

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

FIONA GARLAND, *Applicant*

vs.

**SANTA BARBARA UNIFIED SCHOOL DISTRICT, permissibly self-insured through
SELF-INSURED SCHOOLS OF CALIFORNIA, *Defendants***

**Adjudication Number: ADJ10773229
Santa Barbara District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board previously granted reconsideration of the May 26, 2021 Findings and Award to further study the factual and legal issues presented. This is our Decision After Reconsideration.

Defendant seeks reconsideration of May 26, 2021 Findings and Award wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a special education aide sustained an injury to her back that caused 100% permanent total disability. The WCJ also found that applicant is entitled to total temporary disability from May 1, 2014 through May 1, 2019.

Defendant contends that the WCJ's finding that applicant is entitled to permanent total disability benefits is not supported by substantial medical evidence and that diminished future earning capacity is not a permissible factor in determining permanent disability for injuries on or after January 1, 2013. Defendant also contends that the WCJ erred in failing to address the issue of apportionment. Finally, defendant contends that the WCJ's finding that applicant is entitled to temporary total disability is not supported by the record and is conclusory.

Applicant filed an Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted and the Appeals Board issue a new finding that applicant sustained 30% permanent disability.

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

Reconsideration, we will rescind the Findings and Award and return this matter to the trial level for further proceedings and a new decision.

In his Opinion on Decision, the WCJ addressed the issue of applicant's level of permanent disability as follows:

Based on the medical reporting of Richard Kahmann, M.D., in the capacity of a primary treating physician, the vocational reporting of David Van Winkle, and after a total of four (4) back surgeries including the implementation of a spinal cord stimulator, it is found that Applicant is unable to return to the open labor market and is permanently totally disabled. (May 26, 2021 Amended Opinion on Decision, p. 1.)

In his Report, the WCJ provided the following analysis to explain why he would now find applicant 30% disabled instead of 100% disabled:

After review of defendant's petition for reconsideration, I would change my Opinion on Decision and Findings of Fact and Award and find applicant to have sustained 30% permanent disability without apportionment.

However, if I were to set aside my Opinion on Decision and Findings of Fact and Award, and issue an award of 30%, I have no doubt Applicant will file a petition for reconsideration averring all of the arguments raised in his answer to the instant petition for reconsideration which support my initial finding of permanent total disability. Therefore, for judicial economy, I will address both arguments at this time.

Under the *Montana* factors, post injury Applicant has shown an interest in and has made efforts to secure employment. This includes waitressing, completing an aesthetician program at Santa Barbara City College that resulted in employment. She is in an apprenticeship program to be a tattoo artist and has worked part-time performing that job.

As a result of these efforts and applicant's successes in attending school and educational intern programs and being able to secure employment, my original determination finding applicant to be totally permanently disabled is not supported by the evidence. (Report, pp. 2-3.)

Labor Code section 5313¹ requires that, together with "the ...decision...there shall be served upon all parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, §5313.) An adequate

¹ All statutory references not otherwise identified are to the Labor Code.

and complete record is necessary to understand the basis for the WCJ's decision and the WCJ shall ". . . make and file findings upon all facts involved in the controversy[.]" (Lab. Code, § 5313; *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*)). 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 475.) The purpose of this requirement is to enable "the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]" (*Hamilton*, supra, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350; see also *Blackledge v. Bank of America, ACE American Insurance Company (Blackledge)* (2010) 75 Cal.Comp.Cases 613, 621-22.)

In this case, the WCJ's Opinion on Decision does not explain the basis for the WCJ's initial finding that applicant as permanently totally disabled and the Report does not explain the basis for a proposed finding that applicant is 30% disabled. Therefore, as the Decision After Reconsideration, we will rescind the Findings and Award and return this matter to the trial level for the WCJ to conduct further proceedings and issue a new decision with an explanation of how he arrived at that decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 26, 2021 Findings and Award is **RESCINDED**, and the matter is returned to the trial level for further proceedings and a new decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

MARGUERITE SWEENEY, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 24, 2022

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

**FIONA GARLAND
HOURIGAN, HOLZMAN & SPRAGUE, LLP
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP
KARLIN, HIURA & LASOTA, LLP**

MWH/oo

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