WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

HASSAAN SALAAM, *Applicant*

vs.

TRADESMEN INTERNATIONAL; NEW HAMPSHIRE INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ8063851, ADJ8061988
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant and defendant have filed separate petitions for reconsideration with regard to a workers' compensation administrative law judge's (WCJ) Joint Findings, Award Order of August 2, 2024, wherein, as applicable to the instant petitions, it was found that while employed as a welder during a cumulative period ending August 18, 2011, applicant sustained industrial injury to the right shoulder, low back, wrists, and psyche, causing the statutory maximum 104-weeks temporary disability, permanent disability of 68% after apportionment. The WCJ found that applicant was entitled to temporary disability indemnity at the rate of $780.97 per week, based on average weekly earnings of $1,171.45 per week.

Applicant contends in his Petition that the WCJ erred in finding permanent disability of only 68% arguing that there were improper ex parte communications at the deposition of psychiatrist Salvador Echeverria, M.D. and that Dr. Echeverria's deposition testimony discussing apportionment should be stricken from the evidentiary record. Defendant contends in its Petition that the WCJ erred in determining applicant's average weekly wage, arguing that the WCJ did not take into account breaks in applicant's employment.[1] Defendant has filed an Answer to Applicant's Petition and the WCJ has filed a joint Report and Recommendation on Petition for Reconsideration addressing both petitions.

[1] Defendant also alleges a typographical error in the Opinion on Decision. Since this error is not in the decision itself, we need not address it.

As explained below, we will grant reconsideration and amend the WCJ's decision to find applicant entitled to an unapportioned award of 77% permanent disability. Although we agree that there were no improper ex parte communications, after reviewing the record, we find that there is no substantial medical evidence of apportionment. We will affirm the WCJ's findings regarding applicant's average weekly wage.

Preliminarily, we note that former Labor Code 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, Labor Code 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.
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> (b)
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> (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 Labor Code 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 September 18, 2024, and 60 days from the date of transmission is Sunday, November 17, 2024. The next business day that is 60 days from the date of transmission is Monday, November 18, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, November 18, 2024, so we have timely acted on the petition as required by Labor Code section 5909(a).

[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.

Labor Code 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 September 18, 2024, and the case was transmitted to the Appeals Board on September 18, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 18, 2024.

Turning to the merits of defendant's Petition, Labor Code section 4453(c), which governs the calculation of average weekly earnings, states in pertinent part that:

> [T]he average weekly earnings … shall be arrived at as follows:
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> (1) Where the employment is for 30 or more hours a week and for five or more working days a week, the average weekly earnings shall be the number of working days a week times the daily earnings at the time of the injury.
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> (2) Where the employee is working for two or more employers at or about the time of the injury, the average weekly earnings shall be taken as the aggregate of these earnings from all employments computed in terms of one week; but the earnings from employments other than the employment in which the injury occurred shall not be taken at a higher rate than the hourly rate paid at the time of the injury.
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> (3) If the earnings are at an irregular rate, such as piecework, or on a commission basis, or are specified to be by week, month, or other period, then the average weekly earnings mentioned in subdivision (a) shall be taken as the actual weekly earnings averaged for this period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay.
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> (4) Where the employment is for less than 30 hours per week, or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings shall be taken at

> 100 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his or her injury, due consideration being given to his or her actual earnings from all sources and employments.

An earnings statement was introduced into evidence showing that in the 15 weeks preceding the industrial injury, applicant worked 30 or more hours in 13 of the 15 weeks. There was one week that reflected no earnings at all, and one week that applicant worked 22.5 hours. (Ex. V, Payroll Records.) Thus, applicant was arguably entitled to have his average weekly earnings calculated utilizing Labor Code section 4453(c)(1), which would have resulted in a higher average weekly wage. However, applicant testified at trial, that there were sometimes breaks between jobs which he was not compensated for (which may be reflected in Exhibit V with no pay for one week and less pay for the week immediately before). Applicant also testified that earlier in the year, he worked mostly for another company with a base pay of $20-22 per hour, but he did not produce documents specifying the regular or overtime hours worked. (Minutes of Hearing and Summary of Evidence of May 8, 2022 hearing at p. 8.)

The WCJ wrote in her Opinion on Decision:

> He testified that there may be time when a job ended before another started so they would have time to go home and regroup, which would substantiate Defendants' argument that the Applicant's work had gaps in time. He testified that occasionally there could be a week or two, or less between jobs. Mr. Salaam also testified that he had worked previously for Tradesman but if they did not have work then he would go to another company to find work. Mr. Salaam testified that he was more dedicated to Tradesmen in the more current employment, during the cumulative trauma injury.
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> Defendants have argued that the Applicant's employment is sporadic, with weeks of time where the Applicant received no earnings. The documentation for 2010 does not allow for an assessment of the Applicant's earnings during the rest of November and December, but the documentation for 2011 does indicate very little earnings from the beginning of the year through the end of April. The Applicant worked for Tradesmen for a total of five weeks during the entire period from January 1, 2011 through May 4, 2011. However, the earnings information makes an abrupt change in May of 2011, beginning with the payment in the week of May 11, 2011. From May 11, 2011, the Applicant receives a paycheck every week reflecting full time earnings, except the week of August 3, 2011. This is evidence of a change in the Applicant's employment circumstances. The applicant may have been leased to Ram during the period from January 1 to May 4, but there is no documentation of the period that the Applicant was "leased off". Based on the Applicant commencing full time

> employment with Tradesmen in May 2011, and considering the paychecks for 16 weeks that the Applicant worked consistently between May 11, 2011 and August 24, 2011, including the week of August 3, when Applicant had no earnings, the calculation of earnings would be an average of $2,733.38 per week. However, this does not take into account the period of employment prior to May 4, 2011, when the Applicant's earnings were clearly lower.

Thus, the WCJ did take into account applicant's breaks in employment and prior lower wages in determining the average weekly wage. As noted by the Court of Appeal in *Grossmont Hosp. v. Workers' Comp. Appeals Bd. (Kyllonen)* (1997) 59 Cal.App.4th 1348, 1362 [62 Cal.Comp.Cases 1649], "In most cases benefits for total temporary disability may be based on actual earnings under section 4453, subdivision (c)(1)-(3). Application of the section 4453, subdivision (c)(4) earning capacity method is appropriate where for any reason the application of the actual earnings methods is not reasonable and fair." Although, the WCJ nominally erroneously based her decision on Labor Code section 4453(c)(3) which is applicable to situations where applicant is paid at an irregular rate or for piecemeal work, which is not strictly accurate here, by taking all factors into account she found an amount which "reasonably represent[ed] the average weekly earning capacity of the injured employee at the time of his or her injury" pursuant to section 4453(c)(4). As noted above, subdivision (c)(1) presented the closest statutory scenario to the facts in this case, but the WCJ found that it could not be fairly applied because of the unpaid breaks between projects and because applicant's wages when working on projects for other employers was not completely clear. The WCJ fairly applied all of the factors by determining an average wage less than what would have been determined under subdivision (c)(1) but still reasonably representing applicant's earning capacity. We see no error.

Turning to applicant's Petition, we agree with the WCJ that there were no improper ex parte communications during Dr. Echeverria's deposition. While the record was stopped during the deposition, no evidence was presented that there was any improper communication with Dr. Echeverria while off the record. Nevertheless, we find this issue moot because having reviewed Dr. Echeverria's reports and deposition testimony, we find that there is not substantial medical evidence of apportionment.

In Dr. Echeverria's report of April 10, 2019, Dr. Echeverria finds applicant permanent and stationary and finds that applicant has a Global Assessment of Function (GAF) score of 51 meaning "Moderate symptoms (e.g. flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g. few friends, conflicts

with peers or co-workers)." (2005 Schedule for Rating Permanent Disabilities at p. 1-14.) In the same report, Dr. Echeverria writes, "In my opinion 10% of the psychiatric disability is apportioned to his ongoing cannabis use, which can affect psychiatric symptoms. Therefore 90% of the patient's permanent disability is apportioned to industrial causes and 10% is apportioned to non-industrial causes." (April 10, 2019 report at p. 44.)

At Dr. Echeverria's October 10, 2019 deposition, defense counsel listed several alleged stressors including applicant's strained relationship with his daughters, a separation from his partner in 2014, a history of incarcerations about 10 years before the industrial injury, and family history of anxiety. Dr. Echeverria was asked what percentage of permanent disability could be apportioned to these risk factors and Dr. Echeverria answered, "25 percent." (October 10, 2019 deposition at p. 15.) Under questioning from defense counsel, Dr. Echeverria agreed to 25 percent apportionment to "risk factors" and 10 percent to cannabis use. (October 10, 2019 deposition at p. 25.) However, there was never any explanation how these risk factors or cannabis use were contributing to applicant's GAF score.

Similarly, panel qualified evaluator orthopedist Peter J. Sofia, M.D.'s entire discussion of apportionment with regard to applicant's back was, "I believe the back is primarily industrial, 90% but 10% would be age-related degenerative disc disease that would have accrued since his youth going forward." (February 5, 2019 report at p. 6.)

While it is now well established that one may properly apportion to pathology and asymptomatic prior conditions (see, e.g. *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617 [Appeals Bd. en banc]), an apportionment opinion must still constitute substantial medical evidence. As we explained in *Escobedo*:

> [A] medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citations.]
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> Moreover, in the context of apportionment determinations, the medical opinion 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, so that the Board can determine whether the physician is properly apportioning under correct legal principles. [Citations.]
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> 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.

(*Escobedo*, 70 Cal.Comp.Cases at p. 621.)

Dr. Echeverria's and Dr. Sofia's explanation of apportionment is conclusory and does not constitute substantial medical evidence. The reports and testimony do not describe in detail how non-industrial factors are contributing to applicant's permanent impairment. The burden of proving apportionment falls on the [defendant]…." (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].)

While applicant did not raise this precise issue in his Petition, "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 [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. [Citations.]" (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7 [Appeals Bd. en banc].) Since evidence of non-industrial apportionment does not constitute substantial medical evidence, we find applicant entitled to a non-apportioned award of permanent disability. We thus grant reconsideration and amend the decision to find permanent disability of 77%.

For the foregoing reasons,

IT IS ORDERED that Applicant's and Defendant's respective petitions for reconsideration of the Joint Findings, Award Order of August 2, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings, Award Order of August 2, 2024 is **AMENDED** as follows:

FINDINGS OF FACT

1. For ADJ8061988, Hassaan Salaam, while employed on August 2, 2011, as a welder, Occupational Group Number 380, in California, by Tradesmen International, insured by New Hampshire Insurance Company, administered by Gallagher Bassett Services, Inc., was found to have sustained injury arising out of and in the course of employment related to dehydration but did not sustain injury arising out of and in the course of employment to his neck, arms, back, or legs, and did not sustain psychological and neurological injury due to this injury claim.

2. For ADJ8061988, the specific injury of August 2, 2011, Applicant sustained no period of temporary disability, no permanent impairment and no need for further medical treatment.

3. There is no entitlement to attorney's fees for the specific injury claim ADJ8061988.

4. For ADJ8063851, Hasaan Salaam, while employed during the period from November 1, 2010 to August 18, 2011, as a welder, Occupational Group Number 380, in California, by Tradesmen International, insured by New Hampshire Insurance Company, administered by Gallagher Bassett Services, Inc., sustained injury arising out of and in the course of employment to his right shoulder, low back, bilateral wrists and sustained psychological injury.

5. Applicant did not sustain injury to the neck, as radiating pain is due to injury to the shoulders, and Applicant did not sustain injury to the mid-back or to the lower extremities, as radiating pain is due to injury to the low back. Applicant did not sustain industrial injury to the left shoulder as this was found to be associated with a non-industrial injury.

6. Based on the evidence presented, which was reevaluated at resubmission, the Applicant's earnings are determined to be $1,171.45 per week, warranting a rate of $780.97 per week for temporary disability indemnity and $230.00, increasing to $270.00 after the first 60 days to $310.50, for permanent disability indemnity.

7. For ADJ8063851, Applicant was compensated for temporary disability for the statutory maximum of 104 weeks, at a rate of $423.11 per week, based on an earnings calculation of $634.66 per week. Applicant is entitled to the differential between the amount paid and the amount determined based on the evidence of earnings on average of $1,171.45 per week, with temporary disability indemnity rate of $780.97, in an amount to be determined by the parties. Defendants are entitled to credit for sums paid by the Employment Development Department (EDD), if Defendants have reimbursed the EDD for sums paid, and Defendants are entitled to credit for the sums paid previously for temporary disability indemnity to the Applicant. Applicant's attorney is entitled to a fee in the amount of 15% of the additional, as yet unpaid temporary disability indemnity owed.

8. Based on the evidence presented the Applicant is determined to have reached a permanent and stationary status and maximum medical improvement on February 5, 2019.

9. For ADJ8063851, applicant is found to be entitled to Permanent Disability Indemnity in the amount of 77%, payable at a starting rate of $270.00 per week, increasing to $310.50 per week after 60 days, as a 15% increase in permanent disability indemnity is warranted, as the employer could not timely offer regular, modified or alternate work, for a total period of 545.25 weeks, in the total accrued sum of $168,952.98 payable from 9/25/2013 to 3/8/2024, less credit for sums paid previously by Defendants, and less attorney's fees of 15% of the permanent disability awarded, to be paid to Applicant's Attorney. Applicant is entitled to a life pension pursuant to Labor Code section 4659 in the initial amount of $131.42 per week subject to yearly adjustment pursuant to Labor Code section 4659(c). Applicant's counsel is entitled to an attorney's fee of 15% of applicant's life pension. Applicant's counsel may petition for a commutation of 15 percent of present value of applicant's life pension including a reasonable estimate of future Labor Code section 4659(c) increases.

10. The lien of the County of Orange, Department of Social Services is a lien against compensation. Therefore, prior to any payment being made directly to the Applicant, the current amount of the lien shall be ascertained and either payment in full, or payment of a sum acceptable to the County of Orange, Department of Social Services, to reduce the amount of the lien, shall be paid to the County of Orange, Department of Social Services, with the remainder to the Applicant.

11. The lien of the Employment Development Department was addressed in the Findings and Order issued on September 5, 2014.

12. For ADJ8063851, it is found that the Applicant is entitled to

further medical treatment to cure or relieve the effects of the industrial injuries found, herein.

13. For ADJ8063851, Applicant is entitled to treatment to cure or relieve the effects of the injuries to his right shoulder with radiating pain to the neck, low back, with radiating pain to the mid-back and lower extremities, and to his bilateral wrists and for the sustained psychological injury.

14. For ADJ8063851, the reasonable value of the services of Applicant's Attorney is 15% of the additional temporary disability indemnity awarded, in an amount to be determined by the parties with WCAB jurisdiction reserved, 15% of the permanent disability awarded, a sum of $25,342.94, which shall be deducted and paid from the temporary disability and permanently disability awarded respectively, herein, and 15% of applicant's life pension payments. Applicant's counsel may commence proceedings for a commutation of attorney's fees on the life pension, including a reasonable estimate of future cost of living increases.

15. No clear evidence of any ex parte communication between Defendants and Salvador Echeverria, MD, PQME, was established, and no basis to strike the reports and cross-examination of Dr. Echeverria was established. Applicant's counsel was afforded the opportunity to schedule a second session of the cross-examination of Dr. Echeverria, in order to allow any additional questions to be asked of this physician, if desired.

16. Exhibits 32, 33, 34, 35, 36 and 37 are admitted into evidence. Exhibit V is admitted into evidence.

17. All other issues are reserved and deferred including issues regarding costs, penalties, sanctions and liens. The Board retains jurisdiction over lien issues.

AWARD FOR ADJ8063851

AWARD IS MADE in favor of **HASSAAN SALAAM** against **NEW HAMPSHIRE INSURANCE COMPANY** as follows:

a) Temporary Disability Indemnity in accordance with Finding 7, above less credit for sums paid previously and less attorney's fees in accordance with Findings 7 & 14, above;

b) Permanent Disability Indemnity in accordance with Finding 9, above, less credit for sums paid previously and less attorney's fees in accordance with Findings 9 & 14, above;

c) Further Medical Treatment in accordance with Finding 12, above;

d) Self-Procured Medical Treatment in accordance with Finding 13, above:

e) Reimbursement of the lien of The County of Orange, Department of Social Services is entitled to reimbursement, in accordance with Finding 10, above, prior to any sums awarded as temporary and permanent disability indemnity are paid directly to the Applicant, said sums to be reduced to provide payment of the lien of The County of Orange, Department of Social Services, as indicated in Finding 10, above;

f) Attorney's Fees in accordance with Finding 7, 9, and 14, above;

ORDER

Jurisdiction is reserved and the Workers' compensation Appeals' Board retains jurisdiction over issues of liens, costs, penalties and sanctions.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 18, 2024

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

HASSAAN SALAAM
GARRETT LAW GROUP
COLEMAN, CHAVEZ & ASSOCIATES

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