WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JIM STOCKMAN, *Applicant*

vs.

FEIST CABINETS & WOODWORKS, INC.; CYPRESS INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY HOME STATE COMPANY, *Defendants*

Adjudication Number: ADJ11121934
Santa Rosa District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Award issued by the workers' compensation administrative law judge (WCJ) in this matter on May 31, 2024. In that decision, the WCJ found in pertinent part that applicant sustained industrial injury arising out of and in the course of his employment to his cervical and lumbar spine, urinary and fecal incontinence, and sexual dysfunction. Applicant was awarded permanent disability of 63%, less reasonable attorney fees, and future medical care.

Petitioner contends that the WCJ erred in failing to find applicant has sustained permanent total disability (PTD) based upon a total loss of earning capacity in the open labor market, and that his current activities constitute a sheltered workshop justifying a finding of 100% PTD.

Petitioner further asserts that the WCJ failed to make a finding allowing extraordinary attorney fees to applicant's counsel of 18% of the permanent disability awarded.

We have received an Answer from defendant.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further

consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code[1] section 5950 et seq.

PROCEDURAL HISTORY

As set forth in the Minutes of Hearing and Summary of Evidence (MOH/SOE) dated October 26, 2022, the parties stipulated that the applicant, while employed on December 15, 2016 as a cabinet estimator, occupational group number 320, at Elk Grove, California, by defendant Feist Cabinet and Woodwork, Inc., sustained injury arising out of and in the course of employment (AOE/COE) to his cervical spine and lumbar spine, and claims to have sustained injury resulting in fecal and urinary incontinence and sexual dysfunction.

The issues at trial included were listed as follows:

1. Parts of body injured, defendant denies fecal and urinary incontinence and sexual dysfunction.
2. Permanent disability
3. Apportionment.
4. Need for further medical treatment.
5. Applicant's attorney requests a fee of 15 percent.
6. Applicant's counsel contends Mr. Stockman is totally and permanently disabled.
7. Whether the AMA Guides' permanent disability rating schedule have been adequately rebutted pursuant to Labor Code section 4662(b) and 4660.1.
8. Labor Code section 4660.l(e)(1), permanent disability related to sexual dysfunction.

(Minutes of Hearing and Summary of Evidence (Minutes), dated October 26, 2022, p. 2-3).

The proffered exhibits were admitted into evidence, with the exception of applicant's exhibit 3, which was marked for identification at that time. Testimony was received from applicant, applicant's spouse, and defendant's witness and the matter thereafter stood submitted for decision.

On December 7, 2022, the WCJ issued an Order Vacating Submission to Further Develop the Record and Opinion on Decision (Order). The WCJ issued findings and an opinion that the record required development as to applicant's claimed injury of fecal incontinence, and that a

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

Qualified Medical Examiner (QME) in the field of gastroenterology was necessary in order to determine overall credibility, level of disability, and need for further treatment. (Order, December 7, 2022, p. 1-4.).

The parties returned to the trial calendar on April 24, 2024, at which time the medical reporting and deposition testimony of QME Rashid Iqbal, M.D. was admitted into evidence, and the matter was resubmitted for decision, along with an offer of proof regarding applicant's proposed testimony as to why he did not undergo a sigmoidoscopy as recommended by Dr. Iqbal.

On May 31, 2024, the WCJ issued her Findings and Award in which she found that applicant sustained injury AOE/COE to his cervical spine, lumbar spine, urinary incontinence, fecal incontinence, and sexual dysfunction. The WCJ further found that the AMA Guides had not been rebutted, and that applicant sustained permanent disability of 63 percent, less reasonable attorney's fees of 15%, and future medical care.

It is from these Findings and Award that applicant seeks reconsideration.

I.

Preliminarily, we note the following in our review:

Petitioner takes issue with the findings of the WCJ, including the finding that applicant failed to rebut the Permanent Disability Rating Schedule (PDRS) based upon the existing evidence and pursuant to Labor Code section 4662(b). It is asserted that based upon the Vocational Evaluator (VE) Scott Simon, as well as the medical reporting of the orthopedic, urologic, and gastroenterology QMEs, applicant is clearly totally permanently disabled. Applicant asserts that any work he is performing is a akin to a "sheltered workshop" and thus, per the VE, applicant is not amenable for rehabilitation and has sustained a 100% loss of future earning capacity, labor market access, and amenability. (Petition, p. 8.)

The WCJ addresses this argument in her Report, in part, as follows:

> At the time of trial (MOH pp. 13-14) Witness Ingred Pardoe, office manager and bookkeeper for Feist Cabinets testified Mr. Stockman was working 40 hours per week plus overtime.
>
> Ms. Pardoe testified further that Mr. Stockman worked in the office after his fall until COVID. When Ms. Pardoe began working at the company in June of 2018 Mr. Stockman was working 32 hours a week. He was not working full time because if he did Mrs. Stockman's insurance would not cover him and he wanted to be on his wife's insurance.

Mr. Simon's history that Mr. Stockman was working part time due to his physical condition was not accurate. Further, witness Pardoe indicated there were two other draftsman at the company also currently working from home.

Mr. Stockman is fully employed and according to Ms. Pardoe performs all of the essential functions of his job. (MOH p. 14)

The reports of Mr. Simon were not persuasive in rebutting the PDRS. The Award adequately reflects Mr. Simon's permanent disability.

(Report, pg. 8.)

Petitioner further argues that the WCJ erred in failing to provide for a 3% pain add-on based upon the medical reporting of orthopedic QME Graciela Barzaga, M.D. With respect to the apportionment opinions of Dr. Barzaga, petitioner asserts such opinions are not reliable and should be disregarded. (*Ibid*, pp. 14-15.)

The WCJ stated in her Opinion on Decision (Opinion) the following, in relevant part:

In J 4 Dr. Barzaga describes DRE Cervical spine number 4 at 28%-surgery with multilevel radiculopathy. Her earlier report of December 16, 2020 supported her 28% rating based on category IV page 392 of AMA Guides. It is noted while the report of Dr. Barzaga October 11, 2018 (J12) included a 3% add on for pain at p. 6, no additional pain add on is mentioned in 2020. Since Mr. Stockman's complaints of pain appear to have been reduced, no add on for pain was included in the rating.

(Opinion, p. 5.)

Further, the Report of the WCJ addresses the issue of valid apportionment as follows:

As I noted in the opinion on decision:

50% of the cervical spine disability is apportioned to pre- existing degenerative changes, the rest to the industrial injury. Dr. Barzaga in the report of February 18, 2022 simply described "25% cervical" disability, so it is appropriate to look to the doctor's other reports to address permanent disability and apportionment for the cervical spine.

Exhibit J 3 is Dr. Barzaga 's report dated May 2, 2021. On page 6 she described apportionment of the cervical spine disability based on x-rays, MRI and chiropractic notes. The apportionment of 50% is sufficiently supported in this report. Apportionment is also supported in Exhibit J 4 wherein the doctor

reviewed and summarized multiple records and opined apportionment of 50% non-industrial.

Mr. Stockman had documented pre-existing complaints of neck pain that he reported to a physician 2 weeks after his industrial injury. Dr. Barzaga's apportionment was sufficiently supported by medical records and was persuasive.

(Report, pp. 5-6.)

Finally, with respect to the issue of attorney fees, petitioner asserts that due to the time involved in developing the extensive record in this matter, the attorney fees awarded for applicant counsel should be increased from 15% to 18% as set forth in his written correspondence filed and served post-trial on May 6, 2024.

The issue was addressed in the Report as follows:

At trial Mr. Bloom requested a fee of 15% of permanent disability awarded. He did not request an increase in the fee at the time the case was submitted on April 24, 2024. His request came by letter dated May 6, 2024 and was based largely on the efforts made after submission because the judge determined it was necessary to develop the record. There was no explanation as to why the request was not made at the hearing on April 24, 2024.

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It is generally accepted within the workers' compensation community that a fee of 15% is acceptable. This is the amount Mr. Bloom requested at trial and the amount that was awarded. Only after final submission did Mr. Bloom request a higher fee.

There was no mention of the request at trial on April 24, 2024. It was only raised by letter about two weeks later. While Mr. Bloom may have spent more time on this case than he anticipated, there is no showing that would support a fee higher than what is usual and customary in the community for complicated cases.

(Report, p. 4.)

II.

Any decision of the WCAB must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [520 P.2d 978, 113 Cal. Rptr. 162] [39 Cal.Comp.Cases 310]*; Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [475 P.2d 451, 90 Cal. Rptr. 355] [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's*

Comp. Appeals Bd. (1970) 1 Cal.3d 627, 635 [463 P.2d 432, 83 Cal. Rptr. 208] [35 Cal.Comp.Cases 16].)

In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [445 P.2d 313, 71 Cal. Rptr. 697] [33 Cal.Comp.Cases 660]*; Travelers Ins. Co. v. Industrial Acc. Com. (Odello)* (1949) 33 Cal.2d 685, 687-688 [203 P.2d 747] [14 Cal.Comp.Cases 54]*; Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [20 Cal. Rptr. 2d 778] [58 Cal.Comp.Cases 313].)

Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely their conclusions. (*Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399, 407 [445 P.2d 294, 71 Cal. Rptr. 678] [amere legal conclusion does not furnish a basis for a finding]; *Zemke v. Workmen's Comp. Appeals Bd., supra,* 68 Cal.2d at pp. 799, 800-801 [an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence]; see also *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 [443 P.2d 777, 70 Cal. Rptr. 193] [the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).

Thus, it is unclear from our preliminary review whether the existing record is sufficient to support the decision, order, award, and legal conclusions of the WCJ, as well as whether further development of the record may be necessary with respect to the issues noted above.

III.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

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. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. IndustrialAcci. Com*. (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd*. (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd*. (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra,* at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code section 5901 states in relevant part that:

> No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

IV.

Accordingly, we grant applicant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov .

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award issued on May 31, 2024 is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 16, 2024

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

JIM STOCKMAN
LAW OFFICE OF JOHN BLOOM
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN BROPHY

LAS/abs

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