WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RAMON PLASCENCIA, *Applicant*

vs.

INSURED SOLUTIONS/FONTANA LOGISTICS CENTER; CIGA FOR LUMBERMENS UNDERWRITING ALLIANCE, in liquidation, *Defendants*

Adjudication Number: ADJ10143466
San Bernardino District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings of Fact issued on July 15, 2021, the Workers' Compensation Administrative Law Judge ("WCJ") found that on May 27, 2014, applicant, while employed by Insured Solutions/Fontana Logistics Center, insured by Lumbermans [sic] Underwriting Alliance, now in liquidation and administered by defendant California Insurance Guarantee Association ("CIGA"), sustained industrial injury to his lumbar spine and right leg. The WCJ also found that applicant needs further medical treatment for this injury, including but not limited to the Utilization Review ("UR") determination that back surgery is medically necessary, and that there is no factual or legal basis for CIGA to deny authorization for surgery.

CIGA filed a timely petition for reconsideration of the WCJ's decision. CIGA contends that substantial evidence does not support a finding that applicant's need for back surgery "is the effect of the May 27, 2014 injury," and that CIGA is not liable for medical treatment unrelated to the May 27, 2014 injury. CIGA further contends that the medical opinion of Dr. Feiwell, the

[1] Commissioners Marguerite Sweeney and Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated October 5, 2021. Commissioners Sweeney and Lowe are no longer members of the Appeals Board. New panel members have been substituted in their place.

Agreed Medical Evaluator ("AME"), justifies a finding that back surgery is unnecessary to treat applicant's injury of May 27, 2014.

Applicant filed an answer, which has been considered.

In addition, applicant recently filed a supplemental petition in which he makes a new challenge to CIGA's petition for reconsideration. We reject applicant's supplemental petition based upon WCAB Rule 10964(a). The rule provides that "[w]hen a petition for reconsideration…has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board." (Cal. Code Regs., tit. 8, § 10964(a).) Although the Board has discretion to accept and consider a supplemental petition, parties must follow the rule and seek permission from the Board to submit a supplemental pleading, and they must attach the proposed pleading to the request. Applicant did not follow the rule here. We reject his supplemental petition.

Turning to the merits, we have considered the allegations of CIGA's petition for reconsideration and the contents of the WCJ's Report with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated below and in the WCJ's Report and Opinion, which are both adopted and incorporated as set forth in the attachment to this decision, we will affirm the Findings of Fact of July 15, 2021.

We further note that "notwithstanding whatever an employer does (or does not do)" to contest medical treatment, applicant has the burden of proving, by a preponderance of the evidence, that the treatment in question is medically reasonable and necessary. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230, 242 [73 Cal.Comp.Cases 981], citing Lab. Code, §§ 3202.5 & 4600.) However, applicant's burden of proof is one of reasonable medical probability, not scientific certainty. (*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660]. See also, *Guerra v. Workers' Comp. Appeals Bd.* (*Rodas*) (2016) 246 Cal.App.4th 1301, 1307-1308 [81 Cal.Comp.Cases 324], quoting *Pac. Emp. Ins. Co. v. Ind. Acc. Com.* (1942) 19 Cal.2d 622, 629: "Circumstantial evidence is sufficient to support an award of the [WCAB], and it may be based upon the reasonable inferences that arise from the reasonable probabilities flowing from the evidence; neither absolute certainty nor demonstration is required.")

In addition, we note that Labor Code section 4600 "consistently has been interpreted to require the employer to pay for all medical treatment once it has been established that an industrial

injury *contributed* to an employee's need for it." (See *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1261 [82 Cal.Comp.Cases 679] ("*Hikida*"), italics added, string citations[2] and internal quotations omitted; *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291 (80 Cal.Comp.Cases 489) [death benefits upheld where drugs prescribed to treat industrial injury contributed to employee's death]; *Braewood Convalescent Hospital v. Worker's Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 165 (48 Cal.Comp.Cases 566) [employee suffering from pre-existing condition later disabled by industrial injury was entitled to treatment even for a non-industrial condition that was required to cure or relieve effects of industrial injury]; Lab. Code, § 3202 [Workers' compensation statutes must be "liberally construed" with the purpose of "extending their benefits for the protection of persons injured in the course of their employment."].)

In this case, we agree with the WCJ, as discussed in her Opinion on Decision and Report, that a preponderance of evidence justifies her finding that applicant's injury of May 27, 2014 contributed to the present need for the (second) back surgery disputed herein. In her Report, the WCJ discusses the preponderance of evidence as follows:

> Evidence supports the applicant returned to Dr. Osborne for treatment resulting in a recommendation and authorization for surgery to his low back at three levels. Dr. Osborne performed laminectomies on "three levels", extending from L3 through S1. This surgery was authorized under the claim for injury of 5/27/14 (App Ex 1). Petitioner is silent as to the why surgery was performed and authorized under the 5/27/14 claim in 2016. Instead, Petitioner argues that the current recommendation for surgery is solely a result of the prior 2008 injury. Yet, records reflect that herniations were identified at only two levels under the 6/4/08 date of injury and now three levels following the 5/27/14 date of injury. Furthermore, Petitioner fails to consider that although a surgery was likely and may have been recommended, it cannot be ignored that the applicant was able to perform his usual and customary job duties at Insured Solutions for approximately a year prior to the 2014 injury and approximately a year and a half after the injury. Based on the AME report of Dr. Feiwell, the job duties at Insured Solutions required significant physical activity (Jnt Ex W, pg 2).
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> Although it is undisputed that the applicant suffered a prior injury and future medical care was recommended, this in itself does not excuse a subsequent

[2] One of the cases cited in *Hikida* was *Granado v. Workers' Compensation Appeals Board* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]. In *Granado*, our Supreme Court expressed concern that "the uncertainties attendant to the determination of the proper apportionment [of medical treatment] might cause employers to refuse to pay their share until there has been a hearing and decision on the question of apportionment, and such delay in payment may compel the injured [employee] to forego the prompt treatment to which [the employee] is entitled." (*Granado,* 69 Cal.2d at pp. 405–406.) The instant case illustrates the point.

> employer from liability of a subsequent injury. Even though records reflect that the applicant suffered two prior disc herniations, there is nothing in the record that reflects the applicant's need for surgery in 2008 was also involving the L3-L4 level. What is clear is the request for surgery to include the L3-L4 level arose after the 2014 injury. As noted above, the applicant already underwent both the recommended surgery in 2016 plus an additional level authorized by Petitioner's original carrier.

In addition to the evidence discussed above, the WCJ's statement of facts, found earlier in her Report, shows that the preponderance of evidence supporting further back surgery also includes the Genex Utilization Review and the reporting of Dr. Paquette, the authorized treating physician:

> Applicant…selected Dr. Justin Paquette as his new PTP and authorization was provided by Petitioner in a letter dated 12/21/20 (App Ex 6). Applicant was initially seen by Dr. Paquette on 2/1/21 with complaints of severe low back pain and an MRI was requested (App Ex 7). In his 3/1/2021 report, Dr. Paquette requests authorization for a L4-5, L5-S1 spinal fusion and decompression and a microscopic decompression bilaterally at the L3-4 level (App Ex 8, pg 4). GENEX Utilization Review dated 3/23/2021 certified the spinal fusion and microdiscectomy (App Ex 9, pg 1). […]

In addition, we note that two of CIGA's core arguments are that the WCJ erred in focusing on whether applicant's employment by Insured Solutions/Fontana Logistics Center "aggravated" the prior injury of June 4, 2008, and that the WCJ erred in relying upon Dr. Osborne because applicant failed to disclose his injury of June 4, 2008 to the doctor.

In reference to the issue of "aggravated" injury, we agree with the WCJ's conclusion that the preponderance of evidence supports applicant's entitlement to the second back surgery by reason of the May 27, 2014 injury, regardless of whether it is considered a new injury (as stipulated) or as an "aggravation" of applicant's prior injury of June 4, 2008. As discussed by Dr. Feiwell in his deposition of August 3, 2020, the June 4, 2008 injury left applicant with a high risk of re-injuring his back:

> Surgery was clearly recommended [after the June 4, 2008 injury] and there was some effort to perform the surgery for reasons -- medical, he didn't have it. He was at high risk for having a reinjury. I don't know if I would have agreed to release him to regular duties. I don't have Dr. Osborne's reports to review at 20/20 hindsight.
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> (Joint Exhibit X, p. 16:5-10.)

Further, we agree with the Report of the WCJ in rebutting CIGA's contention that Dr. Osborne's reporting is insubstantial because applicant failed to disclose his injury of June 4, 2008:

> A medical expert's opinion is not substantial evidence to sustain a decision if the opinion is not based on relevant facts or assumes an incorrect legal theory. (*Zemke v. WCAB* (1968) 68 Cal.2d 794, 798; *Franklin v. WCAB* (1978) 79 Cal.App.3d 224, 235.) While it is true that Dr. Osborne's initial permanent and stationary report dated 10/24/14 does not reflect any prior injuries, what is included in the report just months after [applicant's] 5/27/14 date of injury are the MRI results which now reflects a disc protrusion at the L3-L4 level in additional to the two prior levels addressed in the prior case (App Ex 4, pg 2). The assessment now includes L3-L4, L4-L5 and L5-S1 (pg 5). The hospital admission report of Dr. Osborne dated 2/9/16 reflect three levels showing stenosis and disc herniations with pain radiating down both legs (App Ex 2). The operative report confirmed [that] laminectomies were performed at three levels, L3, L4 and L5 (App Ex 3). Dr. Osborne's final report dated 8/5/16, again discusses all three levels and notes some improvement after surgery (App Ex 5, pg 3). Although Dr. Osborne may not have reviewed all the prior reporting, this does not alter the fact that this is an accepted back injury case with new findings following the 2014 date of injury. Petitioner is silent as to when the need for surgery for this additional level (L3-L4) surfaced or how the 2014 injury aggravated his 2008 condition.
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> While the applicant may not have initially disclosed his prior injury to Dr. Osborne, it appears this was also not disclosed to AME, Dr. Feiwell. As the issue at hand is the need for medical treatment since the case at hand is accepted, [applicant's prior lack of disclosure does not help CIGA because] Dr. Feiwell, after reviewing the reports of the prior injury and limited reports of the current injury, still attributed causation at least in part to the 2014 [injury] and comments that medical care cannot be apportioned (Jnt Ex X, pg 21, ln 7) Additionally, Dr. Feiwell does mention L3-L4 level…in his review of records in the 9/20/19 report (Jnt Ex T pg 2). As previously discussed, absent from Dr. Feiwell's review are the full records of Dr. Osborne [.] [A]lthough requested on multiple occasions, [Dr. Feiwell's] request went unanswered. […]

In addition, we observe that to the extent CIGA shares responsibility for the reporting physicians missing a complete set of medical records to review, the doctrine of invited error undercuts CIGA's argument that the WCJ relied upon insubstantial medical evidence. (See *Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1167 (66 Cal.Comp.Cases 1290) [party may not object to sufficiency of evidence to support an adverse finding where lack of evidence results from its exclusion at party's own instance].)

The remaining thrust of CIGA's petition is that the WCJ should have denied the back surgery requested by Dr. Paquette, based on the medical opinion of Dr. Feiwell, the AME.

We disagree. Although an AME's opinion ordinarily is followed because the AME has been chosen by the parties for the physician's expertise and neutrality (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114]), it is the WCAB, and not the AME, who is the ultimate trier-of-fact. (See *Klee v. Workers' Comp. Appeals Bd.* (1989) 211 Cal.App.3d 1519, 1522 [54 Cal.Comp.Cases 251]; *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 792–793 [52 Cal.Comp.Cases 419]; *Johns-Manville Products Corp. v. Workers' Comp. Appeals Bd.* (*Carey*) (1978) 87 Cal.App.3d 740, 753 [43 Cal.Comp.Cases 1372].) Accordingly, the WCAB is not bound by the opinion of an AME; rather, its only obligation is to give consideration to the AME's opinion. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 241 [58 Cal.Comp.Cases 323].)

In this case, we agree with the analysis in the WCJ's Report that Dr. Feiwell's medical opinion, considered in its entirety, does not support a finding that the injury May 27, 2014 did not contribute to the need for applicant to have the back surgery disputed herein. In fact, Dr. Feiwell's ultimate opinion was that the WCAB, as the trier-of-fact, should determine the issue. At the end of his deposition of August 3, 2020, Dr. Feiwell testified as follows:

> Q Well, about March 6, 2015, through the date of surgery, February -- whatever it was -- 2016, [applicant] had five to six pain level all through that period. And right before surgery it was six out of 10, so I don't know why Dr. Osborne did the surgery either.
>
> A So -- yeah, so -- I mean, I am willing to have you bring it to the trier of fact. I just don't know how I can change any opinions at this point. I don't know -- I mean, he needs another surgery for sure. I mean, if he wanted -- he clearly has failed back syndrome and still has S1 radiculopathy. And his postoperative MRI still showed two large disc herniations. Does that second surgery -- somehow related to his subsequent employment at Insured Solutions? I can't say.
>
> I would have to leave it to the trier of fact. To me it looks like he already received a settlement. He was having -- he had symptoms for four years. He was symptomatic for four years and suddenly he gets a settlement and he can work? I don't understand. And he had -- these are not small disc herniations. They're massive disc herniations.
>
> So obviously he was motivated to try to return to work and convinced Dr. Osborne on one occasion to return him to regular duties, but he clearly hadn't recovered.

Q Yeah. So Dr. Osborne was surprised, given the -- given the bulges, that he was able to do so well.

A These weren't bulges. These were massive disc herniations.

Q Yeah. Herniations. So the final question is, is any -- is any portion of that future medical for surgery attributed to the May 27, 2014, case?

A I don't know because the ones that are re-herniated are at L4-5 and L5-S1, which were his 2 original injuries. I just don't -- I'm not sure that I see that.

Q And you are not sure whether L3-L4 were even operated on?

A Well, here's how I can say -- you can go to the trier of fact with -- I said two percent of his impairment is due to the subsequent injury. And it only has to be one percent under law, was my understanding. So I don't know if that gives you an opening to say that the subsequent surgery might be necessary for subsequent employment, but I'd leave that to trier of fact.

Q Okay. That's -- that's great.

A And there also may be a *Hikida* issue as well.

MR. MANRIQUEZ: A what, I'm sorry?

THE WITNESS: *Hikida*.

MR. MANRIQUEZ: What is that? [Sic.]

THE WITNESS: The *Hikida* case, where there's a complication of treatment that results in a disability. I think it's H-i-k-a-d-a (sic). It may also be a *Hikida* situation where there is a complication of treatment. So, you know, you've got -- I have to get -- I can't get access to my phone, so I don't have a calculator.

But whatever two-twenty-sevenths is percentage-wise, that is his -- that amount is responsibility of Insured Solutions. So I think you'd have to go to the trier of fact about that.

(Joint Exhibit X, pp. 19:18-22:2.)

Based on Dr. Feiwell's testimony set forth above, CIGA's contention that the Board should follow his opinion is misplaced. Contrary to CIGA's allegation, Dr. Feiwell did not finally opine that the May 27, 2014 injury played no role in the need for applicant to have the second back

surgery. Further, it is inappropriate for Dr. Feiwell to delegate to the WCAB the doctor's own duty to provide a *professional medical opinion* as to whether applicant's May 27, 2014 injury contributed to his present need for back surgery. Dr. Feiwell's role, which he abandoned, was to answer the *medical question* based on his professional expertise; the WCAB's role is to weigh his medical opinion and the other medical evidence to make an *ultimate legal determination* whether applicant is entitled to the disputed back surgery. (See *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 (Appeals Board en banc) [delineating the roles of WCJs and physicians in the adjudication process].) Here, given Dr. Feiwell's reluctance to provide a firm medical opinion, we agree with the WCJ that a preponderance of other medical evidence in the record, as well as reasonable inferences to be drawn therefrom, support applicant's present need for back surgery as a result of the May 27, 2014 injury.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact issued on July 15, 2021 are **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 8, 2024

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

RAMON PLASCENCIA
LAW OFFICES OF J. SPENCER WAGSTAFF
GUILFORD SARVAS & CARBONARA

JTL/*ara*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

A timely, verified Petition for Reconsideration, filed 8/6//2021, Petitioner, California Insurance Guarantee Association (CIGA) for Lumbermen's Underwriting Alliance, in liquidation (hereafter Petitioner), by and through their representative of record, Guilford Sarvas & Carbonara, seeks reconsideration of the Order issued here on 7/13/2021 and served on 7/15/2021.

At the time of this report, there was no response filed by applicant's attorney.

CONTENTIONS

1. The WCJ acted without or in excess of her powers in determining that the Petitioner provide further medical care including surgery.

2. The evidence does not justify the Findings of Fact.

FACTS

Applicant, Ramon Plascencia (hereinafter applicant), born [ ], began his employment with Insured Solutions/Fontana Logistics Center in approximately 2013. While employed as an order selector, occupation group number 211, at Fontana, California, on 5/27/2014, applicant sustained injury arising out of and occurring in the course of his employment to his lumbar spine and right leg. At the time of the injury, the employer was insured by Lumberman's Underwriting Alliance which now is in liquidation administered by CIGA.

When applicant was hired and throughout his employment with Insured Solutions/Fontana Logistics Center, his job duties consisted of pulling orders, stacking and wrapping pallets, including lifting and carrying bags of dog food weighing up to 60 pounds as well as operating a forklift, and performing constant physical activities (Jnt Ex W, pg 2).

On 5/27/14 during the course of his normal job duties, the applicant was pulling orders of canned goods and stacking them on pallets when he felt immediate pain in his low back. The injury was reported and the applicant was sent to U.S. Healthworks for treatment. The claim was accepted. Applicant was placed on modified duty and received conservative care for approximately two months. When seen by Dr. Osborne on 8/8/14, the applicant reported that he was not having much pain (App Ex 5, pg 3). Applicant then returned to working his usual and customary duties, described as 40 – 72 hours a week (Jnt Ex W, pg 2).

Following his return to full duty, the applicant was declared permanent and stationary by his primary treating physician, Dr. Osborne on 10/24/2014. In his P&S report, Dr. Osborne noted the applicant "overall feels better" and continues to work full duties. Additionally noted, is the possibility of back surgery in the future (App Ex 4, pg 2, 6).

At some point the applicant returned to Dr. Osborne who subsequently requested surgery. A Modified Utilization Review Determination letter dated 9/16/15 from Genex on behalf of

Lumbermen's Underwriting Alliance in connection with the 5/27/14 date of injury, reflects certification for L3 through S1 laminectomies as well as modification of the requested Pre-Op testing and Post-Op physical therapy (App Ex 1). On 2/9/16, the applicant was admitted to Citrus Valley Medical Center for low back pain radiating down both legs. The treatment plan is L3 through S1 lumbar laminectomies (App Ex 2, pg 2). An Operative report dated 2/9/16 by Dr. Osborne indicated the applicant underwent L3 through L5 laminectomies (App Ex 3, pg 1). Dr. Osborne issued another permanent and stationary report dated 8/5/16 in connection with the 5/27/14 injury where he discussed the applicant's increased complaints upon his return on 2/6/15 which resulted in him requiring surgery. Following surgery, applicant's lower back pain was at a level 2-3 and he is taking Ibuprofen for pain. Dr. Osborne provided him 27% WPI and indicated a possibility of future spine surgery (App Ex 5, pg 7, 8).

Applicant contends that as a result of his accepted 5/27/14 injury, applicant is in need of further medical treatment including but not limited to back surgery. Applicant further requests authorization for back surgery as well as attorney fees for having to pursue enforcement of medical care.

Applicant recently selected Dr. Justin Paquette as his new PTP and authorization was provided by Petitioner in a letter dated 12/21/20 (App Ex 6). Applicant was initially seen by Dr. Paquette on 2/1/21 with complaints of severe low back pain and an MRI was requested (App Ex 7). In his 3/1/2021 report, Dr. Paquette requests authorization for a L4-5, L5-S1 spinal fusion and decompression and a microscopic decompression bilaterally at the L3-4 level (App Ex 8, pg 4). GENEX Utilization Review dated 3/23/2021 certified the spinal fusion and microdiscectomy (App Ex 9, pg 1). CIGA acknowledged the UR decision determining the recommended treatment was medically necessary, however, declined liability and authorization (App Ex 10). CIGA further noted that based on the findings of the AME, Dr. Feiwell, there was substantial findings that the applicant's need for back surgery pre-existing his 2014 claim.

Petitioner (Defendant), contends that the need for surgery was a result of a prior injury which resolved by Compromise and Release. Petitioner further contends that as defendant in the current case, they are not responsible for this surgery as surgery was previously recommended for the prior injury and the applicant received compensation for the future medical care in the Compromise and Release.

Petitioner offers records from the prior injury in which applicant suffered an injury to his low back, left leg and hip on 6/4/2008 while employed by Rex Miller as a forklift operator. The case (ADJ7448070) initially resolved by Stipulated Award for 6% on 9/2/10. The applicant returned to work for the employer until May 2011 when he was taken off work for non-industrial issues. Applicant attempted to return to work, however, the employer went out of business. Applicant treated with Dr. Aflatoon, and although surgery was recommended, the applicant was unable to proceed with surgery although continued to treat until April of 2013. Parties utilized Dr. Einbund as a Panel Qualified Medical Examiner. In his report dated 8/8/13, Dr. Einbund concluded the applicant suffered from large disc herniations at L4-5 and L5-S1 (Def Ex A, pg 22). Later in his report, Dr. Einbund concludes that the 6/4/08 industrial injury resulted in the development of "two large disc herniations" (Def Ex A, pg 27). The case later resolved by Compromise and Release for

$136,393.225 with an Order Approving on 12/6/13 based on the reporting of PQME, Dr. Einbund resulting in 26% permanent disability after apportionment (Def Ex B, pg 9).

DISCUSSION

Petitioner contends that the WCJ erred when determining that CIGA was obligated to provide medical treatment to the applicant, including back surgery, and determining that there was no factual or legal basis for CIGA not to authorize back surgery.

Current requested surgery is due to in part the current injury

Petitioner asserts that the question is not whether applicant aggravated his back while working with Insured Solutions but rather the medical treatment sought is unrelated to the 5/27/14 injury and need not be provided. There is no doubt that medical treatment in connection to the applicant's prior injury in 2008 included a recommendation for back surgery. The PQME for the June 4, 2008 claim, Dr. Einbund, noted in his 8/8/13 report the applicant was diagnosed with large disc herniations at L4-5 and L5-S1 (Def Ex A, pg 22). Dr. Einbund's further notes that surgery has been recommended and is **likely** under future medical care due to his developing "two large disc herniations" (Def Ex A, pg 27). Although decompression and discectomy at two levels (L4-L5, L5-S1) were recommended, that surgery was not performed and the applicant returned to the labor force approximately five years after his injury. Approximately a year later, the applicant suffered a subsequent injury which was accepted.

Labor Code §4600 states that the employer shall provide such treatment which is reasonably required to cure or relieve from the effects of the injury. Records support that following the 05/27/2014 injury, the applicant treated at US Healthworks. Reference in the records reflect that after a brief period of modified duty, the applicant continued to work full duty between 40 to 72 hours a week until he was taken off work on or about 10/1/2015 (Jnt Ex W, pg 2, 3). Although Petitioner acknowledges that the applicant was working his normal job duties when he aggravated his back resulting in pain, Petitioner minimizes the injury and the need for treatment.

Evidence supports the applicant returned to Dr. Osborne for treatment resulting in a recommendation and authorization for surgery to his low back at three levels. Dr. Osborne performed laminectomies on "three levels", extending from L3 through S1. This surgery was authorized under the claim for injury of 5/27/14 (App Ex 1). Petitioner is silent as to…why surgery was performed and authorized under the 5/27/14 claim in 2016. Instead, Petitioner argues that the current recommendation for surgery is solely a result of the prior 2008 injury. Yet, records reflect that herniations were identified at only two levels under the 6/4/08 date of injury and now three levels following the 5/27/14 date of injury. Furthermore, Petitioner fails to consider that although a surgery was likely and may have been recommended, it cannot be ignored that the applicant was able to perform his usual and customary job duties at Insured Solutions for approximately a year prior to the 2014 injury and approximately a year and a half after the injury. Based on the AME report of Dr. Feiwell, the job duties at Insured Solutions required significant physical activity (Jnt Ex W, pg 2).

Although it is undisputed that the applicant suffered a prior injury and future medical care was recommended, this in itself does not excuse a subsequent employer from liability of a subsequent injury. Even though records reflect that the applicant suffered two prior disc herniations, there is nothing in the record that reflects the applicant's need for surgery in 2008 was also involving the L3-L4 level. What is clear is the request for surgery to include the L3-L4 level arose after the 2014 injury. As noted above, the applicant already underwent both the recommended surgery in 2016 plus an additional level authorized by Petitioner's original carrier.

Petitioner cites *Granado*, indicating "medical treatment unrelated to the industrial injury need not be furnished by the employer". However, so long as the treatment is reasonably required to cure or relieve from the effects of the industrial injury, the employer is required to provide the treatment, and treatment for nonindustrial conditions may be required of the employer where it becomes essential in curing or relieving from the effects of the industrial injury itself (*Granado v. WCAB* (1968) 69 Cal. 2d 406). Additionally, an aggravation of a pre-existing condition is an industrial injury, i.e. aggravation of a prior industrial injury constitutes a new injury. *(Argonaut Ins. Co. v. Industrial Acc. Comm. (Harries) (1964) 231 Cal.App2d 211 [29 Cal.Comp.Cases 279]; City of Los Angeles v. Workers' Comp. Appeals Bd. (Clark) (2017 W/D) 82 Cal.Comp.Cases 404.)* Although surgery may have been recommended as a result of the 2008 date of injury, it did not go forward. Here, following the "aggravation" and/or injury, applicant had back surgery in 2016 and now requires an additional more complex surgery. Based on the evidence submitted as a whole, the applicant's current need for surgery is a result of both dates of injury.

The reporting is substantial medical evidence as to the limited issue

Petitioner further argues that the Opinion on Decision must rest on substantial evidence and as the applicant failed to disclose his prior injury, then Dr. Osborne's reporting is not considered substantial evidence as there was false and inaccurate medical history.

A medical expert's opinion is not substantial evidence to sustain a decision if the opinion is not based on relevant facts or assumes an incorrect legal theory. (*Zemke v. WCAB* (1968) 68 Cal.2d 794, 798; *Franklin v. WCAB* (1978) 79 Cal.App.3d 224, 235.) While it is true that Dr. Osborne's initial permanent and stationary report dated 10/24/14 does not reflect any prior injuries, what is included in the report just months after his 5/27/14 date of injury are the MRI results which now reflects a disc protrusion at the L3-L4 level in additional to the two prior levels addressed in the prior case (App Ex 4, pg 2). The assessment now includes L3-L4, L4-L5 and L5-S1 (pg 5). The hospital admission report of Dr. Osborne dated 2/9/16 reflect three levels showing stenosis and disc herniations with pain radiating down both legs (App Ex 2). The operative report confirmed laminectomies were performed at three levels, L3, L4 and L5 (App Ex 3). Dr. Osborne's final report dated 8/5/16, again discusses all three levels and notes some improvement after surgery (App Ex 5, pg 3). Although Dr. Osborne may not have reviewed all the prior reporting, this does not alter the fact that this is an accepted back injury case with new findings following the 2014 date of injury. Petitioner is silent as to when the need for surgery for this additional level (L3-L4) surfaced or how the 2014 injury aggravated his 2008 condition.

While the applicant may not have initially disclosed his prior injury to Dr. Osborne, it appears this was also not disclosed to AME, Dr. Feiwell. As the issue at hand is the need for medical treatment since the case at hand is accepted, [applicant's prior lack of disclosure does not help CIGA because] Dr. Feiwell after reviewing the reports of the prior injury and limited reports of the current injury still attributed causation at least in part to the 2014 [injury] and comments that medical care cannot be apportioned (Jnt Ex X, pg 21, ln 7) Additionally, Dr. Feiwell does mention L3-L4 level…in his review of records in the 9/20/19 report (Jnt Ex T pg 2). As previously discussed, absent from Dr. Feiwell's review are the full records of Dr. Osborne [.] [A]lthough requested on multiple occasions, [Dr. Feiwell's] request went unanswered. As such, this may have created some of Dr. Feiwell's uncertainty in his final cross-examination, in which Dr. Feiwell appears confused as to what levels were addressed following the 2008 injury versus the additional level following the 2014 injury. In review of all the reports, Dr. Feiwell is consistently concluding that the applicant is in need of the recently recommended back surgery and [overall the doctor's opinion reasonably suggests] that at least 1% of the causation is attributed to the 2014 injury.

Petitioner asserts that Dr. Feiwell should be afforded substantial weight. The record reflects that both Dr. Osborne and Dr. Feiwell's reports [despite initially overlooking the June 4, 2008 injury] were relied on and considered substantial medical evidence by the undersigned for the issue at hand. Although the reports of Dr. Osborne and Dr. Feiwell are initially absent information as to the 6/4/08 date of injury, what they do contain is a review and findings of the applicant's condition including diagnostic testing, MRI findings, treatment as well as causation attributed to the 5/27/14 injury. It should also be noted that Dr. Feiwell's report contains review of records which appear to belong to another applicant with a different date of birth (Jnt Ex U, pg 14) WCAB claims reflecting 4/28/11 and 2/23/11 dates of injuries. As Dr. Feiwell serves as the Agreed Medical Examiner, [his] review of accurate and complete records [is required going forward, should he remain the AME].

Furthermore, petitioner contends that Dr. Feiwell's repeated conclusion is that the 5/27/14 injury did not contribute to the applicant's need for surgery. Petitioner misstates Dr. Feiwell's conclusions. [Petitioner erroneously asserts] that Dr. Feiwell's later responses in his cross-examination by applicant's attorney is somehow due solely to [faulty] questioning by applicant's attorney. It is apparent that in his first report, Dr. Feiwell was unaware of the prior injury of 6/4/08. In his second report dated 1/19/17, Dr. Feiwell concluded, based on review of the diagnostic testing and examination of the applicant, that the applicant "requires revision surgery" noting the abnormalities [shown by] the MRI scan will not resolve with conservative measures (Jnt V, pg 6). In his third report, Dr. Feiwell evaluates the applicant again on 6/4/18, reviews records including those from the prior injury, and concludes that causation [should] be apportioned to both the prior 2008 injury as well as the current 2014 injury and provides whole person impairment for the 2014 date of injury. Yet, Dr. Feiwell was not provided the full complement of records of Dr. Osborne. Dr. Feiwell concludes that applicant remains a candidate for revision of back surgery [with] a fusion at two to three levels (Jnt U, pg 22). There is no discussion [by Dr. Feiwell] that surgery is solely due to the 2008 injury.

In his first cross examination dated 1/10/19, Dr. Feiwell indicated that he does not have Dr. Osborne's records and barring his current records, he is apportioning by *Labor Code 4664* although this is pending the review of records (Jnt Y, pg 13, ln 17). When questioned by applicant's attorney, Dr. Feiwell indicated he required Industrial Clinic records, referral to Dr. Osborne as well as his

clinic notes, operative report and post-operative evaluations. Dr. Feiwell confirms that he attributes at least some whole person impairment to the 2014 injury. In his final report dated 9/20/19, Dr. Feiwell reviews some of Dr. Osborne's reports, however, the reports from the Industrial Clinic and Dr. Osborne's notes were not included for his review. […] Dr. Feiwell concludes that "…it is unclear why he required the back surgery…" and deferred the issue to either an interrogatory or a deposition (Jnt T, pg 5).

Without the benefit of these records, in his final cross-examination on 8/3/20, Dr. Feiwell is questioned by Petitioner and based on the summary provided by Petitioner, Dr. Feiwell initially indicates that the 2014 injury did not contribute to the need for back surgery. However, what is apparent is Dr. Feiwell's lack of recollection as to what was initially recommended for the 2008 date of injury and why surgery was performed and required in 2016. When specifically asked strictly for the 2014 date of injury, what treatment recommendations [the doctor] would provide, Dr. Feiwell responded, [he] would recommend surgery and [he] further indicates that L3-L4 level may or may not been operated on and would not have been required after the first injury (Jnt X, pg 9, ln 12). After a hesitation, he then changes his statement.

When questioned by applicant's attorney, again Dr. Feiwell indicates he did not receive Dr. Osborne's reports and he has been requesting them since 2016. Dr. Feiwell does not appear to recall what surgery was recommended in 2008 and why and/or what surgery was done in 2016.

Contrary to Petitioner's [assertions], Dr. Feiwell states [that legally] he is unable to apportion the need for the back surgery […] . Once again, Dr. Feiwell indicates he is unaware [of] Dr. Osborne's treatment or his thought process. Dr. Feiwell is clear that the applicant needs another surgery, he has "failed back syndrome" but [the doctor is] unable to recall whether L3-L4 was operated on. Dr. Feiwell then defers the issue to the trier of fact indicating it only has to be one percent under the law for the subsequent surgery (Jnt X, pg 21, ln 11).

A causal relationship does exist

Petitioner further contends that applicant has the burden of proving a causal relationship between [the May 27, 2014 injury and the present need for surgery]. Based on the evidence presented and discussed above, applicant has met his burden [of] proving there is [such] a causal relationship […] . This is supported by the acceptance of the claim by Lumbermans, authorization of the prior surgery by Lumbermans, Dr. Osborne's opinion and Dr. Feiwell's opinion. It is only Petitioner who ignores the facts at hand.

Additionally, Petitioner argues that there is no evidence that the failed 2016 back surgery worsened applicant's condition or contributed any degree to the applicant's current need for back surgery. Dr. Paquette, applicant's authorized primary treating physician reviews a recent MRI of 2/25/21 and diagnosed significant findings from L3 through S1 (App Ex 8, pg 3) as well as "failed prior surgical decompression" (pg 4). Dr. Paquette further discusses the need for fusions at two levels due as well as decompression in order to improve pain and functionality.

The need for surgery is determined on the applicant's current symptoms. If his condition had improved and he was no longer in pain, there would not be a present need for surgery. As

discussed, surgery was previously recommended for two levels following his 2008 date of injury, the applicant did not go forward with the surgery due to personal and/or medical issues. Subsequently, the applicant's condition either stabilized and/or improved sufficiently that he was able to return to fulltime employment. Following the 2014 injury, the applicant once again returned to full time employment and continued to work for more than a year. The current need for surgery arose after the 2014 injury, and after the 2016 surgery which also included an additional level L3-L4.

Petitioner argues it is the employee's burden to establish his entitlement to particular treatment. In this instance, the employee has done so. There is no doubt that the applicant requires additional back surgery, AME, Dr. Feiwell and PTP, Dr. Paquette both agree and this is supported by the Utilization Review which certified the surgery. Although Petitioner believes that the 2014 injury did not cause the need for back surgery, the evidence indicates otherwise. Furthermore, Petitioner fails to address the differences in the recommendations following the 2008 injury nor the issues surrounding 2014 applicant's L3-L4 condition […] . It cannot be ignored that the applicant was able to perform job duties at Insured Solutions prior to the 2014 injury and subsequent. The 5/27/14 is a separate and distinct injury from the prior 6/4/08 injury and therefore the applicant should be afforded the required medical treatment. In this instance, the medical treatment includes further surgery as the prior surgery [failed].

It is well known that medical care cannot be apportioned. There is ample credible evidence to support the determination that the applicant's current symptomatology is resulting in the need for further surgery and medical care which is attributable at least in part to the 5/27/14 date of injury.

RECOMMENDATION

I recommend the Petition for Reconsideration, filed by Insured Solutions/Fontana Logistics Center; CIGA for Lumbermen's Underwriting Alliance, in liquidation on 8/6/2021 be **DENIED** on the merits.

JODY L. EATON
Workers' Compensation
Administrative Law Judge

Filed and Served by mail on: 08/23/2021

OPINION ON DECISION

Ramon Plascencia, born [ ], while employed as an order selector, occupation group number 211, at Fontana, California, by Insured Solutions/Fontana Logistics Center sustained injury arising out of and occurring in the course of his employment to his lumbar spine and right leg on 5/27/2014. At the time of the injury, the employer was insured by Lumbermans Underwriting Alliance now in liquidation administered by CIGA.

ISSUES

1. Need for further medical treatment, including but not limited to back surgery.
2. Applicant requests authorization for back surgery.
3. Attorney fees

Applicant contends that he suffered an accepted back injury on 5/27/2014 resulting in the need for back surgery. Applicant further argues that Utilization Review has determined the surgery to be medically necessary.

Defendant contends that the applicant suffered a prior injury on 6/4/2008 in which he resolved by Compromise and Release with an Order Approving Compromise and Release on 12/6/2013. Defendant further contends that the need for surgery as well as the value of the surgery was included in the Compromise and Release settlement and that the back surgery is not their liability as the need for back surgery was a result of the 6/4/2008 date of injury.

FACTS

The applicant suffered a prior back injury on 6/4/2008 while employed by Rex Miller as a forklift operator. The case initially resolved by Stipulated Award for 6% on 9/2/2010. The case later resolved by Compromise and Release for $136,393.225 with an Order Approving on 12/6/2013 based on the reporting of Dr. Einbund resulting in 26% permanent disability after apportionment (Def Ex B, pg 9).

The applicant suffered a subsequent injury to his back on 5/27/2014 which was accepted. The applicant was declared permanent and stationary by his primary treating physician, Dr. Osborne on October 24, 2014. In his P&S report, Dr. Osborne noted the applicant continues to work full duties and was provided a refill of Ibuprofen. Additionally noted, is the possibility of back surgery in the future (App Ex 4, pg 2, 6).

A Modified UR Determination letter from Genex in connection with the 5/27/2014 date of injury, dated 9/16/2015, reflects certification for L3 through S1 laminectomies as well as modification of Pre-Op testing and Post Op physical therapy (App Ex 1). On 2/9/2016, the applicant was admitted to Citrus Valley Medical Center for low back pain radiating down both legs. The treatment plan is L3 through S1 lumbar laminectomies (App Ex 2, pg 2). An Operative report dated 2/9/2016 by Dr. Osborne indicated the applicant underwent L3 through L5 laminectomies (App Ex 3, pg 1). Dr. Osborne issued another permanent and stationary report dated 8/5/2016 in connection with the 5/27/2014 injury where he discussed the applicant's increased complaints upon his return on

2/6/2015 which resulted in him requiring surgery. Dr. Osborne provided him 27% WPI and indicated a possibility of future spine surgery (App Ex 5, pg 7, 8).

In a letter dated 12/21/2020, CIGA authorized the applicant to treat with Dr. Paquette as his new PTP for date of injury 5/27/2014 (App Ex 6). In his initial report dated 2/1/2021, Dr. Paquette requested an MRI for further diagnosis. In his 3/1/2021 report, Dr. Paquette requests authorization for a L4-5, L5-S1 spinal fusion and decompression and a microscopic decompression bilaterally at the L3-4 level (App Ex 8, pg 4). GENEX Utilization Review dated 3/23/2021 certified the spinal fusion and microdiscectomy (App Ex 9, pg 1).

However, in a letter dated 3/29/2021, CIGA acknowledged the UR decision determining the recommended treatment was medically necessary, however, declined liability and authorization (App Ex 10). CIGA further noted that based on the findings of the AME, Dr. Fei[n]well, there was substantial findings that the applicant's need for back surgery pre-existed his 2014 claim.

Records reflect that parties selected Dr. Lawrence Feiwell as the Agreed Medical Examiner for the 5/27/2014 date of injury. Dr. Feiwell issued reports dated 11/14/2016, 1/19/2017, 6/4/2018, 9/20/2019 and was cross-examined on 1/10/2019 and 8/3/2020.

DISCUSSION

There is no dispute that the applicant suffered an industrial injury to his back (lumbar) on 6/4/2008 resulting in permanent impairment. The Compromise and Release dated 12/6/2013 notes settlement is based on the QME Report of Dr. Einbund (Def Ex B, pg 9). Defendant also offers the medical reporting from Dr. Einbund dated 8/8/2013 reflecting the need for surgery to his back (Def Ex A, pg 25). Nor is there a dispute that the applicant suffered an industrial injury to his back (lumbar) as a result of his 5/27/2014 date of injury as indicated in the Pre-Trial Conference Statement (EAM#36605170).

Parties jointly offer the medical reporting of the AME, Dr. Lawrence Feiwell. Initially, Dr. Feiwell attributed applicant's back complaints to the 5/27/2014 specific injury as well as a cumulative trauma period (Jnt Ex W, pg 9) (Jnt Ex V, pg 6). However, after receiving applicant's medical records and reviewing prior diagnostic testing, Dr. Feiwell altered his opinion. In his 6/4/2018 report, Dr. Feiwell reviewed applicant's medical records from his prior 6/4/2008 injury and concluded that applicant's impairment of 28% was apportioned between pre-existing condition, his prior 2008 injury as well as his specific injury of 5/27/2014 (Jnt Ex U, pg 22). During Dr. Feiwell's 1/10/2019 cross-examination, it was concluded that additional records were needed to be reviewed.

After review of records, and in his next report dated 9/20/19, Dr. Feiwell again finds causation to the 5/27/2014 injury and concludes 1% impairment is attributed to the 5/27/2014 date of injury. Dr. Feiwell was cross-examined on two separate occasions. At the cross-examination on 8/3/2020, Dr. Feiwell again was asked regarding causation and apportionment and the need for surgery.

Although Dr. Feiwell initially indicated that the need for back surgery was due to the 6/4/2008 injury, Dr. Feiwell also indicated that the applicant had surgery and the surgery failed (Jnt Ex X,

pg 18, ln 15). Dr. Feiwell further states that he is unable to say if the second surgery is due to his employment with Insured Solutions (Jnt Ex X, pg 20, ln 6). On page 21, line 8, Dr. Feiwell stated that "two percent of his impairment is due to the subsequent injury". Dr. Feiwell defers to the trier of fact whether the subsequent surgery is in part due to the subsequent employment (pg 21, ln 11).

It has long been the law that the acceleration, aggravation or "lighting up" of a preexisting condition "is an injury in the occupation causing the same." *(Tanenbaum v. Industrial Acc. Com. (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590]; Zemke v. Workmen's Comp. Appeals Bd. (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358]; Reynolds Electrical & Engineering Co. v. Workers' Comp. Appeals Bd. (Buckner) (1966) 65 Cal.wd 438 [31 Cal.Com.Cases 421].)* An aggravation of a pre-existing condition is an industrial injury, i.e. aggravation of a prior industrial injury constitutes a new injury. *(Argonaut Ins. Co. v. Industrial Acc. Comm. (Harries) (1964) 231 Cal.App2d 211 [29 Cal.Comp.Cases 279]; City of Los Angeles v. Workers' Comp. Appeals Bd. (Clark) (2017 W/D) 82 Cal.Comp.Cases 404.)*

All the medical evidence agrees that applicant suffered a back injury and is in need of surgery. The question is whether or not the applicant's [injury of May 27, 2014 while employed] as an order selector with Insured Solutions/Fontana Logistics Center [contributed to the present need for surgery]. As discussed above, the medical evidence consists of reports of Dr. Einbund who examined the applicant for his 6/4/2008 injury as well as AME, Dr. Lawrence Feiwell who examined the applicant for his 5/27/2014 date of injury. Records support that the applicant declined surgery and went to work for the subsequent employer, Insured Solutions sometime in 2013 and sustained an injury to his low back on 5/27/2014. In July of 2014, he returned to work full duties. He returned for medical care, obtained authorization for surgery and subsequently underwent surgery with Dr. Osborne on 2/9/16 and was again considered MMI. In the history taken by the AME, Dr. Feiwell noted that by "2015 his regular duties aggravated his low back pain" (Jnt Ex W, pg 2). In all of his conclusions, Dr. Feiwell was consistent that at least in part, applicant's condition was attributed to some degree to his 5/27/2014 date of injury.

It has been well established that medical care cannot be apportioned. While it may be accurate that applicant's back condition was initially due to his 6/4/2008 injury, the above opinions of Dr. Osborne as well as Dr. Feiwell [who ultimately became aware of the 6/4/2008 injury] constitute substantial support [for the conclusion] that applicant's subsequent employment with Insured Solutions, aggravated his condition which required further surgical intervention. Applicant's work history reflects he was able to return to work in a full-time capacity subsequent to the 6/4/2008 injury and even following the 5/27/2014 injury. Whether surgery was recommended as a result of the 6/4/2008 injury, does not change the fact that the applicant continued to work and required surgery after the 5/27/2014 injury. AME, Dr. Feiwell attributes causation and provides some impairment due to the 5/27/2014 date of injury. As in this case, the need for medical treatment may be jointly produced by successive injuries.

Based on the above, including but not limited to the UR determination that back surgery is medically necessary, it is found that applicant requires further medical care for his 5/27/2014 date of injury including but not limited to the certified surgery. There is no legal or factual basis for Defendant to deny authorization for the certified surgery.

Although applicant attorney claimed attorney fees as an issue, no accounting of time spent was offered and therefore an insufficient record to award attorney fees. Parties are to meet and confer, adjust and negotiate the issue with jurisdiction reserved.

DATE: 7-13-2021

JODY L. EATON
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE