

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

**JOSE ESPINOZA, *Applicant***

**vs.**

**ARIANA AUTO BODY;  
NATIONAL CASUALTY COMPANY,  
administered by ILLINOIS MIDWEST, *Defendants***

**Adjudication Number: ADJ16740659**

**Oakland District Office**

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

Applicant seeks reconsideration of the “Findings and Award and Opinion on Decision” (F&A) issued on May 28, 2024, by the workers’ compensation administrative law judge (WCJ).

The WCJ found, in pertinent part, that applicant sustained industrial injury to his left knee and left ankle, but did not sustain industrial injury to his lumbar spine. The WCJ further found that applicant’s injury became permanent and stationary on March 21, 2023, and awarded 12% permanent partial disability benefits.

Applicant argues that the WCJ erred because the finding of permanent and stationary status is not based upon substantial medical evidence. Applicant further alleges that the finding of non-industrial injury to the lumbar spine is not supported by substantial medical evidence.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, and the contents of the WCJ’s Report. Based on our review of the record, we will grant reconsideration, and as our Decision After Reconsideration, we will rescind the WCJ’s May 28, 2024 F&A and return this matter to the trial level for further proceedings consistent with this decision.

## FACTS

Applicant, while working as an auto detailer, sustained an admitted industrial injury on September 13, 2022, to his left knee and left ankle. (Minutes of Hearing and Summary of Evidence, March 18, 2024, p. 2, lines 3-5.) Applicant claimed to have sustained further injury to the lumbar spine. (*Ibid.*)

Applicant was examined by Qualified Medical Evaluator (QME) James Stark, M.D., who issued one report in evidence and was deposed. (Defendant's Exhibits A and B.) Dr. Stark took the following history of injury:

On September 13, 2022, Mr. Espinoza was polishing the hood of a car. He struck his left knee on a bar and felt immediate pain. He reported that he moved suddenly and thereby injured not only his knee, but also his lower back and left ankle.

(Defendant's Exhibit A, Report of QME James Stark, M.D., March 22, 2023, p. 2.)

Dr. Stark did not provide a permanent and stationary opinion in his report, but he did provide permanent disability ratings. (See generally, *id.*) He opined on applicant's condition as follows:

Despite the 6 months that have elapsed since the injury, he has not improved and reports that he is actually worsening. His treating physician, Dr. Retodo, has recommended additional physical therapy to all 3 anatomical areas, anti-inflammatory medication and gabapentin.

Before going further with this discussion, it is suggested by this examiner that this case be settled through whatever administrative means are necessary. I do not anticipate subjective improvement in the foreseeable future based upon the history and fear iatrogenic injury, if there are considerations for invasive treatment.

(*Id.* at p. 6.)

Applicant was diagnosed with:

1. Left knee contusion- 09/13/2022.
2. Left ankle sprain- 09/13/2022 .
3. Lower back pain-chronic with probable radiculopathy secondary to multilevel degenerative disk and joint disease, lumbar spinal stenosis and L5-S1 intervertebral disk herniation (chronic).

4. Psychological and/or motivational factors affecting physical examination.

(*Id.* at p. 6.)

In deposition, Dr. Stark commented upon causation of injury to the low back as follows:

- Q. Okay. So, now, in light of the medical care that Mr. Espinoza had very early in this case, would you agree that his back was injured?
- A. I don't know that. If he's taken at his word that his back somehow became asymptomatic after years of problems, the answer is yes. But we have that four-year gap without records and no way of answering that question with substantial medical evidence.

(Defendant's Exhibit B, Deposition of James Stark, M.D., August 28, 2023, p. 24, lines 8-17.)

Applicant sought treatment through a functional restoration program. In deposition, Dr. Stark testified to applicant's permanent and stationary date as follows:

- Q. . . . [Y]ou are indicating that it's a -- it could help Mr. Espinoza if he were to attend the Feinberg Functional Restoration Program, would you consider changing your permanent and stationary date?
- A. By definition, yes. If he's still undergoing diagnostic testing and treatment, he's not permanent and stationary.

MR. KHARSHAN: Dr. Stark, I –

THE WITNESS: In retrospect, we can answer that question better after -- after that is done, whether it was actually permanent and stationary now. But I think, by definition, because things are slowly progressing, he's not permanent and stationary.

(Defendant's Exhibit B, Deposition of James Stark, M.D., August 28, 2023, p. 15, lines 1-15.)

Applicant provided the opinions of multiple treating doctors. In particular, Dr. Wedemeyer provided the following analysis of Dr. Stark's testimony:

I reviewed QME Dr. Starks deposition taken on 8/28/23. He was asked about participation in a functional restoration program. He would recommend the program but with some reservation. Dr. Stark had indicated in his report that psychological and/or motivational factors were affecting his presentation. He indicated that his depression might answer some of the questions regarding his

presentation. Dr. Stark agreed that a psychiatric evaluation might shed light on the patient's behavior. He did not think his knee was surgical. The left ankle might be surgical but he would be reluctant to recommend anything invasive given his presentation. He would recommend consultation with orthopedic foot specialist Dr. Jeffrey Mann. He apparently has a referral to see a podiatrist. Given the discussion, Dr. Stark had previously opined that the patient was permanent and stationary because he could not think of any treatment that would lead to measurable improvement in the foreseeable future. A lot of that had to do with non-orthopedic issues including psychiatric or motivational. He felt the patient's response to injury or injuries was excessive. There was no medical evidence of treatment from 2018 through 2022 to support a continuing problem. It was possible that his chronic pain could improve with a functional restoration program.

I agree with PQME Dr. Stark that Mr. Espinoza is not yet permanent and stationary.

**Work Status:** Modified duty. He is precluded from lifting, carrying, pushing, pulling more than 10 pounds and no repetitive bending at the waist.

(Applicant's Exhibit 6, Report of Matthew Wedemeyer, M.D., December 4, 2023.)

## DISCUSSION

When applicant claims a physical injury, applicant has the initial burden of proving industrial causation by showing the employment was a contributing cause. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302; § 5705.) Applicant must prove by a preponderance of the evidence that an injury occurred AOE/COE. (Lab. Code<sup>1</sup>, §§ 3202.5; 3600(a).)

The requirement of Labor Code section 3600 is twofold. On the one hand, the injury must occur in the course of the employment. This concept ordinarily refers to the time, place, and circumstances under which the injury occurs. On the other hand, the statute requires that an injury arise out of the employment. It has long been settled that for an injury to arise out of the employment it must occur by reason of a condition or incident of the employment. That is, the employment and the injury must be linked in some causal fashion.

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<sup>1</sup> All future references are to the Labor Code unless noted.

(*Clark*, 61 Cal.4th at 297 (internal citations and quotations omitted).)

\* \* \*

The statutory proximate cause language [of section 3600] has been held to be less restrictive than that used in tort law, because of the statutory policy set forth in the Labor Code favoring awards of employee benefits. In general, for the purposes of the causation requirement in workers' compensation, it is sufficient if the connection between work and the injury be a contributing cause of the injury.

(*Clark, supra* at 298 (internal citations and quotations omitted).)

To constitute substantial evidence “. . . 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.” (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) “When the foundation of an expert’s testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions.” (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) 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].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

“‘Permanent and stationary status’ means the point when the employee has reached maximal medical improvement his or her condition is well stabilized and unlikely to change substantially in the next year with or without medical treatment.” (Cal. Code Regs., tit. 8, § 9811(k).)

The evidence in this case indicates that applicant is not permanent and stationary. Both the QME and the primary treater appear to agree. The QME testified: “I think, by definition, because things are slowly progressing, he's not permanent and stationary.” (Defendant’s Exhibit B, *supra* at p. 15, lines 1-15.) While other parts of the record contain ambiguous indications of permanent

and stationary status, Dr. Stark's unambiguous testimony is that applicant is not permanent and stationary. Accordingly, the F&A erred in finding that applicant is permanent and stationary.

Next, the parties dispute whether applicant's injury to the low back was industrial. No doctor has provided a clear opinion explaining causation to the low back. At one point, the QME concludes that there is no way to answer that question. The QME failed to adequately explain how and why he was incapable of answering the question. It further appears that the QME failed to consider the proper legal standard of causation in workers' compensation, which is contributory causation. The September 13, 2022 injury need not be the sole cause of injury to the low back. It is sufficient if the September 13, 2022 injury aggravated or exacerbated prior injury to the low back.

At another point of testimony, the QME opines that if applicant's back was asymptomatic prior to the September 13, 2022 injury, then the back is industrial. The QME did not explain why the back must be asymptomatic for an industrial injury to have occurred. As explained above, aggravation and exacerbation are also industrial injuries.

We agree with the WCJ that much equivocation exists in the record as to Dr. Stark's causation opinion. However, in deposition, Dr. Stark opined that if applicant is taken at his word that his back was asymptomatic at the time of the September 13, 2022 injury, then applicant's low back injury was industrial. The WCJ needed to address this issue with credibility determinations, but no such determinations were made as part of the F&A. Thus, development of the record is warranted.

Accordingly, we will grant reconsideration and as our Decision After Reconsideration we will rescind the WCJ's May 28, 2024 F&A and return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the May 28, 2024 Findings and Award and Opinion on Decision is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the May 28, 2024 Findings and Award and Opinion on Decision is **RESCINDED**.

**IT IS FURTHER ORDERED** that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



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

**August 13, 2024**

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

**JOSE ESPINOZA  
LAW OFFICES OF JOHN E. HILL  
D'ANDRE LAW LLP**

**EDL/mc**

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