

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

NAOMI RIVERS, *Applicant*

vs.

**UNITED PARCEL SERVICE; LIBERTY MUTUAL INSURANCE CORPORATION,
*Defendants***

**Adjudication Number: ADJ17378619
Riverside District Office**

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

Applicant seeks reconsideration of the December 23, 2024 Findings, Award, and Order (FA&O) wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant while employed as a preloader by defendant on February 6, 2023, sustained an injury arising out of and in the course of employment (AOE/COE) to the left leg (shin). The WCJ issued an award of future medical, but no permanent disability based upon the final report of panel Qualified Medical Evaluator (QME), Dr. Anthony Fenison, dated February 16, 2024, wherein Dr. Fenison found "no evidence to support any type of neuropathy involving the anterior proximal left lower leg." (F&A, p. 2; Exhibit A, p. 2.)

Applicant contends that the reports of Dr. Fenison are not substantial medical evidence as he failed to "adequately account for the Applicant's current medical condition, relied on outdated information, and reached bare legal conclusions without a proper factual foundation." (Petition, p. 5.)

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we

will grant the Petition and rescind and substitute the WCJ's December 23, 2024 FA&O to reflect that permanent disability, apportionment, and attorney's fees are deferred pending further development of the record including a reevaluation of the applicant by Dr. Fenison and provision of all updated medical records to Dr. Fenison for review and comment.

FACTS

Applicant claimed that while employed by defendant as a preloader on February 6, 2023, she sustained an industrial injury to her left leg (shin).

Applicant was seen by primary treating physician Dr. William Montgomery of Central Occupational Medicine Providers on July 21, 2023, December 8, 2023, and January 11, 2024. (Exhibits 6-8.) Dr. Montgomery diagnosed applicant with a left lower leg abrasion, contusion, and pain and strain of the muscle(s) and tendon(s) of the anterior muscle group at the lower left leg. (Exhibits 6-8, p. 2.) Applicant was released to work full duty on July 21, 2023. (Exhibit 6, p. 3.)

Applicant was referred by Dr. Montgomery to pain management specialist Dr. James Rho of Inland Interventional Medicine Associates and was seen by Dr. Rho on December 20, 2023, January 17, 2024, February 13, 2024 and April 22, 2024. (Exhibits 2-5.) Dr. Rho diagnosed applicant with complex regional pain syndrome of the left lower limb, muscle spasm of the calf, myalgia, and myositis. (*Ibid.*) In his most recent report dated April 22, 2024, Dr. Rho noted complaints of ongoing left lower extremity pain secondary to complex regional pain syndrome with poor sleep quality due to pain. (Exhibit 5, p. 2.)

Applicant underwent a nerve conduction study (NCV/EMG) of the left lower extremity on July 1, 2023 with normal findings. (Exhibit C.) Applicant also underwent various x-rays of the left tibia/fibula and left ankle with normal findings. (Exhibit B, pp. 8-10.)

The parties ultimately retained Dr. Anthony Fenison as the panel QME. Dr. Fenison issued an initial report dated June 28, 2023 and a supplemental report dated February 16, 2024.

In his February 16, 2024 report, Dr. Fenison found that based upon his review of the additional clinic notes from Central Occupational Medicine Clinic, his prior June 28, 2023 QME report, and the July 1, 2023 EMG, applicant had "0% whole person impairment" as there was "no evidence to support of any type of neuropathy involving the anterior proximal left lower leg." (Exhibit A, p. 2.).

On October 17, 2024, the parties proceeded to trial on the issues of permanent and stationary date, permanent disability, apportionment, need for future medical treatment, and attorney's fees.

On December 23, 2024, the WCJ issued an FA&O which held, in relevant part, that applicant sustained an injury AOE/COE to the left shin while employed by defendant as a preloader but sustained no permanent disability.

DISCUSSION

Preliminarily, former Labor Code¹ 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.

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 under the Events tab 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 24, 2025, and 60 days from the date of transmission is March 25, 2025. This decision was issued by or on March 25, 2025, so that we have timely acted on the petition as required by section 5909(a).

¹ All further statutory references will be to the Labor Code unless otherwise indicated.

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 constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on January 24, 2025, and the case was transmitted to the Appeals Board on January 24, 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 January 24, 2025.

II.

Turning now to the Petition, applicant contends that the reports of Dr. Fenison are not substantial medical evidence as to the issue of permanent disability. Applicant argues that the QME failed to “adequately account for the Applicant’s current medical condition, relied on outdated information, and reached bare legal conclusions without a proper factual foundation.” (Petition, p. 5.) Applicant alleges that Dr. Fenison failed to review updated medicals from Dr. Rho which document applicant’s diagnosis of chronic regional pain syndrome (CRPS) and as such, Dr. Fenison’s opinions do “not reflect the Applicant’s actual condition at the time of trial.” (*Ibid.*) As noted above, in his last report dated February 16, 2024, Dr. Fenison found a “0% whole person impairment” as there was “no evidence to support any neuropathy involving the anterior proximal left lower leg.” (Exhibit A, p. 2.) Dr. Fenison’s findings served as the basis for the WCJ’s December 23, 2024 FA&O wherein applicant was awarded future medical for his left shin but no permanent disability indemnity. (F&A, p. 2.)

As explained in *Hamilton v. Lockheed Corporation* (Hamilton) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc), a decision "must be based on admitted evidence in the record" (*Id.* at p. 478) and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (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. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) “The term

‘substantial evidence’ means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value.” (*Braewood Convalescent Hospital v. Workers’ Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) A medical opinion proffered as substantial evidence must be framed in terms of reasonable medical probability, be based on pertinent facts, an adequate examination, and history, set forth reasoning in support of its conclusions, and not be speculative. (*E.L. Yeager v. Workers’ Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Bd. en banc).) “[A] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (citations) Further, 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)” (*Gatten, supra*, at p. 928.) “A medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises. Such reports do not constitute substantial evidence to support a denial of benefits. (citation)” (*Kyle v. Workers’ Comp. Appeals Bd (City and County of San Francisco)* (1987) 195 Cal.App.3d 614, 621.)

Here, based upon our review of the record, including the reports of Dr. Fenison, it appears that although diagnostics and records from Dr. Montgomery and Central Occupational Medicine Providers were provided to Dr. Fenison for review, none of the reports from Dr. Rho or Inland Interventional Medical Associates were provided, or if provided, were not reviewed. In light of this, Dr. Fenison’s reporting appears to be incomplete.

It is well established that 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].) and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) Further, an adequate and complete record is necessary to understand the basis for the WCJ’s decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) The WCJ’s decision must also “set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on,” so that “the parties, and the Board

if reconsideration is sought, [can] ascertain the basis for the decision[.] (*Id.* at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350])).)

To ensure substantial justice and a complete and adequate record, further development of the record is necessary. We therefore recommend the provision of all updated medicals to Dr. Fenson for review, including reports from Dr. Rho and Inland Interventional Medical Associates. Given that over a year and a half has passed since applicant's last evaluation, we also recommend a re-evaluation of applicant by Dr. Fenison.

Accordingly, we grant the Petition and rescind and substitute the December 23, 2024 Findings and Award to reflect that permanent disability, apportionment, and attorney's fees are deferred pending further development of the record including a reevaluation of the applicant by Dr. Fenison and provision of all updated medical records to Dr. Fenison for review and comment.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of December 23, 2024 Findings, Award, and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the December 23, 2024 Findings, Award, and Order is **RESCINDED** and **SUBSTITUTED** with a new Findings, Award, and Order as provided below.

FINDINGS OF FACT

1. Applicant, Naomi Rivers, born [], while employed on February 6, 2023 as a Preloader, Occupational Group 360, in Riverside California, by United Parcel Service, whose workers' compensation insurance carrier was Liberty Mutual Insurance Corporation, sustained injury arising out of and in the course of employment to her left shin.
2. Applicant's earnings at the time of injury were \$647.94 per week producing a temporary disability rate of \$431.96 per week.
3. Applicant will require further medical treatment for cure or relieve from the effects of this injury.

AWARD

AWARD IS MADE in favor of Naomi Rivers against United Parcel Service insured by Liberty Mutual Insurance Corporation for future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

ORDERS

1. Defense Exhibits A and B are ordered into evidence.
2. Applicant is ordered to be reevaluated by panel QME, Dr. Anthony Fenison. In preparation for the reevaluation, parties are to provide all updated medicals for review, including those of Dr. James Rho/Inland Interventional Medical Associates.
3. Permanent disability, apportionment, and attorney's fees are deferred pending further development of the record.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 24, 2025

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

**NAOMI RIVERS
NYMAN TURKISH
ALBERT AND MACKENZIE**

RL/cs

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