

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

**MICHAEL FISHEL, *Applicant***

**vs.**

**RICK'S LUBE AND COMPLETE AUTO;  
OAK RIVER INSURANCE COMPANY,  
adjusted by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ11053430  
Long Beach District Office**

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

Applicant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on February 18, 2022. By the F&A, the WCJ found that the orthopedic qualified medical evaluator (QME) has not provided a definitive determination regarding applicant's need for lumbar spine surgery on an industrial basis.

Applicant contends that the evidence supports a finding that the QME has opined that the lumbar spine surgery is reasonable and necessary.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant reconsideration, rescind the F&A and return this matter to the trial level for further proceedings consistent with this opinion.

**FACTUAL BACKGROUND**

Applicant claims injury to his lumbar spine, hips, excretory system and right knee on August 18, 2017 while employed as an auto mechanic by Rick's Lube and Complete Auto. Defendant has accepted the low back as compensable. (Expedited Minutes of Hearing and

Summary of Evidence, January 26, 2022, p. 2.)

This matter has previously come before the Appeals Board regarding a dispute about lumbar spine surgery. In our March 16, 2021 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (Opinion), we amended the WCJ's December 28, 2020 Findings and Award to provide the following order:

**IT IS ORDERED** that determination of whether the applicant should be authorized to proceed with lumbar spine surgery is deferred to the determinations of the orthopedic Panel Qualified Medical Evaluator ("PQME"), Vincent Gumbs, M.D., and the psychiatric clearance by E. Richard Dorsey, M.D., rather than the Utilization Review/Independent Medical Review process.

(Opinion, March 16, 2021, p. 3.)

Neither party challenged this Opinion.

Additional reporting was subsequently obtained from the orthopedic QME Dr. Gumbs. In his May 25, 2021 report, Dr. Gumbs stated in relevant part:

It is my opinion that he should have more aggressive treatment to his lumbar spine/right knee. I recommend the following: He should have recent MRI of the lumbar spine for review. He should have flexion and extension views of the lumbar spine. He should have MRI of the right knee and he should be referred to his spine surgeon for further treatment and evaluation with a view to surgery. It is my opinion that he would benefit from surgery. Prior to the surgery, should have all these tests done, so that the surgeon can make an accurate decision of the procedure he would like to perform.

(Joint Exhibit AA, Report by PQME Vincent Gumbs, M.D. May 25, 2021, p. 5.)

In another supplemental report, Dr. Gumbs stated in relevant part:

I am not an expert in MTUS. I read it as does most physicians. I defer the need for lumbar fusion at L5-S1 to the surgeon involved.

...

I do state the applicant's symptomatology indicates lumbar decompression and maybe not necessarily spinal fusion. He would benefit from nerve decompression. Spinal fusion may not be necessary, but of course, it will depend upon the surgeon at the time of surgery.

...

However, at the end of it all, the clinical presentation i.e. symptomatology, his clinical examination and MRI findings, his falling down due to his leg giving way secondary to radiculopathy and leg weakness, pain, and the psychological impact on him, his family, his financial concerns and his future, I believe given

proper preoperative clearance that he might still be a candidate for a lumbar decompression - not spinal fusion, if the surgeon agrees.

...

Surgery is not a decision one should take lightly. In the end, it comes down to the decision being made by the patient and his surgeon.

Thank you for your interrogatories with which I do agree as spine surgery is a delicate procedure and one should not take it lightly. Given the period of time lapse from the date of injury to present, Michael Fishel has not improved. He has failed all conservative treatment thus far.

(Joint Exhibit BB, Report by PQME Vincent Gumbs, M.D. May 27, 2021, pp. 7-9.)

Dr. Gumbs was cross-examined. His deposition testimony included the following exchanges as relevant herein:

Q. You are deferring the need for surgery to someone else; correct?

A. Because the surgeon is the one that will decide. Even sometimes when the surgeon does a surgery, he may find that he will have to do a little bit more than what he went in to do initially. You need to defer to him. He is the one that's doing the surgery. He is the one that sees everything.

...

Q. So in reading your opinion from the May 25 and the May 27, 2021 reports, would you definitively state that you are deferring the necessity of spinal surgery including the type and the need for it to a spinal surgeon?

MR. MOORE: Objection. Argumentative.

MR. HEFLEY:

Q. Sorry. Doctor, I think you started to answer but I didn't hear you.

A. I said correct.

...

Q. On that point, Dr. Gumbs, do you have an opinion as to whether or not Mr. Fishel, who you evaluated on numerous occasions, requires surgery to treat his lumbar spine injury?

A. Yes, and I stated in my report of 5/27/21.

...

Q. All right. I'm there. Dr. Gumbs, can you please be precise, if you can, as to the type of surgical procedure that you would recommend?

A. Number one, if after having had flexion extension views of the lumbar spine and it shows that he has retrolisthesis of 5 millimeters or more, then that is in compliance with MTUS guidelines and he would be a candidate for lumbar fusion. However, if he has flexion extension views of lumbar spine and retrolisthesis is less than 5 millimeters, he still can be a candidate for surgery, that is a decompression of the lumbar spine, the spinal nerve, so they can decompress that, and relieve his radiculopathy because he has compression of the nerve, that can be relieved. So he would not have the fusion but he can have the decompression -- laminectomy and decompression and that would help to relieve his radiculopathy. However, if the surgeon was in there at that time and finds he has significant instability or that the amount of the lamina that he removed from the bone itself is significant and the spine is unstable at that time, then the surgeon will therefore have to do a fusion. That's why I state I believe I refer everything to the surgeon because he's the one that's doing the surgery and at the time of the surgery, he had to make a decision. Sometimes you have to make different decision to the one you decide to go in prior to the surgery itself, so that's why the decision is made by the surgeon at the time in that regard at the time of the surgery.

(Joint Exhibit CC, Deposition transcript of PQME Vincent Gumbs, M.D., November 23, 2021, pp. 34-35, 41-42.)

The matter proceeded to trial on January 26, 2022 with the sole issue identified as:

Whether Applicant needs lumbar spine surgery on an industrial basis per PQME Gumbs or whether PQME Gumbs defers the need for surgery to another individual.

(Minutes of Hearing and Summary of Evidence, January 26, 2022, p. 2.)

The WCJ issued the resulting F&A as outlined above.

## DISCUSSION

Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d);<sup>1</sup> *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310].) "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 Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], italics and citations omitted.)

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise stated.

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).) “Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board’s findings if it is based on surmise, speculation, conjecture or guess.” (*Heggin v. Workmen’s Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Pursuant to our March 16, 2021 Opinion, Dr. Gumbs is to determine whether applicant should be authorized to proceed with lumbar spine surgery in lieu of the utilization review and independent medical review process. Defendant contends that Dr. Gumbs cannot render an opinion that would be substantial evidence on the need for lumbar spine surgery. The WCJ concluded that Dr. Gumbs has not provided a definitive determination regarding applicant’s need for lumbar spine surgery. The record reveals that Dr. Gumbs does recommend surgery to the lumbar spine, but has deferred the determination regarding the specific type of surgery to the surgeon. It is premature on this record to address whether the lumbar spine surgery must be provided until there has been further development of the record regarding the specific type of surgery recommended for applicant.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The “Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee.” (*San Bernardino Cmty. Hosp. v. Workers’ Compensation Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that “[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any

time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete.” (*Id.* at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Id.*) Per *McDuffie*, if the existing physicians cannot cure the need for development of the record, the selection of an agreed medical evaluator (AME) should be considered by the parties. Lastly, if the record cannot be developed with the existing physicians or an AME, the WCJ may appoint a regular physician to evaluate applicant pursuant to section 5701.

In this matter, Dr. Gumbs has already opined that he is deferring the specific type of lumbar spine surgery necessary to the surgeon who will perform the operation. He has explained why from a medical perspective this determination is best left to the operating physician. The most practical course of action would be to obtain reporting from a spinal surgeon addressing which specific type of surgery, if any, is recommended to be performed on the lumbar spine. This reporting may then be provided to Dr. Gumbs for his review and comments before there is an adjudication before the trier of fact addressing the lumbar spine surgery.

This is the second time this matter has come before us regarding the disputed lumbar spine surgery. The record reflects that the parties have been disputing this medical treatment for over two years. It is unclear how this protracted litigation serves the interests of either party. Multiple hearings before the district office and petitions for reconsideration filed with the Appeals Board expend limited judicial resources. We urge the parties to advance this dispute and applicant’s claim towards a resolution.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings and Award issued by the WCJ on February 18, 2022 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the WCJ on February 18, 2022 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**April 19, 2022**

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

**HEFLEY LAW  
MICHAEL FISHEL  
MOORE & ASSOCIATES**

*AI/pc*

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