

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

FRANCES JOHNSON, *Applicant*

vs.

**STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS AND
REHABILITATION, legally uninsured, administered by STATE COMPENSATION
INSURANCE FUND - STATE CONTRACTS SERVICES, *Defendants***

**Adjudication Number: ADJ9598012
San Bernardino District Office**

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

Defendant seeks reconsideration of the Findings and Award, (F&A) issued by the workers' compensation administrative law judge (WCJ) on February 12, 2021, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her right shoulder, right elbow, right wrist, right hand, and in the form of complex regional pain syndrome in her right upper extremity; that she did not sustain injury AOE/COE in the form of left carpal tunnel syndrome; and that the injury caused 70% permanent disability.

Defendant contends that the March 1, 2019 report from primary treating physician (PTP) Scott Goldman, M.D., is not substantial evidence, and that the trial record does not contain substantial evidence that applicant retired because of her industrial injury so she is not entitled to the Labor Code section 4658(d)(2) 15% increase in permanent disability indemnity.¹

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We did not receive an Answer from applicant.

¹All further statutory references are to the Labor Code unless otherwise noted.

We have considered the allegations in the Petition for Reconsideration (Petition), and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, and we will affirm the F&A, except that we will amend the F&A to find that the injury caused 71% permanent disability, and to defer the issue the section 4658(d)(2) 15% increase in permanent disability indemnity (Finding of Fact 2); and to defer the issue of attorney fees (Finding of Fact 4). We will amend the Award based thereon and return the matter to the WCJ to conduct further proceedings consistent with this opinion

BACKGROUND

Applicant claimed injury to her right shoulder, right elbow, right wrist, right hand, and in the form of left arm carpal tunnel syndrome, and bilateral upper extremity complex regional pain syndrome, while employed by defendant as a teaching assistant during the period from October 4, 2010, through August 17, 2012.

On January 15, 2013, applicant was evaluated by orthopedic qualified medical examiner (QME) Vincent L. Gumbs, M.D. (Def. Exh. A, Dr. Gumbs, January 15, 2013.) Dr. Gumbs re-evaluated applicant on May 20, 2014, and September 12, 2017.

Applicant's primary treating physician (PTP) Scott Goldman, M.D., found that applicant's condition reached maximum medical improvement/permanent and stationary status on March 1, 2019. (App. Exh. 1, Dr. Goldman, March 1, 2019, p. 4.) Dr. Goldman diagnosed applicant as having right carpal tunnel syndrome/status post right carpal tunnel release, right upper arm complex regional pain syndrome I (CPRS I), and right cubital tunnel syndrome. (App. Exh. 1, p. 3.) He concluded that applicant had 11% whole person impairment (WPI) for her right elbow and 39% WPI for her right wrist/hand, for a total of 46% WPI. (App. Exh. 1, pp. 4 - 5.)

On September 24, 2019, Dr. Gumbs re-evaluated applicant. Dr. Gumbs re-examined applicant, took a history, and reviewed the interim medical record. He concluded that applicant's right shoulder was normal, that she was post right lateral epicondylitis [tennis elbow] with right lateral extensor release [elbow surgery], that she had right carpal tunnel syndrome, and complex regional pain syndrome. (Def. Exh I, Dr. Gumbs, September 24, 2019, p. 10.) Dr. Gumbs assigned 45% right upper extremity impairment, converted to 27% WPI and included a 3% WPI pain add-on. (Def. Exh I, addendum [Electronic Adjudication Management System (EAMS) p. 16].)

The parties proceeded to trial on November 17, 2020. The issues submitted for decision included parts of body injured and permanent disability/apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), November 17, 2020, p. 2.)

DISCUSSION

An award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) The relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (See *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, [35 Cal.Comp.Cases 525].)

Here, the F&A was based on the opinions of PTP Dr. Goldman as stated in his March 1, 2019 report. (See Opinion on Decision, p. 2; Report, pp. 2 – 3.) Defendant argues that Dr. Goldman's report is not substantial evidence because he did not list the records he reviewed to prepare his report and that, "In stark contrast to the de minimis record review of Dr. Goldman, PQME Vincent Gumbs indicated he spent eight and 1/4 hours reviewing records to prepare his September 24, 2019 report." (Petition, pp. 3 – 4.) We first note that Dr. Goldman was applicant's PTP over a course of several years, beginning May 6, 2013. (App. Exh. 1, p. 1.) In the Treatment History section of his report Dr. Goldman summarized applicant's treatment, including the elbow and carpal tunnel surgeries she underwent. (App. Exh. 1, p. 1.) Also, Dr. Gumb's review of the medical record included approximately thirty of Dr. Goldman PR-2s. (Def. Exh I, pp. 3 – 8.) Based on our review of the reports from Dr. Gumb and Dr. Goldman, it appears that Dr. Goldman was well aware of applicant's treatment history. The fact that he did not list the reports and diagnostics prepared and/or reviewed over the course of applicant's treatment, does not mean his report is not substantial evidence.

Defendant also argues that Dr. Goldman's report is not substantial evidence because "it provides impermissible duplication of applicant's impairment." (Petition p. 4.)

The Combining Impairment Ratings section of the Upper Extremity chapter in the American Medical Association Guides to the Evaluation of Permanent Impairment, (AMA Guides) states:

When a given unit has more than one type of impairment (eg, abnormal motion, sensory loss, and partial amputation of a finger), the various impairments are

combined to determine the total impairment of the unit (eg, finger) before conversion to the next larger unit (eg, hand). Similarly, multiple regional impairments, such as those of the hand, wrist, elbow, and shoulder, are first expressed individually as upper extremity impairments and then combined to determine the total upper extremity impairment. The latter is finally converted to whole person impairment (Table 16-3).
(AMA Guides, p. 438.)

In his report, Dr. Goldman stated that applicant had 11% WPI for her right elbow and 39% WPI for her right wrist/hand, and he combined the impairments for a total of 46% WPI. (App. Exh. 1, pp. 4 - 5.) Having combined the multiple regional impairments, (right elbow and right wrist/hand) Dr. Goldman's conclusion that applicant had 46% WPI is consistent with the provisions of the AMA Guides as noted above.

Although Dr. Goldman's report is substantial evidence, the 70% permanent disability rating was not based on the 46% combined impairment he assigned as the WPI caused by applicant's injury. (App. Exh. 1, pp. 4 - 5.) The right elbow and the right wrist/hand impairments were rated separately and then combined, for a total of 70%. (Opinion on Decision, p. 3.) Pursuant to the Combining Impairment Ratings section of the AMA Guides quoted above, Dr. Goldman properly combined the impairments for a total of 46% WPI. Based thereon applicant's disability is rated using the Upper Extremity CPRS I Impairment, (2005 Permanent Disability Rating Schedule, 2 - 4) as follows: 16.01.02.04 - 46 - [5] - 58 - 241G - 61 - 71% PD

Finally, we note that there is no Finding or Award in the F&A as to the section 4658(d)(2) 15% increase in permanent disability indemnity. In the Opinion on Decision, the WCJ states:

The Defendant failed to provide any evidence they made an offer of regular work to the Applicant consistent with Labor Code section 4658(d)(2). Therefore, it is found that the Applicant is entitled to a 15% increase in permanent disability pursuant to Labor Code section 4658(d)(2).
(Opinion on Decision, p. 3.)

Statements in an Opinion on Decision are not findings of fact, their purpose is to explain the basis for the decision. (See Lab. Code § 5313; *Twentieth Century-Fox Film Corp. v. Workers' Comp. Appeals Bd.*, (1983) 41 Cal.App.3d 778 [48 Cal.Comp.Cases 275].) Also, the issue of applicant's entitlement to the section 4658(d)(2) increase was not raised or identified as an issue at trial and it was not an issue submitted for decision. (MOH/SOE, p. 2.) Raising and determining such an issue without providing prior notice to the parties, and giving them an opportunity to be

heard, is contrary to due process. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284 [66 Cal.Comp.Cases 584]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151 [65 Cal.Comp.Cases 805].) All parties are entitled to due process in a workers' compensation proceeding. (*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789 [59 Cal.Comp.Cases 461].) Thus, upon return of this matter the parties may, or may not, raise and litigate the issue of the section 4658(d)(2) increase.

Accordingly, we affirm the F&A, except that we amend the F&A to find that the injury caused 71% permanent disability, and to defer the issue of the section 4658(d)(2) 15% increase in permanent disability indemnity (Finding of Fact 2); and to defer the issue of attorney fees (Finding of Fact 4). We amend the Award based thereon and return the matter to the WCJ to conduct further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on February 12, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 12, 2021 Findings and Award, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. The injury caused permanent disability of 71 percent; the issue of applicant's entitlement to a Labor Code section 4658(d)(2) increase in permanent disability indemnity benefits is deferred.

4. The issue of the reasonable attorney fee for applicant's counsel is deferred.

AWARD

* * *

a. The award of permanent disability indemnity is deferred pending development of the record.

c. The award of attorney fees to applicant's counsel is deferred pending development of the record.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 30, 2021

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

**FRANCES JOHNSON
LERNER, MOORE, SILVA, CUNNINGHAM & RUBEL
STATE COMPENSATION INSURANCE FUND**

TLH/pc

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