision served on July 22, 2024 was incorrect. Accordingly, we rescind the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration issued on July 22, 2024 on motion of the Appeals Board, and substitute the following Opinion:**

Defendant seeks reconsideration of the Findings and Award (F&A) dated April 22, 2024, and issued on May 1, 2024, wherein the workers' compensation judge (WCJ) found in relevant part that applicant has permanent disability as found by qualified medical evaluator (QME) Dr. Deshmukh for the cervical spine, and by QME Dr. Bhatia for the left upper extremity, with a combined rating of 59% after adjustment for age and occupation; and applicant has "further permanent disability determined by Paul Stanford . . . resulting in a 100% permanent disability" and the reports were determined to be substantial evidence; and that the reports of Scott Simon were determined not to be substantial evidence.<sup>1</sup>

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<sup>1</sup> The F&A did not include the parties' stipulations as to the parties, parts of body, date of injury, earnings, rate of compensation, and compensation previously paid. The WCJ is reminded that stipulations do not become legally enforceable orders of the WCAB unless they are approved by a WCJ (Lab. Code, § 5702), and a F&A must contain all findings so that it is legally enforceable and capable of being reduced to a judgement (Lab. Code, §§ 5806, 5807).

Defendant contends that the reports of applicant's vocational expert were not substantial evidence as only the first reports, and not the subsequent reports, were submitted to the QMEs for review.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted as he now believes that the reports of applicant's vocational expert were not substantial evidence.

We did not receive an answer from applicant. However, we subsequently received a Petition for Reconsideration from applicant in response to the WCJ's recommendation in the Report. We accept the Petition as a supplemental pleading pursuant to our authority in WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964) and have considered it.

We have considered the Petition for Reconsideration, the supplemental pleading, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will dismiss applicant's Petition as one for reconsideration and accept it as a supplemental pleading, and we will grant defendant's Petition for Reconsideration, rescind the F&A, and return this matter to the WCJ for further proceedings consistent with this decision.

To constitute substantial evidence, among other things, a report "must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) It is well established that in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal.Comp.Cases 660].) Also, a medical report is not substantial evidence unless it sets forth the reasoning behind the expert's opinion, not merely the conclusions. (*Granado v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 399, 407 [33 Cal.Comp.Cases 647].) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

In the en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741] ("*Nunes I*"), the Appeals Board held that Labor Code section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment, and that the Labor Code makes no

statutory provision for “vocational apportionment.” The Appeals Board further held that vocational evidence may be used to address issues relevant to the determination of permanent disability, and that vocational evidence must address apportionment, but such evidence may not substitute impermissible “vocational apportionment” in place of otherwise valid medical apportionment. The Appeals Board explained that an analysis of whether there are valid sources of apportionment is still required, even when applicant is deemed not feasible for vocational retraining and is permanently and totally disabled as a result. In such cases, the WCJ must determine whether the cause of the permanent and total disability includes nonindustrial or prior industrial factors, or whether the permanent disability reflected in applicant's inability to meaningfully participate in vocational retraining arises solely out of the industrial injuries. Consequently, because only physicians may render those opinions, vocational reporting must be submitted to the physician for consideration. The Appeals Board affirmed these holdings in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] (“*Nunes II*”).

Here, the record reflects that there is no medical reporting after July 16, 2022, and that only one vocational report was obtained after August 29, 2023, the date when *Nunes II* issued. In his Report, the WCJ concedes that “the only ‘safe’ way to remedy the situation would be to allow both of the QMEs to review the VR reports and make appropriate comments as to each experts’ opinions.” (Report, p. 3.)

Labor Code section 5313 requires a WCJ to state the “reasons or grounds upon which the determination was made.” The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision “must be based on admitted evidence in the record” (*Hamilton, supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, “the WCJ is

charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton, supra*, at p. 475.)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (Lab. Code, §§ 5701, 5906; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; *McDonald v. Workers' Comp. Appeals Bd., TLG Med. Prods.* (2005) 70 Cal. Comp. Cases 797 [2005 Cal. Wrk. Comp. LEXIS 182]; *Lopez v. Wps Fbo Garco Enters* (January 5, 2022, ADJ12017211) [2022 Cal. Wrk. Comp. P.D. LEXIS 2, \*18-19].) The Appeals Board 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].) Labor Code sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141-143 [2002 Cal.Wrk.Comp. LEXIS 1218] (Appeals Bd. en banc).) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd., supra*, 79 Cal.App.4th at p. 404.)

Upon return, we recommend that the WCJ and the parties proceed with further discovery so as to submit QME and vocational expert reporting that complies with the guidelines outlined in *Nunes I and II, supra*.

Thus, we dismiss applicant’s Petition as one for reconsideration, grant defendant’s Petition for reconsideration, rescind the WCJ’s decision, and return this matter to the WCJ for further proceedings consistent with this decision. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ’s new decision.

For the foregoing reasons,

**IT IS ORDERED** on motion of the Appeals Board that the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration issued on July 22, 2024 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

**IT IS ORDERED** that applicant's Petition for Reconsideration of the decision issued by a WCJ on May 1, 2024 is **DISMISSED**.

**IT IS ORDERED** that defendant's Petition for Reconsideration of the decision of May 1, 2024 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of May 1, 2024 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**July 25, 2024**

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

**AUSTIN CHAMPION  
BERRY, SMITH & BARTELL  
LAW OFFICES OF DOUGLAS G. MACKAY**

**AS/mc**

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

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**AUSTIN CHAMPION, *Applicant***

**vs.**

**LADELL INC. dba JOHNSON AIR;  
ZURICH SAN FRANCISCO, *Defendants***

**Adjudication Number: ADJ12803585  
Fresno District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the decision of May 1, 2024 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of May 1, 2024 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

I CONCUR,

**s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**July 22, 2024**

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

**AUSTIN CHAMPION  
BERRY, SMITH & BARTELL  
LAW OFFICES OF DOUGLAS G. MACKAY**

**AS/mc**

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