WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JHAIRO GARCIA, ***Applicant***

vs.

LIBERTY PACKING COMPANY LLC / MORNING STAR PACKING COMPANY and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, ***Defendants***

Adjudication Number: ADJ10499216
Fresno District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings of Fact and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on December 17, 2020, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his cervical, thoracic, and lumbosacral spine, to his bilateral shoulders, and his psyche; that applicant was temporarily disabled for the period from October 16, 2015, through June 30, 2017; that the injury caused 70% permanent disability; that the opinions of qualified medical examiner (QME) John W. Hill, D.C., are substantial evidence; and that the report from orthopedist Don Williams, M.D. was not admissible.

Defendant contends that the reports from QME Dr. Hill are not substantial evidence; that although Dr. Hill testified that Chiropractor Schroeder was a "Board Certified Chiropractic Radiologist" there is no evidence to support that title; that applicant's temporary disability indemnity should be based on his seasonal employment; and that the report from Dr. Williams, should be admitted into the record.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We did not receive an Answer from applicant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report and the Opinion on

Decision (F&A, pp. 5 – 10), which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will affirm the F&A

BACKGROUND

Applicant claimed injury to his neck, bilateral shoulders, arm (right or left not identified), mid-back, abdomen, low back, bilateral legs, and psyche, while employed by defendant as a sanitation worker on October 16, 2015. Applicant's claim of injury to his neck, mid-back, low back, and psyche, was accepted.

QME Dr. Hill evaluated applicant on November 10, 2016. (Joint Exh. W, Dr. Hill, November 16, 2016.) Dr. Hill examined applicant, took a history and reviewed the medical records he was provided. He indicated that applicant needed to undergo further diagnostics and that applicant's condition had not reached maximum medical improvement (MMI). (Joint Exh. W, pp. 16 – 17.)

Dr. Hill was provided additional medical records, including the diagnostics he had requested, and re-evaluated applicant on June 22, 2017. (Joint Exh. X, Dr. Hill, June 30, 2017.) He concluded that, "The Subject is MMI on the date of this report" (Joint Exh. X, p. 22) and that applicant had 28% cervical spine WPI, 8% thoracic spine WPI, and 23% lumbar spine WPI. (Joint Exh. X, p. 21.)

The parties proceeded to trial on October 6, 2020. The issues submitted for decision included, parts of body injured, temporary disability, permanent disability/apportionment, and applicant's employment as a seasonal worker. (Minutes of Hearing and Summary of Evidence (MOH/SOE), October 6, 2020.

DISCUSSION

To be 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 (Appeals Board en banc).) Dr. Hill examined applicant twice and he reviewed the medical record including MRIs, x-rays, and an electromyography/nerve conduction study (EMG/NCV). In his June 30, 2017 report, Dr. Hill discussed the various diagnostics he reviewed and his examination findings. (Joint Exh. X, pp. 12

– 20.) He then explained his conclusions as to applicant's disability caused by the October 16, 2015 injury. (Joint Exh. X, pp. 20 – 21.) As noted by the WCJ in the Report, at his deposition Dr. Hill explained:

> … that flexion/extension X-rays are used to detect instability. (Joint Exhibit Z, page 43, lines 2-8.) He explained that MRI studies and X-ray studies are "different tools" and that "The Guides specifically set the criteria as using plane film x-rays for – as the best method of analyzing motion segment integrity, and that was what was used here." (Joint Exhibit Z, page 35, line 19 to page 36, line 7.) He also explained that the flexion/extension X-rays "puts different tension and moves the bones and it exposes the instability" providing a different picture than a static X-ray. (Joint Exhibit Z, page 34, line 21 to page 35, line 13.)
> (Report, p. 4.)

As to Dr. Hill's reliance on the x-rays and the "non-certified opinions of Chiropractor Schroeder" (Petition, p. 6), the WCJ stated:

> Dr. Hill has not relied upon the "opinions" of Dr. Schroeder at all. Dr. Hill testified in his deposition that he is, "not interested in Dr. Schroeder's interpretation. I appreciate everybody's input, because I am fallible . . . but I'm not sending the patient to Dr. Schroeder necessarily for the pathological read, because ultimately I am the one responsible for doing the analysis on it and I do the analysis." (Joint Exhibit Z, page 29, line 21 to page 30, line 6.) Dr. Hill explained that he did not rely on non-certified opinions of Dr. Schroeder, but rather took measurements from Dr. Schroeder's studies, and then Dr. Hill interpreted those.
> (Report, p. 4.)

It is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (See *Place v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 372, [35 Cal.Comp.Cases 525].) Based on our review of the entire record we agree with the WCJ, that the opinions of Dr. Hill constitute substantial evidence.

Defendant is correct that when a seasonal employee has no off-season earnings, the employee is not entitled to temporary disability indemnity during the off season. (*Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, [71 Cal.Comp.Cases 1044].) However, the trial record contains no evidence indicating that applicant was a seasonal employee with no off-season earnings. The burden of proof rests upon the party holding the affirmative of the issue. (Lab. Code, § 5705; *Lantz v. Workers' Comp. Appeals Bd*. (2014) 226

Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.* (*Obernier*) (1995) 34 Cal.App.4th 1204 [60 Cal.Comp.Cases 289].) Defendant did not meet its burden of proof as to applicant's employment status.

Pursuant to Labor Code sect. 4062.2 (a):

> Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.
> (Lab. Code, § 4062.2.)

Labor Code section 4062.3 states in part:

> (k) If, after a medical evaluation is prepared, the employer or the employee subsequently objects to any new medical issue, the parties, to the extent possible, shall utilize the same medical evaluator who prepared the previous evaluation to resolve the medical dispute.
> (Lab. Code, §4062.3.)

Finally, applicant was examined by QME Hill on November 10, 2016, and June 22, 2017. (Joint Exhs. W and X.) Dr. Hill submitted his supplemental report on September 14, 2018. (Joint Exh. Y.) Don T. Williams, M.D., examined applicant on October 19, 2018. The report from Dr. Williams is clearly not a treating physician report but is instead a medical-legal report. Also, there is no evidence that defendant had applicant "submit at reasonable intervals to examination" by Dr. Williams as "a practicing physician" (Lab. Code, § 4050) and Labor Code section 4050 may not be used to circumvent the medical evaluation and reporting procedure of Labor Code section 4062. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal. App. 4th 596 [71 Cal. Comp. Cases 155].) The trial record contains no evidence, or information, that explains the factual or legal basis for having applicant undergo a medical-legal evaluation by Dr. Williams. Thus, we agree with the WCJ that:

> Dr. Hill remains the Panel Qualified Medical Examiner, and the exam with Dr. Williams does not affect Dr. Hill's status as the Panel QME or the application of the Labor Code to the case. The report of Dr. Williams is inadmissible.
> (F&A, p. 8, Opinion on Decision.)

Accordingly, we affirm the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 17, 2020 Findings of Fact and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

I DISSENT,

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 16, 2022

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

JHAIRO GARCIA
GROSSMAN LAW
LAURA G. CHAPMAN & ASSOCIATES

TLH/*pc*

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

DISSENTING OPINION OF COMMISIONER JOSE RAZO

For the reasons discussed below it is my opinion that the reports from QME John Hill, D.C. are not substantial evidence, and based thereon, I respectfully dissent.

Applicant underwent MRIs and x-rays at the El Portal Imaging Center on February 21, 2017. Regarding the thoracic spine x-rays Steven K. Hansen, M.D. stated:

> There is good alignment of vertebral bodies. Disc spaces and vertebral body heights are intact. There is no evidence of focal osseous lesion or vertebral collapse. Pedicles and transverse processes are intact. ¶ IMPRESSION: Negative thoracic spine series.
> (Def. Exh. H.)

The lumbar MRI, showed, "Multilevel moderate facet arthropathy and mild disc desiccation. No evidence of disc protrusion or significant encroachment on the spinal canal or neural foramina." (Def. Exh. I.) The lumbar x-rays indicated, "Disc spaces and vertebral bodies are intact. … Degenerative change of sacroiliac joints. No acute distress." (Def. Exh. J.) Dr. Hansen stated that the cervical MRI showed, "Multilevel disc desiccation without evidence of disc protrusion or significant encroachment on the spinal canal or neural foramina" (Def. Exh. K) and that the x-rays indicated, "There is good alignment of vertebral bodies. Disc spaces and vertebral body heights are intact. Facet arthropathy is noted at mid and lower cervical levels." (Def. Exh. L.)

In his December 27, 2017 report, after examining applicant and reviewing cervical and lumbar MRIs, neurosurgical physician Adam J. Brant, M.D., stated:

> There are really no significant correlating findings on cervical or lumbar imaging. There is nothing where any neurosurgical recommendation would be considered here and I will refer him to interventional pain management for further evaluation and treatment. I have discharged him … from further neurosurgical follow-up.
> (Joint Exh. A, Adam J. Brant, M.D., December 27, 2017, p. 3.)

Dr. Hill appears to rely on the opinions of the non-radiologist chiropractor Paul Schroeder, D.C., as to the MRIs and x-rays of applicant's spine. The opinions of Dr. Schroeder, and in turn, the opinions of Dr. Hill are inconsistent with the MRI and x-ray results as explained by Dr. Hansen and with Dr. Brant's conclusions, quoted above. Dr. Hill's opinions, based on those of Dr.

Schroeder, and applicant's non-verifiable subjective complaints, do not constitute substantial evidence and should not be the basis for the Findings of Fact and Award at issue herein.

For these reasons, I would rescind the Findings regarding applicant's permanent disability and return the matter to the WCJ for development of the record and a new decision based thereon.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 16, 2022

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

JHAIRO GARCIA
GROSSMAN LAW
LAURA G. CHAPMAN & ASSOCIATES

TLH/*pc*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

INTRODUCTION

1.	Applicant's Occupation:	Sanitation (Group 340)
	Age at Injury:	46
	Parts of Body Alleged Injured:	Neck, mid back, low back, and psyche accepted; arm, abdomen, bilateral shoulders, bilateral legs alleged.
	Manner in Which Injury Alleged Occurred:	While washing pipes on top of a trailer, slipped and fell to the ground
2.	Identity of Petitioner:	Defendant
	Timeliness:	The Petition was timely filed on January 4, 2021
	Verification:	The Petition was verified.
3.	Date of Award:	December 17, 2020
4.	Petitioner contends:	

a. That the evidence does not justify the Findings of Fact.
b. That the Findings of Fact do not support the Order, Decision, or Award

II
FACTS

The Applicant had an accepted injury when he fell from a trailer while cleaning pipes. The injury was accepted, but the Defendant disputed nature and extent of injury. The Defendant did pay temporary disability from July 6, 2016 through October 14, 2016 per the printout of benefits. (Defendant's Exhibit E). The EDD also paid benefits from November 1, 2015 through June 5, 2016. (EDD Exhibit 14.)

The Applicant underwent conservative treatment, and a number of diagnostic studies to include MRI studies, static X-ray studies, and flexion/extension X-ray studies. The Applicant did not undergo any surgery related to the industrial injury.

The Applicant was examined by Panel QME Dr. Hill who examined the Applicant twice, issued a total of three reports, and was deposed once. Dr. Hill assessed whole person impairment for the thoracic spine based on muscle spasm and asymmetric loss of range of motion, and assessed whole person impairment for the lumbar and cervical spine based on alteration of motion segment integrity.

The Applicant was deposed during discovery.

The matter proceeded to Trial on October 6, 2020. No testimony was taken at Trial. The deposition transcripts of both the Applicant and Dr. Hill, as well as treating physician Dr. Foxley, were introduced into evidence. A Findings and Award issued on December 17, 2020.

Defendant now brings a timely Petition for Reconsideration. As of the service of this Report and Recommendation, no Answer has yet been filed by the Applicant.

III

DISCUSSION

The Defendant focused its Petition for Reconsideration on four primary issues. This Report & Recommendation will address each individually.

The Petition alleges the Trial Judge supported the QME's disregard of medical science, but the Trial Judge relied upon the QME and his conclusions which were supported by the evidence

In this matter the Panel QME, Dr. Hill, assessed whole person impairment for the lumbar and cervical spine based on alteration of motion segment based on measurements from flexion/extension X-rays. (Joint Exhibit X, pages 19-21.) The Petition for Reconsideration argues that Dr. Hill, "elected to rely upon the latter [X-rays] to provide the Applicant's permanent disability rating." The Petition gives the impression that Dr. Hill gave one set of X-ray studies more weight, or found them more reliable. However, a review of Dr. Hill's deposition testimony explains that Dr. Hill relied upon all of the X-ray studies in this case. The pertinent fact was that the X-ray studies performed by Dr. Schroeder were flexion/extension X-rays, and therefore a different type of X-ray than performed by the other examiners as those were static. It is not that Dr. Hill "elected to rely" upon one set of X-rays over the others, but rather that the X-rays were different types of studies, and therefore provided different information. It was only the flexion/extension X-rays which could be relied upon to assess whole person impairment based on "Loss of motion segment integrity defined from flexion and extension radiographs." (From Table 15-3 AMA Guides.)

The Petition for Reconsideration argues that Dr. Hill, "has continued to ignore the findings of the appropriate specialists" and that he "did not address the vast difference in interpretation of the diagnostics which were conducted by the specialists and non-specialists in the radiology field." (Petition for Reconsideration, page 5, lines 19-21.) This is not an accurate representation of the facts. Dr. Hill did not ignore the other X-ray studies, and he did address the difference in interpretation during the course of his deposition. (Joint Exhibit Z.)

The deposition of Dr. Hill (Joint Exhibit Z) lasted nearly 1-1/2 hours and the vast majority of the questioning was pertaining to whole person impairment and the difference between static X-rays, MRI studies, and flexion/extension X-rays. Dr. Hill addressed that static X-rays are used to look for pathology excluding instability, and that flexion/extension X-rays are used to detect instability. (Joint Exhibit Z, page 43, lines 2-8.) He explained that MRI studies and X-ray studies are "different tools" and that "The Guides specifically set the criteria as using plane film x-rays for – as the best method of analyzing motion segment integrity, and that was what was used here." (Joint Exhibit Z, page 35, line 19 to page 36, line 7.) He also explained that the flexion/extension X-rays "puts different tension and moves the bones and it exposes the instability" providing a different picture than a static X-ray. (Joint Exhibit Z, page 34, line 21 to page 35, line 13.)

Dr. Hill assessed whole person impairment in this matter for the cervical and lumbar spine based on alteration of motion segment integrity, and those measurements were based on the flexion/extension x-rays. The Petition for Reconsideration argues that, "Dr. Hill has rejected the objective data and instead relied upon the non-scientific and non-certified opinions of Chiropractor Schroeder." (Petition for Reconsideration, page 6, lines 12-14.) This is not an accurate representation of the facts. Dr. Hill did not reject any objective data. Instead he explained how the different studies are different tools that allow for different analysis. Dr. Hill has not relied upon the "opinions" of Dr. Schroeder at all. Dr. Hill testified in his deposition that he is, "not interested in Dr. Schroeder's interpretation. I appreciate everybody's input, because I am fallible . . . but I'm not sending the patient to Dr. Schroeder necessarily for the pathological read, because ultimately I am the one responsible for doing the analysis on it and I do the analysis." (Joint Exhibit Z, page 29, line 21 to page 30, line 6.) Dr. Hill explained that he did not rely on non-certified opinions of Dr. Schroeder, but rather took measurements from Dr. Schroeder's studies, and then Dr. Hill interpreted those.

The Petition for Reconsideration argues, "There is no objective medical evidence for the ratings provided by QME Hill – simply his reliance on the X-rays conducted by Chiropractor Schroeder." (Page 3, lines 24-25.) It is true that Dr. Hill relied upon the flexion/extension X-rays conducted by Dr. Schroeder. As Dr. Hill explained, doing so is based on the AMA Guides, where, for example, in Table 15-3 of the Guides it provides impairment of 20-23% based on "Loss of motion segment integrity defined from flexion and extension radiographs." That is what Dr. Hill relied upon. The X-rays were objective medical evidence.

<u>The Petition alleges the Trial Judge relied upon hearsay that Dr. Schroeder is a Board Certified Chiropractic Radiologist, but this was not hearsay evidence, if it were it would still be permissible, and the certification of Dr. Schroeder is irrelevant to the decision</u>

Dr. Hill, testified under oath on page 26 of his deposition transcript, (Joint Exhibit Z) lines 3-4, that, "Dr. Schroeder is also a Board Certified Chiropractic Radiologist . . . ." Hearsay is evidence of a statement made by someone who is not testifying. This instance is not hearsay. Dr. Hill did not testify as to what Dr. Schroeder said. Instead, Dr. Hill testified that Dr. Schroeder was board-certified and thus that was presumably based on his knowledge. No objection issued at the time of Dr. Hill's testimony (per review of Joint Exhibit Z, pages 26 through 29.) Further, no evidence was introduced that Dr. Schroeder was not board certified. Lastly as to hearsay, even if it were hearsay, it would be permissible in workers' compensation proceedings as the Appeals Board is not bound by the rules of evidence and procedure per Labor Code section 5708.

Lastly, the decision in this matter did not hinge on Dr. Schroeder's qualifications. Dr. Schroeder took flexion X-rays, provided measurements, and Dr. Hill then interpreted those measurements. It was Dr. Hill's reporting upon which the decision in this case rested.

The Petition alleges the Trial Judge ignored the Applicant's seasonal status, but no evidence was introduced on that issue to support such a position

The Petition cites to the Applicant's deposition testimony that he was hired in the 2003 season, and last worked at the end of the 2015 season. (Applicant's Exhibit 1, page 13, lines 16 to 23.) Not cited in the Petition for Reconsideration is that the Applicant also testified that he worked throughout the year. (Exhibit 1, page 16, lines 23-24.) Also not cited in the Petition for Reconsideration is that the Applicant testified that "the season was over" when he was injured and getting equipment ready for the next year. (Applicant's Exhibit 1, page19, lines 16-17.) The Applicant did not testify that he was a seasonal employee, but rather appeared to be testifying to the seasons relevant to the packing company and harvesting. The Petition for Reconsideration included calculations as to how the Applicant's temporary disability rate was determined, but those calculations were not introduced into evidence.

As noted in the Findings and Award, there were no employment records introduced into evidence to establish a seasonal work period, there was no testimony by the employer to establish a seasonal work period, and the only testimony on point was from the Applicant when he testified that he worked "throughout the year." The Petition puts forth arguments as to the "Daily rate in season" and "TTD Rate in season" but there was no evidence to establish a season.

The only evidence cited in the Petition for Reconsideration was the Applicant's deposition transcript, which as noted above did not outline a seasonal work period, and the printout of benefits, which only established payment of benefits by Defendant.

The Petition alleges that the report of Dr. Williams should be admissible, but the report is not admissible per Labor Code 4050

In the midst of discovery, the Defendant scheduled an exam with Dr. Williams, and the Applicant's attorney responded (Applicant's Exhibit 2) that while the exam could go forward, the report of Dr. Williams could not be forwarded to any other examiners since the report was obtained pursuant to Labor Code section 4050. The Defendant did not introduce any evidence to rebut Applicant's assertion. By all accounts, the exam with Dr. Williams was obtained per 4050.

Dr. Williams labeled his report as a "Consultation Exam." (Defendant's Exhibit D.) Dr. Williams offered no treatment to the Applicant. He completed his report addressing all typical medical/legal issues in workers' compensation cases. By all accounts, his report was obtained per Labor Code section 4050.

The Findings and Award excluded the report based on Labor Code section 4050. The Petition for Reconsideration does not address this. As noted in the Opinion on Decision, page 8, "While an employer may obtain a report under Labor Code section 4050 at its own expense, such a report may not be used to circumvent the medical/legal evaluation process. In this matter Dr. Hill remains the panel qualified medical examiner, and the exam with Dr. Williams does not affect Dr. Hill's status as the panel QME or the application of the Labor Code to the case. The report of Dr. Williams is inadmissible." (See Nunez v. WCAB (2006) 136 Cal.App.4th 584 [71 Cal. Comp. Cases 161].)

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

DATE: January 12, 2021
Jeremy K. Lusk
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

The Applicant was deposed and the transcript was entered into evidence. The Applicant did not testify at Trial. In his deposition, the Applicant testified to his work with the employer, some prior falls, and his fall cleaning pipes in 2015 when he fell from a trailer. He testified as to treatment he received and doctors he saw. He testified as to his pain and complaints. He testified as to issues that would pertain to his psychiatric claim.

In this matter Dr. John Hill acted as the Panel Qualified Medical Examiner. He examined the Applicant twice, issued a total of three reports, and was deposed once. In Dr. Hill's initial report he found the Applicant was not yet permanent and stationary. He recommended a number of tests including nerve conduction testing, MRI studies, and X-rays.

In Dr. Hill's second report, he found the Applicant permanent and stationary. He assigned whole person impairment for the cervical spine, thoracic spine, and lumbar spine. He addressed apportionment, as well as future medical care which could entail pain management as well as possible lumbar and cervical spine surgeries.

Dr. Hill was deposed. He testified that he has been a QME since 2009 (other than a short period in the 1990's), and serves on the committee to write the new QME evaluation test. Dr. Hill recalled the Applicant's injury falling from a trailer to the ground. The questions then turned to the second exam at which time Dr. Hill found the Applicant P&S.

Dr. Hill explained motion segment integrity in the AMA Guides. Extensive questions and answers took place regarding how motion segment integrity is measured and is translated into impairment rating. Dr. Hill testified that his opinions were to a reasonable medical probability. He did discuss that the EMG/NCV testing was normal. He discussed that the X-rays were performed by Dr. Schroeder who is a Board Certified Chiropractic Radiologist. Dr. Hill explained that the treating physician had ordered X-rays, but they were not flexion/extension, and therefore not looking for finer instabilities. Dr. Hill used Dr. Schroeder for the X-rays as Dr. Schroeder "knows how to take the best quality pictures, and he is a known entity. When I refer through One Call, I do not know what facility they are going to send, let alone what technician they use or what their familiarity with it is, so you get what you get."

Dr. Hill explained that he sent the Applicant to Dr. Schroeder for the X-rays to be performed, but Dr. Hill said, "Ultimately I am the one responsible for doing the analysis on it and I do the analysis." Dr. Hill continued that at times he disagrees with Dr. Schroeder's measurements. As to the lumbar spine MRI, Dr. Hill confirmed there was no nerve compression, no significant stenosis, and no neural compression or disk protrusion. Dr. Hill confirmed the X-rays earlier in the case and later in the case differed, but one set was static and the other was flexion/extension. Therefore, they were different types of X-rays, explaining the different findings.

In this matter Dr. Hill assigned whole person impairment for the cervical and lumbar spine based on alteration of motion segment integrity, and for the thoracic spine based on muscle spasm and asymmetric loss of range of motion. As to the motion segment integrity, Defendant focused much of the questioning in the deposition on this point. The AMA Guides discuss loss of motion segment

integrity rather extensively on pages 378-379, and within Box 15-1. Dr. Hill assigned whole person impairment for the cervical and lumbar spine based on DRE Category IV, which provides for impairment for "Loss of motion segment integrity defined from flexion and extension radiographs . . . ." Much time was spent in the deposition of Dr. Hill as to the difference between the earlier X-rays and those taken by Dr. Schroeder. However, Dr. Hill addressed that the X-rays by Dr. Schroeder were of a different type as the first X-rays were static, and the next were flexion and extension. There is a difference between the findings in the X-rays, but that is due to the fact that they are different types of X-rays. Dr. Hill's assessment of whole person impairment is found to be substantial medical evidence as he relied on the AMA Guides and explained his analysis.

Defendant objected to the admissibility of Applicant's Exhibit 2, marked for identification purposes at the time of Trial. Applicant had listed the exhibit on the Pre-Trial Conference Statement, but did not file the exhibit with the WCAB at the same time as filing the other exhibits. The exhibit was filed the day of Trial. As the exhibit was listed on the Pre-Trial Conference Statement, as Defendant was not surprised by the exhibit, and as it was a letter previously sent to the Defendant fourteen months prior, the objection is overruled and Applicant's Exhibit 2 is moved into evidence.

Defendant objected to all of the exhibits of the Employment Development Department which were marked for identification purposes at Trial as EDD Exhibits 10-14. Defendant objected as the EDD was not present at the MSC and the exhibits were not listed on the Pre-Trial Conference Statement. In this matter the original Notice of Lien Claim was sent to the Defendant on December 9, 2015, nearly five years ago. The EDD lien was filed in August 2016, which was four years ago. The EDD exhibits were filed and served on all parties including the Defendant and defense counsel on August 7, 2020, which was approximately three weeks after the MSC and two months before the Trial took place.

Evidence not listed at the MSC on the Pre-Trial Conference Statement is generally not admissible per Labor Code section 5502(d)(3). That statute provides in relevant part, "Discovery shall close on the date of the Mandatory Settlement Conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." The MSC in this matter took place over the AT&T conference lines established this year due to the COVID crisis and Governor Newsom's Executive Orders. It is true that the EDD representative apparently was not at the MSC telephonically. However, Defendant has been on notice of the EDD lien for nearly five years and adjudication of the benefits in this case necessarily implicates reimbursement of the EDD lien. Therefore, as Defendant was on notice of the lien for nearly five years, and the exhibits are necessary as to payment of benefits under this Award, the Defendant's objection

to admissibility is overruled and the EDD Exhibits 10-14 are moved into evidence.

Applicant objected to defense Exhibit A (report of Dr. Brant of 12/27/17) as it was unsigned, and Exhibit D (report of Dr. Williams as obtained in violation of Labor Code). As to the report of Dr. Williams obtained pursuant to Labor Code section 4050, that report is excluded from evidence. While an employer may obtain a report under Labor Code section 4050 at its own expense, such a report may not be used to circumvent the medical/legal evaluation process. In this matter, Dr. Hill remains the Panel Qualified Medical Examiner, and the exam with Dr. Williams does not affect Dr. Hill's status as the Panel QME or the application of the Labor Code to the case. The report of Dr. Williams is inadmissible.

As to the report of Dr. Brant, Labor Code section 5703(a)(2) requires the signature of the physician, however case law establishes that unsigned reports are allowed if other reports by that physician are signed. In this matter it appears that the one report dated December 27, 2017 being unsigned is just an oversight. The related Request for Authorization dated January 18, 2018, and the related referral of the same date to pain management, were both signed. Therefore the Applicant's objection to the admissibility of Dr. Brant's December 27, 2020 report is overruled, and the report is moved into evidence.

As to seasonal employment, the Applicant testified in his deposition that he worked throughout the year, but the question was not directly as to which months. He also noted that he was washing the trailer as the season was over, but he did not say that "his" season was over. A review of Dr. Hill's initial QME report makes no indication of the Applicant being a seasonal employee. There were no employment records introduced into evidence to establish a seasonal work period, nor was there any testimony from the employer on the point. As the burden is on the Defendant to establish seasonal employment, it is found that burden is not met and the employee is not seasonal.

As to the parts of body injured, Dr. Hill's June 30, 2017 report found industrial injury to the Applicant's cervical, thoracic, and lumbosacral spine, and the bilateral scapulae (shoulder blades). Dr. Hill did not find any industrial injury to the Applicant's arm, abdomen, bilateral shoulders, or bilateral legs. Dr. Hill's conclusions are substantial evidence as to causation as to parts of body.

As to the P&S date, the Applicant claims June 30, 2017. The Defendant did not assert a specific date. Dr. Hill's November 16, 2016 report found the Applicant not yet P&S. His June 30, 2017 report found the Applicant P&S as of the date of that report. There were no medical reports introduced into evidence to establish a different P&S date. Thus, the P&S date is June 30, 2017.

The permanent disability of Dr. Hill's report rated to:

Cervical: 100% - (15.01.01.00 - 28 - [1.4] 39 - 340G - 42 - 44%) 44%
Thoracic: 100% - (15.02.01.00 - 8 - [1.4] 11 - 340G - 13 - 14%) 14%
Lumbar: 100% - (15.03.01.00 - 23 - [1.4] 32 - 340G - 35 - 37%) 37%

The above ratings combine to 44 C 37 = 65 C 14 = 70% permanent disability.

As to temporary disability, the Applicant claimed October 16, 2015 through June 30, 2017. Dr. Hill found the Applicant had been "temporarily disabled since the DOI" and through the June 30, 2017 report. The EDD paid at $648.00 per week from November 1, 2015 through June 5, 2016. The Defendant's printout of benefits showed temporary disability was paid at the rate of $787.59 from July 6, 2016 through October 14, 2016. So at issue is:

- TD demanded from 10/16/15 to 10/31/15
- EDD reimbursement from 11/1/15 to 6/5/16
- TD demanded from 6/6/16 to 7/5/16
- TD paid from 7/6/16 to 10/14/16
- TD demanded from 10/15/16 to 6/30/17

No evidence was introduced showing the Applicant had returned to work during the October 16, 2015 through June 30, 2017 timeframe, nor was any evidence introduced indicating the Applicant was not temporarily totally disabled during that timeframe. Based on the reporting of Dr. Hill, the Applicant is entitled to temporary disability during the period of October 16, 2015 through June 30, 2017, less sums paid by EDD, any wages paid, and less attorney fees, to be adjusted by the parties with jurisdiction reserved should a dispute arise.