WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EPIFANIO MEDINA, ***Applicant***

vs.

SECOND NATURE;
MID-CENTURY INSURANCE COMPANY, ***Defendants***

Adjudication Numbers: ADJ1413052; ADJ4567871
Stockton District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Second Amended Findings of Fact, Award and Order (F&A) issued on August 9, 2024, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a laborer manager on July 9, 2001, sustained industrial injury to his left knee, back, psyche and neck. The WCJ found, in relevant part, that applicant was temporarily totally disabled from February 22, 2017, through March 1, 2019. The WCJ determined that applicant sustained 78 percent permanent partial disability after the application of valid legal apportionment.

Applicant contends that he was temporarily totally disabled from March, 2019 through February, 2022, and that he is entitled to reimbursement of outstanding medical expenses.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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 discussed below, we will grant applicant's Petition for Reconsideration and affirm the F&A, except that we will amend it to award 86 percent unapportioned permanent disability.

FACTS

Applicant sustained injury to his left knee, back, psyche, and neck, while employed as a laborer manager by defendant Second Nature on July 9, 2001.

On May 29, 2024, the parties proceeded to trial, at which time the WCJ entered the following minute reflection:

> LET THE MINUTES REFLECT that this matter has come on the trial calendar several times. On May 8, 2019, the matter was submitted and a Findings of Fact, Award and Order issued June 26, 2019. At that time, the issues involving Case No. ADJ4567871 were resolved. The matter then came on the trial calendar March 4, 2021 to admit further evidence after development of the record. After that, a Second-Amended Finding of Fact, Award and Order issued May 18, 2021. After the decision of May 18, 2021, the Applicant requested and was granted reconsideration and determination of partial permanent disability and the entitlement to a life pension was deferred by the Workers' Compensation Appeals board on August 2, 2021. The Applicant filed a further Petition for Reconsideration, which was denied on October 27, 2021. The Applicant has been reevaluated by the psychologist, Karen A. Hutchinson, Ph.D., M.P.H., and the matter returned to the trial calendar on June 21, 2023. The matter was submitted the same day, and a Findings of Fact and Order issued August 4, 2023 ordering further development of the record that has now been completed. The matter is now back on the trial calendar to determine the issues in ADJ1413052.
>
> (Minutes of Hearing and Summary of Evidence (Minutes), dated May 29, 2024, at p. 2:2.)

The WCJ admitted the January 8, 2024 supplemental report of Dr. Hutchinson into evidence and ordered the matter submitted as of May 29, 2024.

On August 9, 2024, the WCJ issued the F&A, as amended to correct the value of the life pension figures and the deferred issues. (F&A, p. 1.) The WCJ found, in relevant part, that applicant was entitled to temporary disability from February 22, 2017, through March 1, 2019. (Findings of Fact No. 13.) The WCJ determined the apportionment opinion of Dr. Hutchinson to be valid, and based thereon, that applicant sustained 78 percent permanent disability. (Findings of Fact Nos. 12 & 9.) The WCJ also found good cause to defer the liens of Monarch Medical Beverly Hills, applicant's two prior attorneys, and the issue of expenses related to self-procured medical treatment. (Findings of Fact No. 14.)

Applicant's Petition, which takes the form of a letter to the WCJ, notes that the WCJ's decision entitled applicant to future medical care to cure or relieve from the effects of industrial

injury, but also determined that the apportionment opinion of evaluating psychologist Dr. Hutchinson was valid. (Petition, at p. 1; Findings of Fact No. 12.) Applicant's Petition requests confirmation that his ongoing psychiatric treatment will be covered under the medical care provisions of the F&A. The Petition also observes that treating physician Frank Fine, D.C., opined that applicant was temporarily disabled from March, 2019 through February, 2022. (Petition, at p. 2.)

The WCJ's Report observes that the provision for future medical care applies to the entire injury, including the psyche. The Report also states that the findings regarding temporary disability were made on the evidence submitted, and that the issue of reimbursement of self-procured medical expenses was deferred.

DISCUSSION

I.

Former Labor Code[1] 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.
> >
> > (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 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

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

Appeals Board on September 13, 2024, and the next business day that is 60 days from the date of transmission is November 12, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on the next business day after November 12, 2024, 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 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 September 13, 2024, and the case was transmitted to the Appeals Board on September 13, 2024. 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 September 13, 2024.

II.

Applicant's Petition observes that the F&A provides for future medical treatment, but also finds valid apportionment of applicant's psychiatric injury. (Petition, at p. 1.) Applicant seeks confirmation that the expenses associated with his psychiatric treatment will continue to be paid by defendant.

We agree with the WCJ, who states in her Report that the "medical award is to the entire injury, including the psyche." (Report, at p. 2.) We note that notwithstanding the apportionment of applicant's psychiatric *permanent disability*, the award of future medical care is not subject to apportionment. (*Granado v. Workmen's Comp. Appeals. Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647] ["There can be no doubt that medical expense is not apportionable."].)

---

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

Pursuant to section 4600, the employer is responsible for the cost of medical treatment to cure or relieve from the effects of the industrial injury. (Lab. Code, § 4600; *Granado, supra*, at pp. 405-406.) However, we also observe that scope of the award of future medical treatment is not unlimited and continues to be subject to the requirement that it be medically necessary as determined by Utilization Review (Lab. Code, § 4610) and Independent Medical Review (Lab. Code, §4610.5).

Applicant also contests the Award of temporary disability. Finding of Fact No. 13 provides for temporary disability from February 22, 2017 through March 1, 2019. Applicant's Petition avers Dr. Fine placed applicant on temporary disability from March, 2019, through February, 2022. (Petition, at p. 2.) The WCJ's Opinion on Decision notes, however, that the evidentiary record only documents temporary disability through the March 1, 2019 report of Frank Fine, D.C. (Opinion on Decision, at p. 5.) We note that applicant's Petition offers no citation to the evidentiary record that establishes additional periods of temporary disability. (See Cal. Code Regs., tit. 8, § 10945(b) ["every petition and answer shall support its evidentiary statements by specific references to the record"].) Following our independent review of the record, however, we do not identify any additional periods of temporary disability supported by competent medical evidence, and we do not disturb the WCJ's findings with respect to temporary disability.

III.

Upon the filing of a petition for reconsideration, the Appeals Board has the authority 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. As we observed in *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, fn. 7 [2006 Cal. Wrk. Comp. LEXIS 35, 51-17] (Appeals Board en banc), section 5906 provides that "[u]pon the filing of a petition for reconsideration . . . the appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge…." (Lab. Code, § 5906.) Similarly, section 5908 provides that "[a]fter . . . a consideration of all the facts the appeals board may affirm, rescind, alter, or amend the original order, decision, or award." (Lab. Code, § 5908.) Thus, it is settled law that 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 [218 P. 1009] [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*Pasquotto, supra,* citing *State Comp. Ins. Fund v. Industrial Acc. Com.* (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].)

Here, following our independent review of the record we are not persuaded that the apportionment to nonindustrial factors described by regular physician Dr. Hutchinson constitutes substantial medical evidence. Section 4663 sets out the requirements for the apportionment of permanent disability and provides, in relevant part, as follows:

> (a) Apportionment of permanent disability shall be based on causation.
>
> (b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.
>
> (c) In order for a physician's report to be considered complete on the issue of permanent disability, it must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.
>
> (Lab. Code, § 4663.)

In order to comply with section 4663, a physician's report in which permanent disability is addressed must also address apportionment of that permanent disability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*).) However, the mere fact that a physician's report addresses the issue of causation of permanent disability and makes an apportionment determination by finding the approximate respective percentages of industrial and non-industrial causation does not necessarily render the report substantial evidence upon which we may rely. Rather, the report must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable

disability, and *set forth the basis for the opinion that factors other than the industrial injury at issue caused permanent disability.* (*Id.* at p. 621.) Our decision in *Escobedo* summarized the minimum requirements for an apportionment analysis as follows:

> [T]o be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.
>
> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, *how* and *why* it is causing permanent disability at the time of the evaluation, and *how* and *why* it is responsible for approximately 50% of the disability.
>
> (*Ibid.*, italics added.)

Here, the October 12, 2014, report of Dr. Hutchinson states there are no prior awards or industrial factors of apportionment, but there is "indication" of a nonindustrial Personality Disorder. The regular physician writes, "I apportion 25% to the preexisting personality disorder, and 15% to [applicant's] wife's poor health that is also having a negative impact on Mr. Medina's residual disability and the remaining 60% to the Industrial Injury." (Ex. 9(b), Report of Karen Hutchinson, Ph.D., dated October 12, 2014, at p. 64.)

In a subsequent report of June 19, 2022, Dr. Hutchinson opines:

> In this case, there is no indication of an award for prior psychological or psychiatric disability, prior industrial psychiatric or psychological injury, subsequent psychiatric or psychological injury, or other factors such as natural progression of a disabling condition, prior pathology, asymptomatic prior conditions, or retroactive prophylactic work preclusions (LC §4663, 4664, and Escobedo v. Marshalls). However, there is indication of a Personality Disorder with narcissistic, dependent and histrionic personality traits. I apportion 25% to the preexisting personality disorder, and the remaining 75% to the industrial injury. [Applicant's] wife's health condition has improved so there is no longer an indication for apportionment to this factor. He has had a heart attack and other

> medical problems but they are resolved. His chronic pain and consequent depression and anxiety is the primary residual factor in this case.
>
> (Ex. 11, Report of Karen Hutchinson, Ph.D., dated June 19, 2022, at p. 65.)

Notwithstanding the change in the apportionment opinion of the regular physician, the F&A applies 40 percent nonindustrial apportionment to applicant's psychiatric permanent disability. (Finding of Fact No. 12; Opinion on Decision, at p. 5.)

However, neither the October 12, 2014, nor the June 19, 2022, report of the regular physician discusses in any detail the mechanics of how an Axis II diagnosis of a personality disorder properly constitutes a factor of nonindustrial apportionment. The physician's findings of apportionment to the personality diagnosis are conclusory and offer no explanation of the physician's underlying analysis. Nor is it clear that the "indication" of a collateral psychiatric diagnosis is a properly identified factor of medical apportionment, to a reasonable medical probability. Neither of the regular physician's apportionment determinations describe how and why applicant's personality disorder is nonindustrial in etiology, or how and why the disorders are currently contributing to applicant's psychiatric permanent disability. Nor do the apportionment opinions describe how the regular physician arrived at the particular percentages applied. Thus, the regular physician has not identified or quantified the factors of nonindustrial apportionment in accordance with correct legal principles. (*Escobedo, supra*, 70 Cal.Comp.Cases 604, 621.) We therefore conclude that the evidentiary record does not support valid apportionment to nonindustrial or prior industrial factors.

Based on the foregoing analysis of the apportionment opinions of the regular physician, we conclude that applicant is entitled to an unapportioned award.

The WCJ has rated the orthopedic and psychiatric permanent disability described by the evaluating physicians as follows:

2.4 – 30 – 480E – 28 – 28 = 17 (60% industrial apportionment)

12.1 – 40 – 480I – 49 – 49 (100% industrial apportionment)

14. – 40 – 480H – 46 – 46 (100% industrial apportionment)

The WCJ's ratings are not challenged by any party. We thus adopt the WCJ's ratings, but for the reasons described above, apply the unapportioned psychiatric disability of 28 percent.

Pursuant to the 1997 Permanent Disability Rating Schedule (PDRS), and the "Rules for Combining Disabilities Involving Different Part of the Body," the combination of the orthopedic

disability of 49 percent and 46 percent yields 77 percent, which is then combined with 28 percent psychiatric disability for a final permanent disability rating of 86 percent. (49C46C28=86; 1997 PDRS, at p. 7-12.) Applicant is therefore entitled to 570.5 weeks of permanent disability, payable at $230.00 per week, followed by a life pension at the weekly rate of $100.50.

In summary, we agree with the WCJ that the award includes provision for future medical care to cure or relieve from the effects of applicant's industrial injuries, without apportionment, but also observe that the requested treatment must be medically reasonable and necessary. We also concur with the WCJ's determination that the record does not support additional periods of temporary disability beyond that which was awarded. Finally, and insofar as applicant's Petition raises the issue of out-of-pocket expense, we agree with the WCJ that the issue has been deferred with jurisdiction reserved in the event the parties are unable to reach an amicable resolution.

Following our independent review of the record, we also conclude that the apportionment opinions of the regular physician do not constitute substantial evidence, and that applicant is entitled to an unapportioned award. Therefore, we grant applicant's Petition for Reconsideration and affirm the F&A, except that we amend it to reflect an unapportioned award.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the decision issued on August 9, 2024, is **GRANTED**

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision issued on August 9, 2024, is **AFFIRMED,** except that it is **AMENDED** as follows:

FINDINGS OF FACT
ADJ1413052

9. Applicant has sustained residual permanent partial disability of 86 percent after adjustment for age, occupation, and apportionment.

…

12. The apportionment opinion of Karen Hutchinson, Ph.D., M.P.H. does not constitute substantial evidence.

AWARD
ADJ1413052

AWARD is made in favor of the applicant, **EPIFANIO MEDINA**, against the defendant, **MIDCENTURY INSURANCE COMPANY** as follows:

a. Permanent Partial Disability of 86 percent, equivalent to 570.5 weeks paid at the rate of $230.00 per week for a total sum of $131,215, less permanent disability advances, if any, less fifteen percent (15%) to be commuted off the far end of the award and held in trust by the defendant until the prior attorneys' fee issue is resolved, and then the balance, if any, of the amount held in trust to be paid to the applicant.
b. Life Pension paid at the rate of $100.50 per week, less fifteen percent (15%) until the prior attorneys' fee issue is resolved, to be commuted from the side of the award if necessary so there is no period without benefits.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 12, 2024

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

SAR/abs

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

SERVICE LIST

CENTRAL VALLEY INJURED WORKER-LEGAL
EPIFANIO MEDINA
EMPLOYMENT DEVELOPMENT DEPARTMENT
FARMERS
MONARCH MEDICAL
PRECISION HEALTH IMAGING
SCOTTS STRATMAN
SECOND NATURE
SEDGWICK
STRATMAN SCHWARTZ WILLIAMS-ABREGO
T MAE YOSHIDA, ESQ.