WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ANTONIO MARTINEZ, *Applicant*

vs.

BARODA FARMS; ZENITH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ8062477
Santa Barbara District Office

OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION

Defendant seeks reconsideration of the "Findings and Award" (F&A) issued on January 14, 2025, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant suffered an industrial injury to his cervical spine, thoracic spine, and lumbar spine, which resulted in applicant sustaining 66% permanent partial disability, without apportionment, and found that applicant was entitled to an increased rate of permanent disability pursuant to Labor Code[1], section 4658(d).

Defendant contends that the finding of apportionment was supported by substantial medical evidence. Defendant further contends that the parties stipulated to the rate of permanent disability and that the issue of whether the rate of disability should have been affected by section 4658(d) was not raised as an issue at trial.

We have received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record we will grant defendant's petition for reconsideration, and as our Decision After Reconsideration, we will affirm the January

[1] All future references are to the Labor Code unless noted.

14, 2025 F&A, except that we will amend the F&A to defer the issues of section 4658(d) and attorney fees and return this matter to the trial level for further proceedings.

FACTS

Per the WCJ's Report:

> Applicant sustained an admitted specific injury occurring on August 27, 2010 to his cervical spine, thoracic spine and lumbar spine while working for Baroda Farms.
>
> Applicant was evaluated by Steven Pearson, M.D., in the capacity of a PQME. Dr. Pearson first evaluated applicant in 2011 and wrote his last report in 2022. Over this period, Dr. Pearson authored (ten) 10 medical reports and was deposed on one occasion. Following trial, the WCJ appointed Peter Newton, M.D., pursuant to Labor Code §5701.
>
> The matter proceeded to trial, and following an Opinion on Decision and Findings of Fact and Award finding inter alia, the physician's opinion on apportionment did not constitute substantial medical evidence and applicant is entitled to an unapportioned award, defendant filed the instant Petition for Reconsideration.

* * *

As the WCAB has cited in the decisions,

> "In order to comply with section 4663, a physician's report in which permanent disability is addressed must also address apportionment of that permanent disability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*).) However, the mere fact that a physician's report addresses the issue of causation of permanent disability and makes an apportionment determination by finding the approximate respective percentages of industrial and non-industrial causation does not necessarily render the report substantial evidence upon which we may rely. Rather, the report 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 that factors other than the industrial injury at issue caused permanent disability.* (*Id.* at p. 621.) Our decision in *Escobedo* summarized the minimum requirements for an apportionment analysis as follows:

> [T]o be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, 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. 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."

Defendant cites two of Dr. Newton's reports to support his position on apportionment. As reflected in defendant's Petition for Reconsideration on page 4,

Dr. Newton issued two reports in this case. He issued an initial narrative report of April 3, 2024 (Applicant's Exhibit 13; EAMS ID # 53837122). Therein, he provides impairment, addressed causation and discussed apportionment at P. 57. Dr. Newton stated:

> "To a reasonable degree of medical probability, 15% of his cervical condition/disability/impairment is apportioned to the continuous trauma work through 8/27/2010 and 85% to the specific of 8/27/2010 injury.
>
> To a reasonable degree of medical probability, l00% of his current thoracic condition/disability/impairment is apportioned to the 8/27/2010 injury.
>
> To a reasonable degree of medical probability, 50% of this applicant's lumbar spine condition/disability/impairment is apportioned to the 4/10/2000 injury from which the applicant continued to be symptomatic through 2010, and the 50% to the 8/27/2010 injury" (Id. At p. 57).

This analysis is wholly inadequate. The doctor assigns percentages without explanation, and then further fails to explain the how and why the prior injuries or impairment contributed and/or caused the impairment in the instant injury.

In his second report, dated July 9, 2024, Dr. Newton reviewed diagnostic studies and Dr. Newton responded to four questions asked by defense.

The first question was asking the doctor to reconsider the level of permanent impairment in the cervical spine.

The second question also concerned permanent disability impairment and whether ROM or DRE was the appropriate methodology to be applied.

The third question asked the doctor to raise the level of apportionment; while the doctor listed numerous studies and reviews of other physician reports and records.

As Dr. Newton wrote,

> "Based on these records, including the applicant's abilities before the 8/27/2010 injury and after, I do feel that 50% apportionment is accurate."

Applicant clearly has a past history of injuries and medical issues. However, merely reciting those issues without an explanation as to the how and why these prior incidents, injuries, and medical issues caused or contributed to the present level of impairment is not substantial evidence on the issue of apportionment.

The fourth question asks the physician to find apportionment based on the MRI and X-rays he reviewed.

The doctor apportions based on his age, degenerative stenosis, and degenerative disc disease, for a total of 10%, but never breaks down what the apportionment is for each of these conditions, and then further never explains how the how and why this contributed to his level of permanent disability from the instant industrial injury.

(WCJ's Report, pp. 2-4.)

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(§ 5909.)

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on February 7, 2025, and 60 days from the date of transmission is Tuesday, April 8, 2025. This decision is issued by or on April 8, 2025, so that we have timely acted on the Petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on February 7, 2025, and the case was transmitted to the Appeals Board on February 7, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on February 7, 2025.

II.

As to the issue of apportionment, we agree with the analysis of the WCJ in his report. Defendant carries the burden of proof on apportionment. (§ 5705.) "[T]he medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (*Peter Kiewit Sons v. Industrial Acci. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188]; see also, *Peter Kiewit Sons v. Industrial Acci. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831 [30 Cal.Comp.Cases 188] "[i]n a field which forces the experts into hypothesis, unaided lay judgment amounts to nothing more than speculation"].)

Here, the medical expert merely recites applicant's medical history and then provides a conclusion on apportionment of disability. What is lacking is an explanation for the conclusion reached and absent such an explanation, defendant has not proven apportionment.

As to the issue of application of section 4658(d), the findings of fact do not support the award issued by the WCJ, and thus, that issue should be returned to the trial level.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd*. (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is ". . . one of 'the rudiments of fair play' assured to every litigant . . ." (*Id*. at 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, [The] commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law. (*Id*. at 577.)

A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal. Comp. Cases 584]; *Rucker, supra,* at 157-158 citing *Kaiser Co. v. Industrial Acci. Com*. (*Baskin*) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd*. (1992) 5 Cal.App.4 703, 710 [57 Cal.Comp.Cases 230].)

While we agree with the WCJ that the raising of permanently disability as an issue necessarily raises application of section 4658(d), the parties stipulated that applicant's permanent disability rate was $230.00 per week. (Minutes of Hearing and Summary of Evidence, December 10, 2024, p. 2, lines 15-17.) As with any proposed stipulation of the parties, the WCJ is not required to accept the stipulation if it is inadequate. However, when rejecting a stipulation, proper procedure is to provide notice to the parties of such inadequacy and allow the parties a chance to be heard on that issue. (Cal. Code Regs., tit. 8, § 10832.)

We would further note that any finding as to application of section 4658(d) requires either a stipulation or a finding that the employer employed at least 50 employees and that no return-to-work offer was provided. (§ 4658(d).) No such findings were made in this case, and thus the findings of fact do not support the award that issued. Thus, to allow all parties due process, we will return the issue of section 4658(d) to the trial level for further proceedings. (See *Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284.)

Lastly, we would admonish defense counsel in this matter that ad hominem attacks on the trial judge as part of a petition for reconsideration are inappropriate, unprofessional, and only serve as a distraction from counsel's argument.

Accordingly, we will grant reconsideration and as our Decision After Reconsideration, we will affirm the January 14, 2025 F&A, except that we will amend the F&A to defer the issues of section 4658(d) and attorney fees and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED that defendant's petition for reconsideration of the F&A issued on January 14, 2025, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Appeals Board that the January 14, 2025 F&A is **AFFIRMED, EXCEPT THAT** Findings of Fact No. 8 and 12 are **AMENDED** to read as follows:

FINDING OF FACT

8. It is found applicant is entitled to a permanent disability award of 66% which is equivalent to 399.25 weeks of indemnity payable at the initial rate of $230.00 per week, less attorney's fees and less permanent disability advances paid on account thereof, and that any change in rate pursuant to Labor Code, section 4658(d) is deferred to the parties to adjust with jurisdiction reserved at the trial level in the event of a dispute.

12. Ghitterman, Ghitterman & Feld is entitled to an attorney's fee equal to 15% of permanent disability benefits awarded herein, the precise calculation of which is deferred pending a final determination of the permanent disability rate.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 8, 2025

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

ANTONIO MARTINEZ
GHITTERMAN, GHITTERMAN & FELD
TOBIN LUCKS LLP

EDL/mc

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