

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

JOSE RAMIREZ, *Applicant*

vs.

**QUALITY SCALES UNLIMITED;
INSURANCE COMPANY OF THE WEST,
adjusted by ICW GROUP, *Defendants***

**Adjudication Number: ADJ10518881
San Jose District Office**

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

Applicant in pro per seeks reconsideration of the Findings and Awards (F&A) issued on December 17, 2024 by a workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant sustained "a non-catastrophic injury arising out of an in the course of employment to his head, neck, low back, left hip, left knee, left shoulder, and psyche"; and, that pursuant to the panel qualified medical evaluation (PQME) reports and depositions of David Chang, M.D., and the consultative rating determination dated February 8, 2022, applicant sustained a permanent disability (PD) impairment rating utilizing the AMA Guides of 40% due to his injury "and excluding any psychiatric component." The WCJ issued an award, in pertinent part, of 40% PD and further medical treatment for all body parts found to cure or relieve from the effects of the injury found.

Applicant contends that the evidence does not justify these findings of fact because: there are other reports from PQME Dr. Chang indicating a 58% PD rating (dated December 1, 2021) and 65% PD rating (dated August 23, 2023); two scars (measuring six inches and two inches) from his surgeries should have been considered when calculating his PD rating pursuant to the AMA guidelines; the PD rating should have contained a psychiatric component as there are copies of documents from the Occupational Safety and Health Agency and Dr. Hilson stating that his injury was "catastrophic and violent"; there are copies of documents from Dr. Hilson, the Social Security

Administration, and a State Vocational Rehabilitation expert stating that he cannot perform gainful work in the open market; and, there are post-trial MRI results dated December 27, 2024 showing damage to left shoulder and left hip. In addition, applicant contends that he has discovered new evidence material to him which he could not with reasonable diligence have discovered and produced at the hearing.

Defendant did not file an answer to the petition for reconsideration. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), who recommended that the petition be denied.

We have reviewed the record in this matter, the allegations of the petition and the contents of the Report. For the reasons set forth below, we grant reconsideration and as our decision after reconsideration, we will amend the F&A (Findings of Fact numbers (2), (6) and (8) and Awards (a) and (b)), but otherwise affirm the WCJ's decision.

I.

Former Labor Code 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, Labor Code 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.

Under Labor Code 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 January 15, 2025 and 60 days from the date of transmission is Sunday, March 16, 2025. The next business day that is 60 days from the date of transmission is Monday, March 17, 2025.. (See Cal. Code Regs., tit. 8, § 10600(b).)¹ This decision is issued by or on Monday, March 17, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on January 15, 2025, and the case was transmitted to the Appeals Board on January 15, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on January 15, 2025.

II.

Applicant raises issues as to the WCJ's findings of fact as to the PD rating and the exclusion of any psychiatric component pursuant to Labor Code² section 4660.1, subdivision (c)(1) (section 4660.1(c)(1)), and thus, the award of PD. However, neither the WCJ's Opinion on Decision nor Report³ is sufficient to make the right of reconsideration meaningful on these issues.

¹ WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that: "Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day."

² All further references are to the Labor Code unless otherwise noted.

³ A WCJ's report *may* cure any technical or alleged defect in satisfying the requirements of Labor Code section 5313. (*City of San Diego v. Workers' Comp. Appeals Bd. (Rutherford)* (1989) 54 Cal.Comp.Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 1026 (writ den.)) However, the WCJ's Report in this matter did not do so.

Section 5313 requires that after a matter is submitted, and together with findings of fact, orders, and/or awards, a WCJ “shall” serve “a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.” (Lab. Code, § 5313; see also *Blackledge v. Bank of America, ACE American Insurance Company (Blackledge)* (2010) 75 Cal.Comp.Cases 613, 621-22 (Appeals Bd. en banc).) This opinion on decision must be based on admitted evidence (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*)), 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] (*Garza*); *Le Vesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) 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, supra*, 66 Cal.Comp.Cases at p. 476, citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

Here, the WCJ concluded that applicant’s PD rating was 40% without reference to the specific medical reports, the AMA Guides, applicant’s WPIs, or providing rating strings:

In this case I predicated the awards on the ratable factors of orthopedic disability determined by the PQME, Dr. Chang, as outlined in his reports and depositions. Those reports were the subject of a consultative rating evaluation admitted into evidence without objection (applicant exhibit 1), producing a final rating of 40%, which is the basis for the permanent disability award.

(F&A, Opinion on Decision, p. 8; Report, p. 6.)

The WCJ also concluded without describing the evidence he relied upon nor the legal grounds for his decision, that applicant did not sustain a catastrophic physical injury because “[t]he injury in this case did not involve loss of a limb, paralysis, or other factors as outlined which would suffice to categorize or find it to be a catastrophic injury, in my opinion.” (F&A, Opinion on Decision, p. 8; Report, p. 7.) Based on this conclusion, the WCJ declined to increase the rating for psychiatric factors pursuant to section 4660.1, subdivision (c)(1). (*Ibid.*)

Therefore, neither the WCJ’s Opinion on Decision nor the Report complies with section 5313 and we cannot ascertain either the evidentiary or legal basis for the WCJ’s legal conclusions related to the PD rating or the psychiatric injury.

In addition, the WCJ admitted that he relied on a consultative rating determination from the Disability Evaluation Unit (DEU) of the Division of Worker's Compensation, which coincidentally found a 40% PD rating based on "[t]hose reports" of PQME Dr. Chang.⁴ It may be that applicant submitted a DEU consultative rating determination as evidence at trial without any objection from defendant's counsel; however, the WCJ should know that "Consultative Rating Determinations will not be admissible in judicial proceedings." (Cal. Code Regs., tit. 8, § 10166(b).) Therefore, pursuant to WCAB Rule 10166(b), the DEU consultative rating should never have come into evidence, and therefore, the WCJ's finding of fact of 40% PD based in part on this inadmissible evidence must be rescinded. (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 476 [a WCJ's decision must be based on admissible evidence].)

We note that if the WCJ was uncertain how to calculate the PD rating in this matter, the WCJ could have submitted formal rating instructions to the DEU pursuant to *Blackledge, supra*, 75 Cal.Comp.Cases at p. 622 ["rating instructions are tentative findings of fact and must be based on substantial medical evidence"].) Even so, "under no circumstances should the WCJ abdicate responsibility for the comprehensive assessment of the employee's WPI(s) to the rater under the guise of asking for the rater's expert assistance. The assistance of the rater should be sought only after the WCJ has thoroughly reviewed the physician's report(s) in conjunction with the AMA Guides and has fully described the WPI(s) to be rated to the best of the WCJ's understanding." (*Id.* at p. 623.)

In addition, while applicant did not sustain loss of limb or paralysis, the WCJ did not explain what he meant by "other factors as outlined" that "would suffice to categorize or find" applicant's injury to be catastrophic. Once again, the WCJ failed to show his work and did not provide sufficient guidance to provide a meaningful opportunity for reconsideration.

First, the WCJ found that applicant sustained a psychiatric injury based on the parties' stipulated findings. (F&A, Findings of Fact number 2; Minutes of Hearing and Summary of

⁴ Applicant's Exhibit 1 is a four-page document consisting of two notices from defendant to applicant regarding his permanent disability benefits dated December 1, 2021 and August 23, 2023, and a consultative rating determination from the Disability Evaluation Unit (DEU) of the Division of Worker's Compensation dated February 8, 2022. (App. Exh. 1, pp. 1-4.) The exhibit raises questions that the WCJ never answered in choosing the 40% PD rating. On December 1, 2021, defendant informed applicant that it calculated his PD rating pursuant to an October 13, 2021 report from PQME Dr. Chang at 58%; on February 8, 2022, the DEU issued the consultative rating determination and calculated his PD rating pursuant to PQME Dr. Chang reports of July 24, 2020 and June 23, 2021 at 40%; on August 23, 2023 – after the consultative rating determination – defendant informed applicant that it calculated his PD rating pursuant to the same October 13, 2021 report from PQME Dr. Chang at 65%. (*Ibid.*)

Evidence, November 13, 2024, p. 2.) However, the WCJ did not make findings of fact as to whether applicant sustained an injury to his psyche as a direct result of his fall and/or whether applicant sustained an injury to his psyche as a compensable consequence of his orthopedic injuries. (See *Wilson v. State Cal Fire* (2019) 84 Cal.Comp.Cases 393, 403 (Appeals Bd. en banc) [employee has burden of proof to establish whether psychiatric injury was directly caused by events of employment or is a compensable consequence of a physical injury].) “Section 4660.1(c) does not preclude increases in impairment ratings when the psyche injury arises directly from the events of employment.” (*Madson v. Michael J. Cavaletto Ranches*, 2017 Cal. Wrk. Comp. P.D. LEXIS 95, *11.)

Any *implicit* finding that applicant’s psychiatric injury was a compensable consequence of his physical injuries given the WCJ’s conclusion that applicant’s injury was not catastrophic is not sufficient to satisfy due process. (See Lab. Code, §4660.1(c)(2); *Wilson, supra*, 84 Cal.Comp.Cases 393 [if psychiatric injury is a compensable consequence of the physical injury, applicant must show that the psychiatric injury resulted from either being the victim of a violent act, being directly exposed to a significant violent act, or sustaining a catastrophic injury].) In addition, given that the issue of whether an injury is catastrophic under section 4660.1(c)(2)(B) “focuses on the nature of the injury and is a fact-driven inquiry,” offering an “opinion” without identifying and referring to the *evidence* and the legal support for that opinion is not sufficient to meet the standards of section 5313 and *Hamilton*. We simply cannot discern *why* it is the opinion of the WCJ that applicant did not sustain a catastrophic injury.

While we express no opinion on whether or not the applicant sustained a catastrophic injury, the trial level decision must not rely solely upon consideration of the specified types of injuries set forth in section 4660.1(b)(2)(B). The plain language of the section makes clear that the legislature did not intend it to be an exhaustive listing. Instead, any determination of the issue should reflect the WCJ’s reasoning as to each consideration enumerated in *Wilson* as to whether or not the injury qualifies as catastrophic.

We also note that there are no findings of fact or discussion in the Opinion on Decision or Report as to whether the mechanism of applicant’s injury was a “violent act” under section 4660.1(c)(2)(A). (See *Madson v. Michael J. Cavaletto Ranches*, 2017 Cal. Wrk. Comp. P.D. LEXIS 95, *13 [“violent act” is not defined as a “criminal or quasi-criminal act” but rather “as an act that

is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening”].)

Finally, as stated above, a decision of the Workers’ Compensation Appeals Board must be supported by substantial evidence, and to be considered substantial evidence, a medical opinion “must be predicated on reasonable medical probability.” (*E.L. Yeager Construction v. Workers’ Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen’s Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-17, 419 [33 Cal.Comp.Cases 660].) An opinion is not substantial evidence if it is based on “inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess.” (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-21 (Appeals Bd. en banc).)

Assessment of an injured employee’s permanent disability starts with a comprehensive medical-legal evaluation conducted by a treating or evaluating physician in compliance with the AMA Guides. (*Blackledge, supra*, 75 Cal.Comp.Cases at p. 619.) The physician determines the WPI for the injured employee’s medical condition pursuant to the AMA Guides and then sets forth his or her reasons for the WPI. (*Id.*, at p. 621.) “The WPI percentage...is dependent, to some extent, on the physician’s judgment, training and experience.” (*Id.*, at p. 620.) However, mere conclusions regarding the WPI are insufficient to establish substantial evidence. (*Id.*, at p. 621; see also *Granado v. Workers’ Comp. Appeals Bd.* (1970) 69 Cal.2d 399, 407; *Zemke v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 799, 800-801.) A WPI evaluation should include: “...a discussion of the employee’s history and symptoms, the results of the physician’s examination, the results of various tests and diagnostic procedures, the diagnosis, the anticipated clinical course, the need for further treatment, and the residual functional capacity and ability to perform activities of daily living (ADLs).” (*Id.*, at pp. 619-620.)⁵ The physician uses the results of the evaluation to compare the employee’s condition with the impairment criteria identified in the AMA Guides and then calculates the percentage of WPI appropriate for the employee’s condition. (*Ibid.*)

We note that the serial permanent and stationary reports of PQME Dr. Chang appear to be inconsistent and lacking in their assessment and evaluation of applicant pursuant to *Blackledge*. For example, Dr. Chang’s mere conclusion that applicant’s low back impairment is no greater than

⁵ WPI percentages, “...estimate the extent of the impairment on whole person functioning and account for basic activities of daily living, not including work.” (AMA Guides, § 1.8, p. 13.)

the award for the prior injury “is insufficient to establish substantial evidence.” (*Blackledge, supra*, 75 Cal.Comp.Cases at 621.)

Accordingly, we grant reconsideration and as our decision after reconsideration, we will amend the F&A as to those findings and awards related to the PD rating and the psychiatric injury (Findings of Fact numbers (2), (6) and (8) and Awards (a) and (b)), but otherwise affirm the WCJ’s decision.

For the foregoing reasons,

IT IS ORDERED that applicant’s Petition for Reconsideration of the Findings and Awards issued on December 17, 2024 by a workers’ compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED as the Decision after Reconsideration of the Workers’ Compensation Appeals Board that the Findings and Awards issued on December 17, 2024 by a workers’ compensation administrative law judge is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS (ADJ1051881)

...

(2) Based on the record, it is found that Applicant, born [], while employed on April 20, 2016 as a scale tech (occupational group 320), at Byron, California, by Quality Scales, Unlimited, insured for workers compensation purposes by Insurance Company of the West, administered by ICW Group, sustained an injury arising out of and in the course of employment, to his head, neck, low back, left hip, left knee, left shoulder, and psyche.

...

(6) The issue of whether applicant’s condition is permanent stationary from the effects of his injury is deferred.

...

(8) The issue of permanent disability impairment rating is deferred. All issues under Lab. Code, § 4660.1(c) are deferred.

...

AWARD AND ORDER (ADJ10518881)

...

(a) The issue of permanent disability impairment rating is deferred.

(b) The issue of attorney's fees is deferred.

...

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PAUL F. KELLY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 17, 2025

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

**JOSE RAMIREZ
YRULEGUI & ROBERTS**

AJF/abs

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