WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LAURA PINKHAM, *Applicant*

vs.

THE ART INSTITUTE OF CALIFORNIA;
SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendant*

Adjudication Number: ADJ10684274
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the 1st Amended Findings, Award and Order (F&O) issued on June 19, 2020, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a student affairs associate dean during the period of November 4, 2006 through September 29, 2015, applicant sustained injury to her bilateral upper extremities and sleep; (2) applicant met her burden of proving injury AOE/COE; (3) the permanent and stationary date for the subsequent industrial injury is June 14, 2017; (4) applicant is 100 percent permanently disabled; (5) applicant met her burden of proving the 35 percent permanent disability threshold without adjustment for age and occupation pursuant to Labor Code section 4751[1]; (6) the final permanent disability rating for the subsequent cumulative injury is 34 percent; and (7) based on stipulation of the parties, defendant begins indemnity payments as of January 5, 2017.

The WCJ issued an award in accordance with these findings and ordered that the exhibits marked for identification be admitted in evidence.

Defendant contends that the WCJ erroneously (1) found that applicant's permanent disability resulting from the subsequent cumulative injury met the 35 percent threshold by adding applicant's impairments rather than using the Combined Values Chart (CVC) and including an impairment for sleep, which is prohibited by section 4660.1; and (2) failed to find that defendant

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

is entitled to a credit for the value of permanent disability benefits paid on applicant's preexisting cumulative injury up to September 29, 2015.

We received an Answer from applicant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that defer the issue of whether applicant's subsequent cumulative injury meets the 35 percent permanent disability threshold under section 4751; and, as appropriate, defer all other issues; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On November 19, 2019, the matter proceeded to trial of the following relevant issues:

1. Employment.
2. Injury arising out of and in the course of employment.
3. Permanent and stationary date . . .
4. Permanent disability.
5. Attorney fees.
6. What is the rating for permanent disability for the subsequent industrial injury? Is the subsequent industrial injury a 35 percent before age and occupation?
7. Is Applicant eligible for SIBTF benefits?
8. Is the DFEC used to determine if the SIBTF 35 percent standard has been met?
9. What is the overall disability considering the preexisting disability and the subsequent industrial disability?
10. Does the preexisting injury have to be actually labor disabling? . . .
11. Whether the preexisting disability is combined or added to the subsequent industrial disability to determine the overall level of disability.
12. Is the applicant 100 percent disabled based on vocational evidence?
13. Is the applicant 100 percent disabled based on any other evidence?
14. Credit and offset issues are deferred.

(Minutes of Hearing and Summary of Evidence, November 19, 2019, pp. 2:12-3:16.)

The WCJ admitted an exhibit entitled Report of Dr. Michael Einbund dated January 18, 2017 into evidence. It includes the following:

> Secondary to decreased range of motion of both shoulders, the patient has a 1% impairment of the left upper extremity and a 1% impairment of the right upper extremity, per Chapter 16, pages 450-454 and 474-479, Figures 16:38-16:46.

Due to decreased range of motion of the elbows, the patient has a 1% impairment of the left upper extremity and a 1% impairment of the right upper extremity, per Chapter 16, pages 450-454 and 470-474, Figures 16:32 to 16:37.

The patient is status post right carpal tunnel syndrome but continues with significant positive findings, including decreased sensation, positive Tinel's sign and positive Phalen test. She also has significant clinical evidence of a left carpal tunnel syndrome, with decreased sensation, positive Tinel's sign, and positive Phalen test. The decreased sensation in a median distribution below the midforearm on the left side is graded at 60%, which carries a 23% impairment of the left upper extremity. The decreased sensation in a median distribution below the midforearm on the right side is graded at 26%, which carries a 10% impairment of the right upper extremity. Please refer to Chapter 16, pages 480-483, Tables 16:10 and 16:15.

The patient is noted to have moderate triggering of the left ring finger, which carries a 4% impairment of the left upper extremity. She has moderate triggering of the right thumb, which carries a 14% [impairment] of the right upper extremity. Please refer to Chapter 16, pages 506-507, Table 16:29.

Using the combined values chart, the patient has a total left upper extremity impairment of 28%, which converts to a 17% whole person impairment rating. She has a total right upper extremity impairment of 25%, which converts to a 15% whole person impairment rating.

Secondary to her residual symptoms, the patient has difficulty sleeping, which adversely affects her daytime alertness. She has also scored high on the Epworth Sleepiness Scale, with a total score of 15. Additionally, she has undergone a sleep study which did reveal significant findings. It is my opinion that she fits the criteria for a Class 1 sleep and arousal disorder, with a 7% whole person impairment rating, as outlined in Chapter 13, page 317, Table 13:4.

Using the combined values chart, the patient has a calculated whole person impairment rating of 66%.

. . .

With regard to her shoulders, elbows, wrists, hands, and fingers, Ms. Pinkham did sustain specific injuries as a result of the industrial injury of November 4, 2006 and she also sustained cumulative trauma injuries as she did continue to work subsequent to the November 4, 2006 industrial injury. It is my opinion that 20% of her current disability related to her shoulders, elbows, wrists, hands, and fingers, can be apportioned to the industrial injury of November 4, 2006 and 80% is apportioned to the industrially-related continuous trauma subsequent to that time through 2015.

(Ex. 2., Report of Dr. Michael Einbund, January 18, 2017, pp. 39-40, 43.)

On June 19, 2020, the WCJ issued the F&O, which explicitly amended the Findings, Award and Order issued on June 12, 2020, by removing an award of future medical treatment and altering the amount and manner of payment of attorney's fees.

On July 14, 2020, defendant filed the Petition to the F&O. (Petition, July 14, 2020.)

In the Opinion on Decision, the WCJ states:

> **IS THE SUBSEQUENT INDUSTRIAL INJURY A 35% BEFORE AGE AND OCCUPATION ADJUSTMENT, PURSUANT TO LABOR CODE SECTION 4751**?
>
> As discussed, Dr. Einbund's reporting is comprehensive and detailed in outlining the applicant's various orthopedic complaints. This is in addition to non-orthopedic body parts which were addressed by other specialists. Among those, neurology QME Dr. Nudelman reviewed multiple records and addressed, inter alia, applicant's sleep complaints. Specifically his discussion indicates that as to her issues with going to and staying asleep, she does have a diagnosis disorder of sleep and arousal, and subjective complaints of reduced memory, concentration and focusing with normal neurodiagnostic testing (Exhibit C, January 7, 2016, page 10.) He provides an impairment rating for sleep disorder noting the nonrestorative sleep disorder is 5% secondary to nonrestorative or fractioned sleep, a consequence of her industrial injury of 2006 (Exhibit C, January 7, 2016, page 10.) The obstructive sleep apnea is non-industrial and her associated cognitive problems resulting from a combination of medications, pain and poor sleep, along with applicant's long history of mild depression (Exhibit C, January 7, 2016, page 10.) He provides the impairment based on the AMA Guides and Almaraz/Guzman I and II equating to a 0.5 benign forgetfulness, a 4% impairment, which was reiterated by Dr. Einbund in that doctor's review of records. Dr. Nudleman's causation and apportionment discussion provides a 50/50 split where half of applicant's cognitive problems are industrial and the other half is due to general medical conditions and prior depression (Defense Exhibit C, January 7, 2016, page 11.)
> (Opinion on Decision, pp. 8-9.)

In the Report, the WCJ states:

> Laura Pinkham . . . sustained a specific injury on November 4, 2006, to her neck, back, elbow and upper extremities, while working as an Associate Dean for The Art Institute of California. Following application of a claim for the specific injury, applicant later filed an application for a claim alleging a cumulative trauma for the period of November 4, 2006 through September 29, 2015. This WCJ found, inter alia, that applicant sustained a cumulative trauma industrial injury to her bilateral upper extremities and sleep and that for purposes of obtaining benefits from Subsequent Injuries

> Benefit Trust Fund, she met her burden of showing at least a 35% standard without adjustment for age and occupation.
> . . .
> As discussed . . . combining impairments . . . cannot occur since use of the CVC can only be used after the adjustment for age and occupation (*Steve Ryder v. City of Los Angeles, PSI, Tristar Risk Management, Subsequent Injuries Benefits Trust Fund* 2016 Cal. Wrk. Comp. P.D. Lexis 212.)
> (Report, p. 2-3.)

DISCUSSION

A petition for reconsideration must be filed and received by the Appeals Board within twenty days of the service of the final order (plus an additional five days if service of the decision is by any method other than personal service, including by mail, upon an address in California). (§ 5903; Cal. Code Regs., tit. 8, § 10605; *Oliver v. Structural Services* (1978) 43 Cal.Comp.Cases 596.) This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely Petition for Reconsideration. (*Maranian v. Workers' Comp. Appeals Bd*. (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com.* (*Hinojoza*) (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].)

Here, the record shows that defendant's Petition from the F&O was filed on July 14, 2020, within the statutory period of twenty days plus an additional five days for mailing to an address in California. The record also shows that the F&O amended the Findings, Award and Order by removing an award of future medical treatment and altering the amount and manner of payment of attorney's fees. Since the F&O made substantive changes to the original decision, we conclude that the operative date for evaluation of the timeliness of the Petition is the date on which the F&O was issued and not the original decision. (See *Nestle Ice Cream Co. v. Workers' Comp. Appeals Bd*. (2007) 146 Cal.App.4th 1104 [72 Cal.Comp.Cases 13].) Accordingly, the Petition was timely-filed and we may address its merits.

Section 4751 provides:

> If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability

> or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article; provided, that either (a) the previous disability or impairment affected a hand, an arm, a foot, a leg, or an eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member, and such latter permanent disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee, is equal to 5 percent or more of total, or (b) the permanent disability resulting from the subsequent injury, when considered alone and without regard to or adjustment for the occupation or the age of the employee, is equal to 35 percent or more of total.
> (§ 4751.)

In *Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581-582 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc), we stated that an employee must prove the following elements to recover subsequent injuries fund benefits:

> (1) a preexisting permanent partial disability;
>
> (2) a subsequent compensable injury resulting in additional permanent partial disability:
>
> > (a) if the previous permanent partial disability affected a hand, an arm, a foot, a leg, or an eye, the subsequent permanent disability must affect the opposite and corresponding member, and this subsequent permanent disability must equal to 5% or more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee; or
> >
> > (b) the subsequent permanent disability must equal to 35% or more of the total disability, when considered alone and without regard to, or adjustment for, the occupation or the age of the employee;
>
> (3) the combined preexisting and subsequent permanent partial disability is greater than the subsequent permanent partial disability alone; and
>
> (4) the combined preexisting and subsequent permanent partial disability is equal to 70% or more. ([Lab. Code] § 4751.)
> (*Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 581-582 (Appeals Board en banc).)

Here, defendant contends that the WCJ erroneously found that applicant's permanent disability resulting from the subsequent cumulative injury met the 35 percent threshold.

Specifically, defendant argues that the WCJ erred by (1) adding applicant's impairments from the subsequent injury instead of combining them using the CVC; and (2) including applicant's impairment to sleep in calculating permanent disability resulting from the subsequent injury.

As to defendant's initial argument, we observe that in *Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680], the Court of Appeals found that the impairments "are generally combined" using the CVC, though the "scheduled rating [under the CVC] is not absolute" and other methodologies may be used to calculate permanent disability. (*Id*., p. 614.) Thus, while the scheduled rating is prima facie evidence of an employee's permanent disability, the scheduled rating is rebuttable. (*Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School Dist.* (*Almaraz-Guzman II*) (2009) 74 Cal.Comp.Cases 1084, 1106 (Appeals Board en banc); see *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 (Appeals Board en banc)*; City of Sacramento v. Workers' Comp. Appeals Bd.* (*Cannon*) (2013) 222 Cal.App.4th 1360.) The overarching goal of rating permanent impairment is to achieve accuracy. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Almaraz-Guzman III*) (2010) 187 Cal.App.4th 808, 822 [75 Cal.Comp.Cases 837].) (*Almaraz-Guzman III*, *supra,* at p. 822.)

For example, in *Athens Administrators v. Workers' Comp. Appeals. Bd.* (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ denied), the Court concluded that impairments resulting from cumulative injury to the bilateral hips may be added where substantial medical evidence supports a physician's opinion that adding impairments will result in a more accurate rating of the level of disability than the rating that results from using the CVC. (See also *De La Cerda v. Martin Selko & Co*. (2017) 83 Cal.Comp.Cases 567 (writ den.) (stating that a physician's opinion as to the most accurate rating method should be followed if she or he provides a reasonably articulated medical basis for doing so); *Johnson v. Wayman Ranches*, 2016 Cal.Wrk.Comp. P.D. LEXIS 235.)

In the present case, Dr. Einbund's report combines the impairments using the CVC, and does not opine that adding impairments will result in a more accurate rating of the level of disability. (Ex. 2., Report of Dr. Michael Einbund, January 18, 2017, pp. 39-40.) Despite the absence of medical evidence that adding impairments would result in a more accurate rating, the

WCJ determined that the impairments must be added based upon *Ryder v. City of Los Angeles*, 2016 Cal.Wrk.Comp. P.D. LEXIS 212 (*Ryder I*).[2] (Report, p. 3.)

But we are not persuaded by *Ryder I* that the question of whether impairments should be combined or added for purposes of establishing the level of permanent disability resulting from a subsequent cumulative injury is wholly legal in nature and requires that they be added in all such cases.

Under the rationale in *Fitzpatrick*, *Almaraz-Guzman II*, and *Kite,* the question of whether impairments should be combined or added for purposes of establishing the level of permanent disability is medical/legal in nature, allowing for impairments to be added rather than combined using the CVC when the medical record establishes that adding impairments is the more accurate method for determining the level of permanent disability. Likewise, the question of whether impairments should be combined or added for purposes of establishing the level of "permanent disability resulting from the subsequent injury" is also medical/legal in nature, and the same standard should apply. (§ 4751(b).) Hence, we conclude that applicant must produce substantial evidence showing that adding impairments will result in a more accurate rating than the rating obtained by the method of combining impairments using the CVC.

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).) "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." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

Here, because the WCJ found that the impairments should be added without a medical record as to whether using that method would result in a more accurate rating, we conclude that

[2] Unlike en banc decisions, panel decisions are not binding precedent on Appeals Board panels. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we may consider these decisions to the extent that we find their reasoning is persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

the medical record should be further developed on that issue. (See also *E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 929 [71 Cal.Comp.Cases 1687] (stating that the Appeals Board may not substitute its judgment for that of a medical expert).)

Accordingly, we will rescind the F&O and substitute a finding that defers the issue of whether applicant's subsequent cumulative trauma injury meets the 35 percent permanent disability threshold under section 4751.

As to defendant's second argument, we observe that section 4660.l (c)(1) provides, as relevant:

> [T]he impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase.
> (§ 4660.1(c)(1).)

Although the medical reporting suggests that the impairment to sleep is a "consequence of her industrial injury of 2006," and it is unclear as to whether it arose out of her specific or cumulative injury, the impairment to sleep clearly arose from a compensable physical injury. If the sleep impairment was a result of applicant's 2006 injury, it may not be considered in calculating the impairment for the subsequent injury threshold, and if it was a result of her subsequent 2015 cumulative injury, it may not serve as grounds for an increased impairment rating. (Opinion on Decision, pp. 8-9.)

Hence, we conclude that the impairment attributed to applicant's sleep impairment may not be used to determine whether the permanent disability from the subsequent cumulative trauma injury meets the 35 percent threshold.

Accordingly, upon development of the medical record, we recommend that the injury to sleep not be included in the calculation of permanent disability resulting from the subsequent injury.

Having concluded that the medical record should be further developed as to whether adding or combining impairments will result in a more accurate rating, we recognize that the issue of whether defendant is entitled to a credit for the value of permanent disability benefits paid on applicant's preexisting November 4, 2006 injury, and all other issues, should also be deferred pending further development of the record.

Accordingly, we will substitute a finding that defers all other issues.

Accordingly, as our Decision After Reconsideration, we rescind the F&O and substitute findings that defer the issue of whether applicant's subsequent cumulative trauma injury meets the 35 percent permanent disability threshold under section 4751; and defer all other issues; and we return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration, that the 1ST Amended Findings, Award and Order issued on June 19, 2020 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Laura Pinkham, born _____, while employed during the period of November 4, 2006 through September 29 , 2015, as a student affairs associate dean at Santa Ana, California, by the Art Institute of California, sustained injury arising out of and in the course of employment to bilateral upper extremities and sleep.

2. The permanent and stationary date for the subsequent industrial injury is June 14, 2017.

3. Applicant is 100 percent permanently disabled.

4. The issue of whether applicant's subsequent cumulative trauma injury meets the 35 percent permanent disability threshold under Labor Code section 4751 is deferred.

5. All other issues are deferred.

ORDER

IT IS ORDERED that:

SIBTF's objection to Applicant's Exhibits is overruled and all exhibits previously marked for identification are now admitted into evidence.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 3, 2024

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

LAURA PINKHAM
THOMAS LAW ALLIANCE
OFFICE OF THE DIRECTOR – LEGAL UNIT (LOS ANGELES)

SRO/*cs*

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