**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**ROSALINA HERRERA,** ***Applicant***

**vs.**

**TESLA MOTORS, INC; SENTRY INSURANCE COMPANY, formerly known as SENTRY INSURANCE MUTUAL,** ***Defendants***

**Adjudication Number: ADJ9840500**
**Anaheim District Office**

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

Applicant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on February 27, 2024, wherein the WCJ found in pertinent part that applicant is not entitled to a Qualified Medical Evaluator (QME) psychiatric panel.

Applicant contends that further discovery should be conducted and that a Qualified Medical Evaluator (QME) panel in the specialty of psychology should issue. Applicant also contends that the reports of Dr. Richard Levy, QME in internal medicine, and the reports of orthopedic QME Dr. Arun Mehta are not substantial medical evidence. Additionally, applicant contends that the orthopedic QME Dr. Arun Mehta requested a psychology QME and the WCJ erred in finding that applicant may not have a psychiatric/psychology panel.

We received an answer from defendant.

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

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto.

Based on our review of the record, and for the reasons discussed in the Report, which we adopt and incorporate, except as to the discussion of whether applicant is entitled to a QME in psychology, and as discussed below, we will grant applicant's Petition, rescind the F&A, and

substitute a new F&A, which finds that applicant claims injury in the form of psyche and that she is entitled to an additional panel in psychiatric/psychology, and defers the issue of whether applicant's claimed injury in the form of psyche caused further permanent disability. We make no other substantive changes to the F&A.

## BACKGROUND

On September 4, 2019, Dr. Mehta issued a report, stating as relevant herein as follows:

CONCLUSION:

1. The claimant's injuries to both arms were part of cumulative trauma as noted.
2. The claimant has had anxiety and depression as well as gastrointestinal problems, psyche and internal medical evaluation would be necessary.

(Ex. 103, Report of Dr. Arun Mehta, dated September 4, 2019, p. 5.)

On November 30, 2022, the matter proceeded to trial on the following issues as relevant herein: 1. Parts of the body injured: Digestive, esophagus, cognitive, nausea, vomiting, stomach, arms, spine, legs, headaches, migraines; 10. Whether Applicant may have psychiatric panel per Dr. Mehta's September 4, 2019 report, page five. (Minutes of Hearing and Summary of Evidence (MOH/SOE), November 30, 2022 trial, pp. 2-3.) The parties stipulated in relevant part that: applicant sustained injury arising out of and in the course of employment to bilateral carpal tunnel, hypertension, and GI.

Trial continued on February 7, 2024. Applicant testified with the assistance of a certified Spanish language interpreter.

On February 27, 2024, the WCJ issued the F&A, which found in relevant part that applicant was not entitled to an additional panel in psychiatric/psychology.

## DISCUSSION

As a preliminary matter, if a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Bd. en banc).) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v.*

*Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Threshold issues include, but are not limited to, the following: injury AOE/COE, jurisdiction, the existence of an employment relationship, and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].)

Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian*, *supra*, 81 Cal.App.4th at p. 1075 ("interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"); *Rymer*, *supra*, 211 Cal.App.3d at p. 1180 ("[t]he term ['final'] does not include intermediate procedural orders or discovery orders"); *Kramer*, 82 Cal.App.3d at p. 45 ("[t]he term ['final'] does not include intermediate procedural orders").) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

A decision issued by the Appeals Board may also address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision disputes the WCJ's determination regarding an interlocutory issue, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions. Here, the WCJ's decision includes findings on threshold issues, and accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Removal may be requested to challenge interim and non-final orders issued by a WCJ. (*Cortez v. Workers' Comp. Appeals Bd*. (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155]; *Kleeman v. Workers' Comp. Appeals Bd*. (2005) 127 Cal.App.4th 275, 281, fn. 2 [70 Cal.Comp.Cases 133].) Removal is discretionary and is generally employed only as an extraordinary remedy upon a showing of substantial prejudice or irreparable harm and a showing that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (*Cortez, supra*, at 600, fn. 5; *Kleemann, supra*, 127 Cal.App.4th at p. 281, fn. 2.) Here, the WCJ's finding that applicant may not have a psychiatric panel resolves an intermediate

procedural or evidentiary issue or issues, specifically a QME panel dispute. Here, we address the interlocutory finding of whether applicant is entitled to a panel in psychology/psychiatry.

As the WCJ states in the Opinion on Decision, the WCAB is not "bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties ...." (Lab. Code, §§ 5708, 5709; see also *Gill v. Workers' Comp. Appeals Bd*. (1985) 167 Cal.App.3d 306, 310 [50 Cal.Comp.Cases 258] (Court of Appeal holding a WCJ's exclusion of relevant evidence to be a violation of due process.)

We observe that the principles of "liberal pleading" have long infused California's statutory landscape. Enacted in 1872, Code of Civil Procedure section 452 requires that, "[i]n the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." Also enacted in 1872, Code of Civil Procedure section 473 provides in pertinent part, "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (Cal. Code Civ. Proc. § 473(b).) Enacted more "recently" in 1963 is Code of Civil Procedure section 576, which provides that, "[a]ny judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading or pretrial conference order." What follows from these statutory pronouncements is more than a century of consistent jurisprudence emphasizing the public policy preference favoring adjudication on the merits, rather than on procedural deficiencies.

In resolving a dispute over an applicant's alleged failure to specify issues, the statutes governing workers' compensation are to be liberally construed in favor of protecting workers. (*Bontempo v. Workers' Comp. Appeals Bd*. (2009) 173 Cal.App.4th 689, 704 [74 Cal.Comp.Cases 419]; *City of Fresno v. Workers' Comp. Appeals Bd*. (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53]; Lab. Code, § 3202 [workers' compensation statutes "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment"].) "[I]t is an often-stated principle that the Act disfavors application of formalistic rules of procedure that would defeat an employee's entitlement to rehabilitation benefits." (*Martino v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 485,

490 [67 Cal.Comp.Cases 1273].) Informality of pleading in proceedings before the Board has long been recognized, and courts have repeatedly rejected pleading technicalities as grounds for depriving the Board of jurisdiction. (*McGee Street Productions v. Workers' Comp. Appeals Bd*. (2003) 108 Cal.App.4th 717, 724 [68 Cal.Comp.Cases 708]; *Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 200-01 [50 Cal.Comp.Cases 160]; *Liberty Mutual Ins. Co. v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 148, 152-153 [45 Cal.Comp.Cases 866].) Moreover, section 5709 states that "[n]o informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division …" (Lab. Code, § 5709.) "Necessarily, failure to comply with the rules as to details is not jurisdictional." (*Rubio, supra*, at pp. 200-201; see Cal. Code Regs., tit. 8, § 10517.)

Additionally, it is the policy of the law to favor, whenever possible, a hearing on the merits. (*Fox v. Workers' Comp. Appeals Bd.*, (1992) 4 Cal.App.4th 1196, 1205 [57 Cal.Comp.Cases 149]; see also *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478, "when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default.") This is particularly true in workers' compensation cases, where there is a constitutional mandate "to accomplish substantial justice in all cases." (Cal. Const., art. XIV, § 4.)

These principles of liberal pleading are further reflected in section 5506, which authorizes the Appeals Board to relieve a defendant from default or dismissal due to mistake, inadvertence, surprise, or excusable neglect in accordance with Code of Civil Procedure section 473. The Court of Appeal has made it clear that the protections afforded under Code of Civil Procedure section 473(b) are applicable in workers' compensation proceedings. (*Fox, supra,* 4 Cal.App.4th 1196.) Therefore, in workers' compensation proceedings, it is settled law that:

> (1) <u>*pleadings may be informal*</u>; *Martino, supra,* 103 Cal.App.4th at p. 491; *Rivera v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 1452, 1456 [52 Cal.Comp.Cases 141]; *Liberty Mutual Ins. Co v. Workers' Comp. Appeals Bd.* (*Aprahamian*) (1980) 109 Cal.App.3d 148, 152-153 [45 Cal.Comp.Cases 866]; *Blanchard v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 590, 594-595 [40 Cal.Comp.Cases 784]; *Zurich Ins. Co. v. Workmen's Comp. Appeals Bd.* (1973) 9 Cal.3d 848, 852 [38 Cal.Comp.Cases 500, 512]; *Bland v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 324, 328-334 [35 Cal.Comp.Cases 513]; *Beaida v. Workmen's*

*Comp. Appeals Bd.* (1968) 263 Cal.App.2d 204, 207-210 [33 Cal.Comp.Cases 345]);

(2) *claims should be adjudicated based on substance rather than form* (*Martino, supra,* 103 Cal.App.4th at p. 491; *Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1116 [53 Cal.Comp.Cases 502]; *Rivera, supra,* 190 Cal.App.3d at p. 1456; *Bland, supra,* 3 Cal.3d at pp. 328-334; *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592, 598 [24 Cal.Comp.Cases 274]);

(3) *pleadings should liberally construed so as not to defeat or undermine an injured employee's right to make a claim* (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, pp. 925-926 [72 Cal.Comp.Cases 778]); *Martino, supra,* 103 Cal.App.4th at p., 490; *Rubio, supra,* 165 Cal.App.3d at pp. 199-201; *Aprahamian, supra,* 109 Cal.App.3d at pp.152-153; *Blanchard, supra,* 53 Cal.App.3d at pp. 594-595; *Beaida, supra,* 263 Cal.App.2d at pp. 208-209); and

(4) *technically deficient pleadings, if they give notice and are timely, normally do not deprive the Board of jurisdiction* (*Rivera, supra,* 190 Cal.App.3d at p. 1456; *Aprahamian, supra,* 109 Cal.App.3d at pp. 152-153; *Blanchard, supra,* 53 Cal.App.3d at pp. 594-595; *Bland, supra,* 3 Cal.3d at pp. 331-332 & see fn. 13; *Beaida, supra,* 263 Cal.App.2d at pp. 208-210).

Finally, we emphasize that WCAB Rule 10517 *specifies that pleadings* are deemed amended to conform to the stipulations agreed to by the parties on the record or *may be amended by the Appeals Board to conform to proof*. (Cal. Code Regs., tit. 8, §10517, emphasis added.) This Rule represents the application of California's public policy in favor of adjudication of claims on their merits, rather than on the technical sufficiency of the pleadings.

Here, applicant seeks the issuance of an additional panel in psychology to evaluate whether she has sustained an injury AOE/COE to her psyche. Yet, she did not raise the issue of injury to psyche at trial and has not filed a pleading claiming injury to psyche. However, in the interests of substantial justice, this pleading technicality should not deprive the Board of jurisdiction. Based on the facts before us, i.e., because orthopedic QME Dr. Mehta stated that a psyche evaluation would be necessary to assess applicant's anxiety and depression (Ex. 103, Dr. Mehta's September 4, 2019 report, p. 5), we will conform the pleadings to proof and find that applicant claimed injury to her psyche.

Administrative Director (AD) Rule 31.7(b) provides for an additional QME panel in another specialty as follows in relevant part:

> (b) Upon a showing of good cause that a panel of QME physicians in a different specialty is needed to assist the parties reach an expeditious and just resolution of disputed medical issues in the case, the Medical Director shall issue an additional panel of QME physicians selected at random in the specialty requested. For the purpose of this section, good cause means:
>
> (1) A written agreement by the parties in a represented case that there is a need for an additional comprehensive medical-legal report by an evaluator in a different specialty and the specialty that the parties have agreed upon for the additional evaluation; or
>
> (2) Where an acupuncturist has referred the parties to the Medical Unit to receive an additional panel because disability is in dispute in the matter; or
>
> (3) An order by a Workers' Compensation Administrative Law Judge for a panel of QME physicians that also either designates a party to select the specialty or states the specialty to be selected and the residential or employment-based zip code from which to randomly select evaluators; or
>
> (4) In an unrepresented case, that the parties have conferred with an Information and Assistance Officer, have explained the need for an additional QME evaluator in another specialty to address disputed issues and, as noted by the Information and Assistance Officer on the panel request form, the parties have reached agreement in the presence of and with the assistance of the Officer on the specialty requested for the additional QME panel. The parties may confer with the Information and Assistance Officer in person or by conference call.

In the absence of an additional panel in psychology, applicant is prevented from conducting the medical-legal discovery necessary to determine compensability for the claimed psyche injury. We therefore agree with applicant that an additional QME panel in psychology is appropriate. (Lab. Code, §§ 5701, 5906 [the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].)

Regarding applicant's supplemental petition for reconsideration, we direct applicant's attorney to WCAB Rule 10964, which states:

> (a) When a petition for reconsideration, removal or disqualification 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.
>
> (b) A party seeking to file a supplemental pleading shall file a petition setting forth good cause for the Appeals Board to approve the filing of a supplemental pleading and shall attach the proposed pleading.
>
> (c) Supplemental petitions or pleadings or responses other than the answer shall neither be accepted nor deemed filed for any purpose except as provided by this rule.

(Cal. Code Regs., tit. 8, § 10964.)

Applicant's supplemental petition for reconsideration appears to reiterate the contentions raised in applicant's petition for reconsideration under the heading "Question 3" and is therefore duplicative. (Petition, pp. 11-13.) More importantly, however, applicant did not seek permission to file a supplemental pleading. (Cal. Code Regs., tit. 8, § 10964.)

We also caution applicant's attorney that attaching documents to a petition that have not been admitted into evidence is a violation of WCAB Rule 10945. (Cal. Code Regs., tit. 8, § 10945(c)(1)-(2).)

Accordingly, we grant applicant's Petition, rescind the F&A, and substitute a new F&A, which finds that applicant claims injury in the form of psyche and that she is entitled to an additional panel in psychiatric/psychology, and defers the issue of whether applicant's claimed injury in the form of psyche caused further permanent disability. We make no other substantive changes to the F&A.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued by the WCJ on February 27, 2024 is **RESCINDED** and the following **SUBSTITUTED** in its place:

## FINDINGS OF FACT

1. Rosalina Herrera, born on [], employed during the periods of November 3, 2012 through November 1, 2013, for Tesla Motors, Inc., insured by Sentry Insurance Company, formally known as Sentry Insurance Mutual sustained injury arising out of in the course of employment to bilateral carpal tunnel, hypertension and GI (gastrointestinal) and claimed injury in the form of psyche.

2. Applicant did not sustain an industrial injury to digestive, esophagus, cognitive, nausea, vomiting, stomach, arms, spine, legs, headaches, and migraines.

3. Applicant's occupational group number is 370.

4. Applicant was permanent and stationary on December 12, 2023.

5. There is good cause for the issuance of an additional panel QME in psychology.

6. Applicant will require further medical treatment to cure or relieve from the effects of her injury.

7. The issue of liability for self-procured medical treatment is deferred.

8. Applicant's injury in the form of bilateral carpal tunnel, hypertension and GI caused permanent disability of 49%, entitling applicant to 264 weeks of disability indemnity at the rate of $230.00 per week for a total sum of $60,720.00.

9. The reasonable value of the services and disbursements of the applicant's attorney is 15% of the amounts awarded herein, in the amount of $9,108.00. The issue of whether applicant is entitled to further attorney fees is deferred.

10. Applicant may not have medical reports translated in Spanish.

11. Applicant's Exhibits #32, #33, and #34 are admissible.

**ORDER**

IT IS ORDERED that:
a. Applicant's Exhibits #32, #33, and #34 are admitted into evidence.
b. Petition to Vacate Submission is denied.

## AWARD

AWARD IS MADE in favor of Rosaline Herrera against Tesla Motors, Inc., legally insured by Sentry Insurance Company, formally known as Sentry Insurance Mutual.

a. Permanent total disability of 49%, entitling applicant to 264 weeks of disability at the rate of $230.00, in the total sum of $60,720.00 less credit to defendant for all sums heretofore paid on account, if any, and less $9,108.00 payable to Law Offices of Kenneth Martinson as attorney fees to be commuted from the far end of the award; and
b. There is need for further medical treatment to cure and relieve the industrial injury.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**JOSÉ H. RAZO, COMMISSIONER**
**PARTICIPATING NOT SIGNING**

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

**May 10, 2024**

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

**ROSALINA HERRERA**
**KENNETH MARTINSON**
**STOCKWELL HARRIS**

**JB/*pm***

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

**REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION**

## I
## INTRODUCTION

| | | |
|---|---|---|
| 1. | Applicant's Occupation: | Assembler Motor Vehicle |
| | Applicant's Age: | 65 |
| | Date of injury: | CT November 3, 2012 – November 1, 2013 |
| | Parts of Body Injured: | Bilateral carpal tunnel, hypertension, GI |
| 2. | Identity of Petitioner: | Rosalina Herrera ("Applicant") |
| | Timeliness: | Yes |
| | Verification: | Yes |
| 3. | Date of Findings and Award | February 27, 2024 |
| 4. | [Applicant's] Contentions: | Ms. Herrera is entitled to further develop the record |

## II
## STATEMENT OF THE CASE AND FACTS

Injured worker Rosalina Herrera was employed as a Motor Vehicle Assembler for Tesla Motors. She sustained an admitted injury to bilateral carpal tunnel, hypertension and GI for a cumulative trauma injury for the period of November 3, 2012 through November 1, 2013. She claims additional injuries to digestive, esophagus, cognitive, nausea, vomiting, stomach, arms, spine, legs, headaches, and migraines.

Injured worker and defendant executed a Stipulation and Request for Award on January 20, 2015. She was awarded 0% permanent disability for cumulative trauma from November 3, 2012 through November 1, 2013. Future medical care was awarded to left thumb, left second finger, right second finger, bilateral hand and bilateral wrists. Settlement was based on Dr. Prasad Kilaru medical report dated December 9, 2014. Judge Jeffrey Friedman issued the Award on December 2, 2015.

A Petition to Reopen was received by the WCAB on October 23 2017. The Petition to Reopen was unsigned and stated "impairments are worse". The matter continued to trial on November 30, 2022 and February 7, 2024. The matter was submitted on February 7, 2024. The applicant's counsel filed a Petition to Vacate Submission on February 17, 2024. The WCJ did not vacate the submission. A Findings and Award issued on February 27, 2024. The WCJ issued disability at 49% based on the medical reports of Dr. Levy and Dr. Metha. Ms. Herrera was award

future medical care to bilateral carpal tunnel, hypertension and GI (gastrointestinal). Applicant filed a timely and verified Petition for Reconsideration on March 11, 2024. The Petition for Reconsideration has additional documents attached such as proof of service for Petition for Consolidation and various emails. Documents attached to Petitions for Reconsideration are in violation of CCR §10945(c), a party may be sanctioned under Labor Code §5813.

On March 19, 2024, applicant filed a Supplemental for Reconsideration. Applicant requests in part additional evidence be submitted and the Award be rescinded. Supplemental petitions or pleadings shall be considered only when specifically requested or approved by the appeals board. (Title 8 CCR §10964). Since permission was not sought it is not being considered.

Applicant contends that further discovery should be conducted and the medical reports are not substantial evidence. Applicant contends that the Findings of Fact is not supported by evidence nor does it support the Award. The WCJ acted in excess its powers. For the following reasons Applicant's Petition should be denied.

## III
## DISCUSSION

*Dr. Levy's Medical Reports*

Applicant is of the opinion that Dr. Levy's reports are not substantial evidence. The applicant believes that Dr. Levy's medical report denies due process to a non-English speaking injured worker.

The Appeals Court determined that 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).)

A medical report is not substantial evidence unless it offers the reasoning behind the physician's opinion, not merely his or her conclusions. (Dr. does not state that 50 percent apportionment would be reasonable partially due to the normal progress of the preexisting injury). (*Granado v. Workmen's Comp. App. Bd*., 33 Cal. Comp. Cases 647)

Dr. Levy was the PQME for internal medicine. He authored eight (8) reports. He took a detailed history. He reviewed several medical reports, diagnostic tests and performed a comprehensive examination of Ms. Herrera throughout his medical reporting. Dr. Levy reviewed

Dr. Cheng, Dr. Mirza, and Dr. Economou recent medical reports. (Ex. 112, pg. 2) Ms. Herrera was not taking stomach or nonsteroidal medicine from 2020 to her 2021 knee injury. (Ex. 111, pg. 2) The additional review of records did not change Dr. Levy's previous opinions. (Ex. 112, pg. 5-6)

There were two interpreters utilized during her December 12, 2023, examination with Dr. Levy. (Ex. 111, pg. 1). One interpreter stated that the applicant tripped and fell while at her mother's funeral. (Ex. 111, pg. 2). The second interpreter and applicant stated that Ms. Herrera did not trip. Her knee gave way. (Ex. 111, pg. 3). Ms. Herrera testified that she had surgery to left knee and not her right. Ms. Herrera testified that she believed that two (2) interpreters during Dr. Levy's examination caused confusion. (2/7/24 SOE pg. 1, ln. 1-2). Dr. Levy relied on review of all medical reports including his previous reports and those of her many treating physicians and diagnostic testing in his conclusions. The use of two interpreters did not encumber his medical conclusions. Dr. Levy was the internal QME. Dr. Levy addressed the internal claims.

For the sake of completeness, Dr. Levy addressed the applicant's knee complaints. Dr. Levy was of the opinion that her subsequent injury to her knee was non-industrial. (Ex. 111, pg. 11) Dr. Levy reviewed additional medical reports in his January 12, 2022 supplemental report. A knee injury was not documented in the medical report. (Ex. 109) He reviewed additional medical reports in his June 21, 2022, supplemental and again a knee injury was not documented. (Ex. 110)

As for the Applicant's internal complaint, she testified that she did not experience vomiting, diarrhea or reflux since December 2021, when she stopped taking anti -inflammatory medications. (2/7/24 SOE pg. 6, ln. 7-11). She did experience vomiting diarrhea and reflux after her 2022 knee surgery. Her doctor stopped her from taking medications and she did not experience those symptoms again. (2/7/24 SOE pg. 6, ln. 13-14)

Dr. Levy increased the applicant's disability and changed non-industrial causation from 30% to 25% for her stomach reflux. The applicant's permanent and stationary date is December 12, 2023, per Dr. Levy's medical report. (Ex. 111, pg. 10) Dr. Levy's prior reflux disability was 10% and apportionment was 70% industrial. Dr. Levy increased Ms. Herrera's disability to her reflux in his December 12, 2023, medical report to 12% and apportionment was 75% industrial. (Ex. 111, pg. 10) Hypertension remained the same as previously. Hypertension 8% permanent disability and apportionment 50% industrial. Future medical was required for her hypertension and GI. The injured worker's due process rights were not violated as interpreters where utilized in the

examinations. Dr. Levy reviewed all medical reports associated with her claim even orthopedic reports. Dr. Levy's medical reports are substantial evidence.

*Dr. Mehta's Medical Reports*

Applicant is of the opinion that Dr. Mehta's reports are not substantial evidence.

To be substantial evidence a medical opinion must be based on pertinent facts, on an adequate examination and accurate history, and it must set forth the basis and reasoning, in support of the conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 621 (Appeals Board en banc).)

A medical report is not substantial evidence unless it offers the reasoning behind the physician's opinion, not merely his or her conclusions. (Dr. does not state that 50 percent apportionment would be reasonable partially due to the normal progress of the preexisting injury). (*Granado v. Workmen's Comp. App. Bd*., 33 Cal. Comp. Cases 647)

Dr. Mehta was utilized as an orthopedic PQME. He issued five (5) medical reports. His reports were well reasoned. He performed a thorough examination of the applicant. He reviewed various diagnostic tests including EMG/nerve studies in his initial permanent and stationary report in 2019. (Ex. 103, pg. 4-5). Additional studies were reviewed in this June 9, 2022, supplemental report. There were no complaints as to lower extremities or spine. Examination of bilateral lower extremities hips, knees and ankles were normal. (Ex. 104, pg. 7) He reviewed Dr. Levy's medical reports and those of her primary treating physicians, Dr. Cabayan, Dr. Kilaru, and Dr. Toufan Razi. He reviewed the subjective and objective evidence. The only medications she was taking at the time of his June 9, 2022, re-evaluation was over the counter Tylenol. (Ex. 104, pg. 5) The medical report documented a recent left knee surgery. Examination of the bilateral lower extremities, hips, knees and ankles were normal. (Ex. 104, pg. 7) He did not diagnose Ms. Herrera with an industrial knee injury. She sustained industrial injury to bilateral carpal tunnel syndrome. Pursuant to the medical reports of Dr. Mehta discussed above and found as substantial evidence Ms. Herrera sustained industrial injury to bilateral carpal tunnel. Dr. Mehta's medical report is substantial evidence.

The matter initially went to trial on November 30, 2022, a few months after Dr. Mehta's June 9, 2022, re-evaluation. The trial did not conclude at that time as the applicant had a headache. (11/30/22 SOE pg. 10, ln. 35-36). Several trial continuances were granted.

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*Admission of Additional Exhibits*

Discovery closes at a MSC unless a party can demonstrate that the evidence was not available or not discoverable prior to the MSC through due diligence. *County of Sacramento v. Workers' Comp. Appeals Board (Estrada)*, (1999) 68 Cal. App 4th 1429. In Estrada, the court annulled the decision of the Workers' Compensation Appeals Board in which the WCJ allowed discovery to remain open after the MSC. The Applicant obtained a supplemental medical report. The Appeals Court held that the Applicant had the opportunity to obtain a supplemental report prior to the MSC but failed to do so.

The court has been more than generous with the injured worker. At the continued trial on November 30, [2023], the Applicant submitted exhibits 32 through 34, which were marked for identification purposes. (11/30/24, SOE pg. 2, ln. 18-25) The court later admitted the exhibits into evidence as noted in the Opinion on Decision. There were no additional exhibits provided into evidence by the applicant's counsel as demonstrated by the MOH/SOE. The applicant did not offer an objection to the Exhibits that were identified. The applicant cannot keep adding medical reports at whim. Dr. Mehta declared the applicant permanent and stationary on June 9, 2022, for her orthopedic injuries. Five months prior to the trial date of November 30, 2022. (Ex. 104, pg. 10) Dr. Levy declared the applicant permanent and stationary as of December 12, 2023, for her internal injuries. (Ex. 111 pg. 10) Future medical care was provided for bilateral carpal tunnel, hypertension and GI.

Based upon the above, I recommend the denial of the Applicant's Petition for Reconsideration.

Date: March 20, 2024

/s/ **Tammy Homen**

Tammy Homen
Workers' Compensation Judge