WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JARED SANDERS, *Applicant*

vs.

CALIFORNIA HIGHWAY PATROL, legally uninsured;
administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ18189096
Sacramento District Office

OPINION AND ORDERS GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the "Findings of Fact, Award, Order, and Opinion on Decision" (F&A) issued on February 26, 2025, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant sustained 34% permanent partial disability after application of apportionment under Labor Code[1] section 4664(b).

Applicant contends that apportionment cannot be applied in this case by application of the anti-attribution clause of section 4663(e) and that defendant failed to prove overlap under section 4664(b). Finally, applicant notes a mathematical error in the calculation of apportionment.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we grant reconsideration to correct the mathematical error, but otherwise deny reconsideration on the merits.

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 applicant's petition for reconsideration and as our Decision After Reconsideration, we will rescind the February 26, 2025 F&A and return this matter to the trial level for further proceedings.

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

FACTS

Applicant worked as an officer for the California Highway Patrol when he sustained a cumulative injury to his lumbar spine through the period ending on March 24, 2023. (Minutes of Hearing and Summary of Evidence, January 29, 2025, p. 2, lines 3-19.) The parties stipulated that applicant's present level of permanent disability is 54% before apportionment. (*Ibid*.) The parties further stipulated that: "Applicant received a prior award of 19% disability for the lumbar spine." (*Id*. at p. 2, lines 17-18.) "The parties have stipulated there is no legal basis for apportionment under Labor Code Section 4663." (*Id*. at p. 2, lines 18-19.)

The primary issue for trial was listed as: "The validity of apportionment under Labor Code section 4664 and whether the current 54% level of disability should be reduced by 19% based on the prior award." (*Id*. at p. 2, lines 21-23.)

Applicant was seen by qualified medical evaluator (QME) David Chow, M.D., who authored two reports in evidence. (Joint Exhibits 1 and 2.) Dr. Chow took a history of cumulative injury and assigned applicant 28% whole-person impairment (WPI) using the Diagnosis Related Estimate (DRE) chart of the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (2001) (AMA Guides). (Joint Exhibit 2, Report of David Chow, M.D., September 3, 2024, p. 2.)

It appears that Dr. Chow reviewed a record of a ratings report from Mark Bernhard, D.O., who evaluated applicant on a prior claim of cumulative injury to the lumbar spine. (*Id*. at p. 7.) Although applicant had underwent lumbar fusion surgery in June 2017, it appears that Dr. Bernhard rated applicant to 10% WPI. (*Ibid*.)

The parties provided a single report of Dr. Bernhard in evidence. (Joint Exhibit 3, Report of Mark Bernhard, D.O., January 18, 2018.) In that report, Dr. Bernhard rated applicant to 22% WPI based upon a range-of-motion analysis. (*Id*. at p. 28.)

Dr. Chow did not comment upon overlap of disability as between the two dates of injury.

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 March 21, 2025, and 60 days from the date of transmission is Tuesday, May 20, 2025. This decision is issued by or on May 20, 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 March 21, 2025, and the case was transmitted to the Appeals Board on March 21, 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 March 21, 2025.

II.

The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, *supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton*, *supra*, at p. 475.)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

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).) "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

"[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] ["[i]n a field which forces the experts into hypothesis, unaided lay judgment amounts to nothing more than speculation"].)

The requirement for expert medical evidence exists throughout workers' compensation proceedings, including determination of temporary disability, permanent disability, apportionment, and causation of injury to name a few.[2] (See also, *Escobedo*, *supra*, [wherein the Appeals Board required that apportionment under section 4663 be established by substantial medical evidence].)

The burden is on the employer to present specific evidence of a prior permanent disability award for which apportionment may be warranted under section 4664(b) and provide medical evidence of overlap. (See *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223 (Appeals Board en banc); *United States Fire Ins. Co. v. Workers' Comp. Appeals Bd*. (*Urzua*) (2007) 72 Cal.Comp.Cases 869 (writ den.) [Defendant failed to meet burden of proof on apportionment in the absence of evidence of a prior award of permanent disability by not subpoenaing records from applicant's prior claim].) This burden of proof was thoroughly described by the court in *Kopping* as follows:

> First, the employer must prove the existence of the prior permanent disability award. Then, having established by this proof that the permanent disability on which that award was based still exists, the employer must prove the extent of the overlap, if any, between the prior disability and the current disability. Under these circumstances, the employer is entitled to avoid liability for the claimant's current permanent disability only to the extent the employer carries its burden of proving that some or all of that disability overlaps with the prior disability

[2] See e.g., *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [59 Cal.Comp.Cases 579] (*Rodarte*); *County of San Bernardino v. W.C.A.B.* (*Nelson-Watkins*) (2018) 83 Cal. Comp. Cases 1282, 12830-1286 [2018 Cal. Wrk. Comp. LEXIS 46] (writ denied) [applicant's correlation of symptoms with work exposures insufficient to establish knowledge her condition was caused by employment]; *Hughes Aircraft Company v. Workers' Comp. Appeals Bd.* (*Zimmerman*) (1993) 58 Cal.Comp.Cases 220 [1993 Cal. Wrk. Comp. LEXIS 2853] (writ den.) [general medical advice that work stress was depleting applicant's immune system insufficient to confer knowledge for purposes of section 5412]; see also *Zenith Insurance Co. v. Workers' Comp. Appeals Bd.* (*Yanos*) (2010) 75 Cal. Comp. Cases 1303, 1305-1306 (writ denied) [2010 Cal. Wrk. Comp. LEXIS 208] [statute of limitations does not begin to run prior to applicant's knowledge she had sustained a cumulative trauma and that injury was work-related].

> and is therefore attributable to the prior industrial injury, for which the employer is not liable.

(*Kopping v. Workers' Comp. Appeals Bd*. (2006) 142 Cal.App.4th 1099, 1115.)

Here, the parties stipulated that applicant had a prior award of 19% permanent disability, but it is unclear how the prior disability was calculated as the award is not in evidence. Accordingly, the prior award is not in the record and we cannot review it upon reconsideration.[3]

The medical reporting that is in evidence from the prior QME established 22% WPI to the lumbar spine using range of motion, which based on the parties' stipulation, exceeds the award itself. It appears that per Dr. Chow's medical record review, the prior QME's opinions on disability may have changed and that defendant may have submitted a stale ratings report in error. The current record does not establish how the prior award was calculated and without such evidence, defendant did not meet its burden of proving that the two awards overlapped.

Accordingly, we grant applicant's petition for reconsideration and as our Decision After Reconsideration, we rescind the February 26, 2025 F&A and return this matter to the trial level for further proceedings.

[3] Even if the WCJ's decision in this matter were expertly reasoned and grammatically flawless, an issue we do not decide, it must still be based upon admitted evidence in the record.

For the foregoing reasons,

IT IS ORDERED that applicant's petition for reconsideration of the Findings of Fact, Award, Order, and Opinion on Decision issued on February 26, 2025, by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Award, Order, and Opinion on Decision issued on February 26, 2025, by the WCJ is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 20, 2025

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

JARED SANDERS
JONES CLIFFORD, LLP
STATE COMPENSATION ISURANCE FUND, LEGAL

EDL/mc

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