

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

VINCENT VALDEZ, *Applicant*

vs.

**HOLDER CONSTRUCTION GROUP, LLC; NATIONAL UNION FIRE INSURANCE,
Adjusted By GALLAGHER BASSETT, *Defendants***

**Adjudication Number: ADJ10654013
San Jose District Office**

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

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings, Award and Order of March 25, 2024, wherein it was found that, while employed on August 30, 2016 as a laborer, applicant sustained admitted injury to his dominant right hand and fingers causing permanent disability of 24% after apportionment. In finding permanent disability of 24%, the WCJ followed the apportionment findings of agreed medical evaluator (AME) orthopedic hand specialist Leonard Gordon, M.D., who opined that 60 percent of applicant's permanent disability was due to the industrial injury, and 40 percent was due to non-industrial factors. The WCJ also rejected vocational evidence offered to rebut the permanent impairment rating garnered from the AME's medical evaluation.

Applicant contends that the WCJ erred in finding only 24 percent permanent disability, arguing that Dr. Gordon's apportionment determination did not constitute substantial medical evidence, and arguing that the WCJ should have followed the vocational evidence rebutting the medical whole person impairment rating. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

Previously in this matter, the WCJ had made similar findings in a decision of May 23, 2023 and the applicant sought reconsideration of the prior findings on the same grounds asserted here. In an Opinion and Decision of August 4, 2023, we found that the then-existing record did not support a finding of apportionment, because the opinions of Dr. Gordon in the record were too conclusory to support a finding of apportionment. However, we noted that Dr. Gordon had

referenced previous reports that were not in the evidentiary record that could potentially substantiate a finding of apportionment. We thus granted reconsideration, rescinded the decision of May 23, 2023, and returned the matter so that Dr. Gordon's reports could be admitted into the evidentiary record, and so that the parties and the WCJ could redetermine the issue of apportionment on an augmented record. Since we returned the matter on that basis, we did not reach the issue of vocational rebuttal, and stated that the applicant could re-raise this issue in the further proceedings.

The record has now been augmented with the inclusion of Dr. Gordon's April 24, 2017 and August 20, 2018 reports. As explained below, Dr. Gordon's reports still do not sufficiently explain his apportionment determination. We therefore find applicant entitled to an unapportioned award of permanent disability. For the reasons stated by the WCJ in the Report which we quote below we affirm the WCJ's finding that applicant did not carry his burden of rebutting the scheduled, unapportioned permanent disability finding. We therefore grant reconsideration and amend the WCJ's decision to find an unapportioned award of permanent disability of 40%.

Applicant was initially evaluated by Dr. Gordon on April 24, 2017. In a report of that date, Dr. Gordon wrote:

As far as causation is concerned, this is a somewhat complex issue.

It appears that Mr. Valdez had an enchondroma which is a tumor within the metacarpal bone that forms a cystic-type lesion within the bone. He then sustained a forcible hyperextension injury when the board hyperextended his fingers, and it is within reasonable medical probability that at that time, this injury caused a fracture through the enchondroma.

It is not unusual for enchondromas to continue to grow, which usually is the case, and a fracture then occurs once the cortex becomes thin and weak enough, and a traumatic episode then results in a fracture and abnormal position. This appears to be the occurrence in this situation.

Considering the underlying problem, the likelihood of ongoing problems, and the aggravating injury that occurred, apportionment as far as the underlying cause is appropriate.

My best judgment would be to apportion 40 percent to the underlying enchondroma and 60 percent to the traumatic episode that caused the fracture, the problem that necessitated bone grafting and further treatment.

(April 24, 2017 report at p. 8.)

At the time of the April 24, 2017 report, Dr. Gordon did not give any factors of permanent impairment. In fact, Dr. Gordon wrote that applicant “remains on temporary total disability.” (April 24, 2017 report at p. 9.) Dr. Gordon ultimately found applicant permanent and stationary in a report of June 29, 2020. In the June 29, 2020 report, as corrected in an October 5, 2020 supplemental report, Dr. Gordon rated applicant’s permanent impairment, assessing 10% whole person impairment based on loss of range of motion in the fingers and 9% whole person impairment based on chronic pain. (June 29, 2020 report at pp. 8-10; October 5, 2020 report at p. 2.)

With regard to apportionment, Dr. Gordon wrote in his June 29, 2020 report:

He did, however, have an enchondroma with a fracture through it requiring grafting. This is now fully healed, and x-ray shows no recurrence. In addition, he has developed a chronic regional pain syndrome.

This significant underlying problem does contribute to the patient’s ultimate disability, and I have previously opined that 40 percent of the ultimate disability results from the underlying enchondroma and tumor processes and 60 percent results from the subsequent fracture that occurred with apportionment of 60 percent to industrial factors, and this remains my opinion.

(June 29, 2020 report at p. 8.)

While it is now well established that one may properly apportion to pathology and asymptomatic prior conditions (see, e.g. *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617 [Appeals Bd. en banc]), an apportionment opinion must still constitute substantial medical evidence. As we explained in *Escobedo*:

[A] medical report is not substantial evidence unless it sets forth the reasoning behind the physician’s opinion, not merely his or her conclusions. [Citations.]

Moreover, in the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles. [Citations.]

For example, if a physician opines that approximately 50% of an employee’s back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury

(e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.

(*Escobedo*, 70 Cal.Comp.Cases at p. 621.)

Dr. Gordon's explanations of apportionment in both his 2017 initial report and his 2020 permanent and stationary report are conclusory and do not constitute substantial medical evidence. Dr. Gordon does not describe in detail how the non-industrial enchondroma is contributing to the loss of range of motion and the pain which constitute the applicant's permanent impairment. In fact, as noted above, the initial apportionment determination was made years before applicant was permanent and stationary and given factors of permanent impairment. The original apportionment determination is thus not a proper parceling of permanent impairment, which had not yet been determined, and the subsequent reporting does not cure this error. We therefore find applicant entitled to an unapportioned award of permanent disability.

With regard to the issue of vocational rebuttal of the permanent disability rating, we will affirm the WCJ's decision for the reasons stated by the WCJ quoted below. We have omitted a sentence regarding applicant's vocational expert's lack of discussion of Dr. Gordon's apportionment determination since, as discussed above, we do not find the apportionment determination to constitute substantial medical evidence.

Vocational Evaluation Evidence

The only substantial medical-legal evidence addressing the issues of permanent disability from a medical evaluator is the reporting by way of multiple reports from Dr. Leonard Gordon, M.D., discussed above.

Following receipt of that reporting, applicant's counsel obtained evidence to rebut the Agreed Medical Evaluator from vocational evaluator Scott Simon. Defendant obtained responsive reporting from vocational evaluator James Westman.

As herein relevant, Mr. Westman concluded, reasonably so in my opinion, that applicant was amenable to rehabilitation.

Mr. Simon concluded that applicant was not so amenable, but also included in

his consideration discussion of disability for applicant's left hand, which was not the subject of the injury herein, with Dr. Gordon having only found disability for the right hand. I found multiple inconsistencies and illogical conclusions in Mr. Simon's reporting, discussed in greater detail in the trial briefing submitted herein by defendant. For all of these reasons, I did not find his conclusions to constitute substantial evidence on the issues herein, and did not follow them.

[Sentence regarding Mr. Simon's lack of consideration of Dr. Gordon's apportionment omitted.] Irrespective of that deficiency, I did not find his overall opinions to be persuasive, as set forth in the preceding paragraph.

As set forth in the *Ogilvie v. WCAB* (2011) 76 CCC 624 decision, and consistent with the *Dahl* decision (*Contra Costa County vs Dahl*)(2015) 80 CCC 1119, absent inability to be vocationally rehabilitated, the permanent disability rating schedule should be utilized as the basis for the award of permanent disability herein. Accordingly, I have rated the permanent disability by utilizing the opinions of the Agreed Medical Evaluator, as set forth previously.

Even were the case law not so interpreted, I did not find the QRR reports sufficiently substantial or persuasive or sufficient to overcome the persuasive opinions of the AME, or sufficient to rebut the Permanent Disability Rating Schedule as per Labor Code Section 4660.1. Therefore, although those reports were admitted into evidence, they were not used as the basis for my findings or this decision, other than with respect to my conclusion that Mr. Westman correctly concluded that applicant was amenable to vocational rehabilitation.

Where legally competent medical evidence is in disagreement, the Board has the power to resolve the conflicts in the evidence and to choose the most persuasive among the conflicting medical reports. (Labor Code Section 3202.5; *Scott Company v. WCAB* (1983) 139 Cal. App. 3d 98, 48 CCC 65, 71). In so doing, the Board may properly rely upon the considered opinion of one physician, although other medical evidence may be in disagreement. *LeVesque v. WCAB* (1970) 1 Cal. 3d 627, 35 CCC 16, 26. In this case, I found most persuasive the well-reasoned and comprehensive reports of the Agreed Medical Evaluator, Dr. Gordon. See also *Garza v. WCAB* (1970) 3 Cal. 3d 312, 35 CCC 500.

Any award, order or decision must be supported by substantial evidence in light of the entire Record, as is the case here with respect to the opinions of the Agreed Medical Examiner. (*Lamb v. WCAB* (1974) 11 Cal. 3d 274, 39 CCC 310; *LeVesque v. WCAB* (1970) 1 Cal.3d 627, 35 CCC 16).

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings, Award and Order of March 25, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Order of March 25, 2024 is **AMENDED** as follows:

FINDINGS

(1) The stipulated facts set forth in the Minutes of Hearing of the hearing held on May 15, 2023, are hereby adopted as FINDINGS OF FACT.

(2) Based on the record, it is found that Vincent Valdez, age 59 on the date of injury, while employed as a laborer (occupational group 480) on August 30, 2016, at Cupertino, California, by Holder Construction Group LLC, insured for workers' compensation purposes by National Union Fire Insurance, administered by Gallagher Bassett, sustained injury arising out of and in the course of employment to his right dominant hand and fingers.

(3) Applicant's earnings were \$1,314.25 per week, sufficient to warrant a temporary disability rate of \$875.50 per week, and a permanent disability rate of \$290.00 per week.

(4) Applicant has been adequately compensated for all compensable periods of temporary disability claimed through 6/29/2020 (with 104 weeks having been paid), and permanent disability has been advanced at \$290.00 per week from 4/11/2019 thru 10/12/2020, in the sum of \$26,328.75, subject to proof.

(5) Applicant's condition was permanent and stationary as of 6/29/2020, as per the reports of Agreed Medical Evaluator Leonard Gordon, M.D.

(6) All medical treatment was furnished, with Dr. Peter Abaci, M.D., the primary treating physician, and applicant is in need of further medical treatment for his right hand and fingers, to cure or relieve from the effects of this injury.

(7) Applicant's occupation is properly categorized in group 480, due to the relatively heavy laboring activities of his job and the duties he was performing at the time of his injury.

(8) The Agreed Medical Evaluator reports of Dr. Leonard Gordon, MD, (most specifically Board Exhibits X, Y and Z, and XX and YY) rate at 19% whole person impairment and after adjustment for age and occupation, the final rating for his permanent disability is 40%, equal to 201 weeks at \$290.00 per week, or \$58,290.00.

(9) Applicant's attorney has earned a fee for his services herein in the sum of \$8,743.50 (15% of the awarded permanent disability), and a lien is allowed to that extent against the permanent disability awarded herein, and to the extent there are insufficient accrued amounts of permanent disability to allow payment of the fee from such source, then defendant is to pay such amount in addition to the awarded permanent disability.

AWARD AND ORDER

AWARD is made in favor of Vincent Valdez and against National Union Fire Insurance, as follows:

(a) Applicant is awarded permanent disability of 40%, equal to 201 weeks of permanent disability payable at \$ 290.00 per week, in the total sum of \$58,290.00, less credit for amounts advanced or paid to date, and further less an attorney fee payable to John Dunn for approved attorney fee in the sum of \$8,743.50 (15% of p.d. awarded); in the event there is insufficient accrued permanent disability remaining to be paid to allow payment in full of said fee, defendant is to pay such insufficient amount available in addition to the awarded permanent disability in order to satisfy the Fee;

(b) Applicant is awarded further medical treatment for the right hand and fingers, to the extent reasonably required to cure or relieve from the effects of the injury herein;

(c) John Dunn is awarded an attorney fee for legal services herein, in the sum of \$8,743.50, payable by defendant as set forth in (a) above;

(d) The cost Petition for QRR reimbursement is deferred for informal adjustment in the event of failure of informal adjustment, with counsel for defendant advising that said Petition is being informally adjusted;

(e) All other issues not herein addressed, including L.C. 132a, are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 31, 2024

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

**VINCENT VALDEZ
JOHN C. DUNN
MULLEN & FILIPPI**

DW/oo

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