WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ANDRES VIZCARRA, *Applicant*

vs.

MASTER TOYS AND NOVELTIES, INC.; TOKIO MARINE AMERICA, *Defendants*

Adjudication Numbers: ADJ7810002; ADJ7982917
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL

Applicant seeks removal[1] from an Order Vacating Submission for Further Development of the Record, issued on August 21, 2023, wherein a workers' compensation administrative law judge (WCJ) determined that the medical-legal reporting of the qualified medical evaluators (QMEs) did not adequately address the issue of apportionment. Consequently, the WCJ vacated the submission of the matter for development of the record.

Applicant contends that the medical evaluators have adequately considered the issue of apportionment between the claimed specific and cumulative injuries, and that further development of the record is unwarranted.

The WCJ issued a Report and Recommendation on Petition for Removal (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition for Removal and the contents of the report of the WCJ with respect thereto. Based on our review of the record we will grant the Petition for Removal, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision.

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[1] Commissioner Sweeney who was previously a member of this panel no longer serves on the Workers' Compensation Appeals Board. Commissioner Dodd, who was previously a member of this panel is not currently available. Other panelists have been substituted in their place.

BACKGROUND

Applicant has filed two applications for adjudication. In Case No. ADJ781002, applicant sustained injury to the cervical spine, lumbar spine, right shoulder, left shoulder, bilateral wrists, right knee, left knee, psyche, and internal while employed as a warehouse manager by defendant Master Toys and Novelties from April 29, 2010 to April 29, 2011. In Case No. ADJ7982917, applicant sustained injury to the lumbar spine while employed as a warehouse manager on April 1, 2011.

The parties have selected Thomas Fell, M.D. as the Agreed Medical Evaluator (AME) in orthopedic medicine, Gregory Cohen, M.D. as the QME in psychiatry, and Stanley Majcher, M.D. as the QME in internal medicine.

On April 20, 2022, the parties brought both cases to trial, submitting into evidence treating physician reporting, vocational expert reporting, and the medical-legal reporting of Drs. Fell, Cohen and Majcher. (Minutes of Hearing and Summary of Evidence, April 20, 2022, at p. 5:1.) The parties submitted the matter for decision on issues including permanent disability, apportionment, and attorney fees.

On June 9, 2022, the WCJ issued Findings and Award.

On July 1, 2022, applicant petitioned for reconsideration of the Findings and Award, and on July 19, 2022, the WCJ issued an Order Vacating Findings and Award and Opinion Decision.

On August 22, 2022, the WCJ conducted an additional hearing. The WCJ provided the parties with a letter addressed to QME Dr. Cohen requesting that the physician further explicate his determination that disability could not be apportioned as between the admitted specific and cumulative injuries. (Letter from the WCJ to Gregory Cohen, M.D., August 22, 2022.) The WCJ provided the parties with a letter to QME Dr. Majcher, outlining similar concerns, and requesting supplemental reporting to address in detail the basis for the physician's opinion. (Letter from the WCJ to Stanley Majcher, M.D., August 22, 2022.) The Minutes reflect the WCJ's provision of a window for objection by either party to the proposed letters, after which time the defendant was directed to submit both letters to the respective physicians. (Minutes of Hearing, August 22, 2022.)

On November 16, 2022, both Dr. Cohen and Dr. Majcher issued supplemental reporting responsive to the WCJ's letter. (Ex. V, Report of Gregory Cohen, M.D., November 16, 2022; Ex. W, Report of Stanley Majcher, M.D., November 16, 2022.)

On June 26, 2023, the WCJ conducted further trial proceedings and admitted the supplemental reporting from Drs. Cohen and Majcher into evidence. (Minutes of Hearing (Further), June 26, 2023, at p. 2:5.)

On August 21, 2023, the WCJ issued an Order Vacating Submission and for Further Development of the Record. The order specified that "further development of the reports of Dr. Gregory Cohen and Dr. Stanley Majcher is necessary … [t]hese reports must comply with the requirements of Labor Code § 4663(c) re: consultation when apportionment cannot be found by the reporting physician and 8 CCR § 10682." (Order Vacating Submission and for Further Development of the Record, August 21, 2023.)

Applicant is aggrieved by the Order Vacating Submission and seeks removal therefrom. Applicant contends that both Dr. Cohen and Dr. Majcher have adequately considered principles of apportionment and have determined that it would be speculative to apportion as between the specific and cumulative injuries. As such, applicant contends that both physicians have adequately addressed the issue of apportionment, and that there is no valid basis for further development of the record. (Petition for Removal, at p. 5:16.)

The WCJ's Report observes that the burden of establishing permanent disability, if any, rests with the applicant, and that to the extent that a valid apportionment determination is a requirement for a medical-legal report to constitute substantial evidence, applicant has not met this burden. (Report, at pp. 9-10.) The WCJ further observes that pursuant to Labor Code[2] section 4663(c), in the event that a physician is unable to render an apportionment analysis, the physician "shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination." (Report, at pp. 6-7.)

DISCUSSION

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that

[2] All further statutory references are to the Labor Code unless otherwise stated.

substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); *Cortez v. Workers' Comp. Appeals Bd., supra,* 136 Cal.App.4th at p. 599, fn. 5; *Kleemann v. Workers' Comp. Appeals Bd., supra,* 127 Cal.App.4th at p. 280, fn. 2.) Additionally, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

Applicant contends that the apportionment analyses offered by QMEs Cohen and Majcher satisfy the requirements of section 4663, obviating the need to develop the record. We agree.

Section 4663 provides, in relevant part:

> (a) Apportionment of permanent disability shall be based on causation.
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> (b) A physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address in that report the issue of causation of the permanent disability.
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> (c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.
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> (Lab. Code, § 4663(c).)

In B*enson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113, 133] (*Benson*), the Court of Appeal held that pursuant to reform legislation of 2005, sections 4663 and 4664 require apportionment to each distinct industrial injury causing permanent disability. (*Id.* at p. 117.) This is because the "plain language of section 4663, subdivision (c) … calls for a physician to make an apportionment determination 'by finding what approximate percentage of the permanent disability *was caused by the direct result of injury arising out of and occurring in the course of employment* and what approximate percentage of the

permanent disability *was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries*.'" (*Id.* at p. 123, italics original.) Thus, based on the legislative history and the Appeals' Board's contemporaneous interpretation of the statute, "apportionment is required for each distinct industrial injury causing a permanent disability, regardless of the temporal occurrence of permanent disability or the injuries themselves." (*Id.* at p. at p. 132.) However, the Court of Appeals in *Benson* also observed that:

> [T]here may be limited circumstances … when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability. In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified. (See § 4663, subd. (c); *Kopping v. Workers' Comp. Appeals Bd.*, supra, 142 Cal.App.4th at p. 1115 ["the burden of proving apportionment falls on the employer because it is the employer that benefits from apportionment"].)
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> (*Benson, supra*, at p. 133.)

Thus, the court determined that defendant bears the burden of establishing apportionment, and that under certain circumstances an evaluating physician will be unable to parcel out, with reasonable medical probability, the approximate percentages of disability arising out of each claimed injury. In such cases, the defendant has not met its burden of establishing valid apportionment as between the various claimed industrial injuries. (See also *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170].) *Torres v. Automobile Club of So. Cal.* (1997) 15 Cal.4th 771, 779 [937 P.2d 290, 63 Cal.Rptr.2d 859]; *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41 Cal.Comp.Cases 42].)

Here, Dr. Cohen issued a November 16, 2022 supplemental report addressing *Benson* apportionment. The supplemental report observed that the QME was unable to parcel out the respective percentages corresponding to applicant's specific and cumulative injuries, respectively. (Ex. V, Report of Gregory Cohen, M.D., November 16, 2022, p. 2.) Dr. Cohen observed that a "review of the medical records provided did not show that other treating or evaluating doctors documented any differences in psychiatric symptoms and dysfunction in relation to the cumulative and specific injuries." (*Ibid*.) Following a review of the entire record, including the submitted medical history, prior clinical examinations, and applicant's deposition testimony, Dr. Cohen concluded that "based upon reasonable medical probability, there is insufficient medical evidence

to apportion psychiatric impairment with regard to the cumulative and the specific injury," and that "[t]o do so would be speculative." (*Ibid*.)

Dr. Majcher's supplemental report, also dated November 16, 2022, similarly reviewed the applicant's medical history, including the relevant treatment records from 2008 to 2011. (Ex. W, Report of Stanley Majcher, M.D., November 16, 2022, pp. 2-3.) Following this review, the QME observed that "there are numerous references to the comments from the orthopedists regarding subjective complaints but the orthopedists do not specify what subjective issues such as pain, stress and administration of nonsteroidal anti-inflammatory drugs had been prescribed for which particular injury … This is the reason why I had concluded that the data were inadequate for me to further apportion per *Benson* and I had concluded that the patient's condition was inextricably intertwined." (*Id.* at p. 3.) Dr. Majcher also noted that he had consulted with a colleague, Omar Tirmizi, M.D., and had inquired specifically with respect to the issues related to apportionment arising out of this case. Dr. Majcher noted that following a review and discussion, Dr. Tirmizi had confirmed he "likewise could not apportion further per *Benson* and agreed with me that the issues were inextricably intertwined." (*Ibid*.)

The WCJ's Report observes that "Drs. Majcher and Cohen have given their *analysis*, as required by the Labor Code, as to why they cannot come up with an *apportionment determination* … However, the requirement that the doctor must give the specific reasons (or show his analysis) why he/she cannot make the *apportionment determination* and the use of the word "shall" regarding the consultation required under Labor Code § 4663 means that regardless of the reasoning behind the inability to provide an *apportionment determination*, a medical consultation must occur." (Report, at p. 8, italics original.)

However, as the Court of Appeal held in *Benson*, there are circumstances when the evaluating physician cannot parcel out the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability, and that in those instances, "a combined award of permanent disability may still be justified." (*Benson, supra*, at p. 133.) This is because a medical determination that apportionment would be speculative, based on substantial evidence, and expressed to a reasonable medical probability, is itself a valid apportionment determination. As we have recently observed in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 748-749 [2023 Cal. Wrk. Comp. LEXIS 30, 13-14], "when a physician considers all appropriate factors of apportionment but nevertheless

determines that it is not possible to approximate the percentages of each factor contributing to the employee's overall permanent disability to a reasonable medical probability, the physician has made the apportionment determination required under section 4663(c)." (See *James v. Pacific Bell Tel. Co.* (May 10, 2010, ADJ1357786) [2010 Cal. Wrk. Comp. P.D. LEXIS 188, at pp. 11-12] ["When a physician is unable to apportion to non-industrial causes—not because consultation with another physician is necessary, but because there is insufficient evidence to justify such apportionment—the defendant has failed to meet its burden of proof; and the applicant is entitled to an unapportioned award."]); see also *Fields v. City of Cathedral City* (March 8, 2013, ADJ6894498; ADJ6896838) [2013 Cal. Wrk. Comp. P.D. LEXIS 103] "a physician's report may constitute substantial medical evidence and meet the requirement that he or she fully address the issue of apportionment, if the physician 'cannot parcel out with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability.'"].)

Here, both physicians have demonstrated familiarity with the record, and as the WCJ observes, discussed the rationale for why *Benson* apportionment as between applicant's specific and cumulative injuries would be inherently speculative, to a reasonable medical probability.

We therefore conclude that pursuant to *Benson*, *supra*, both physicians have appropriately described why they cannot parcel out with reasonable medical probability the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability." (*Benson, supra*, at p. 133.) Accordingly, both physicians have made the apportionment determination required by section 4663(c). (*Ibid*.)

Because we find that the apportionment analyses of both Dr. Cohen and Dr. Majcher satisfy the requirements of section 4663(c), development of the record to augment their respective apportionment opinions is unnecessary. Consequently, we will grant applicant's petition and rescind the August 21, 2023 Order Vacating Submission for Further Development of the Record, and return this matter to the trial level for the WCJ to issue a decision from which any aggrieved person may thereafter seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Removal of the decision of August 21, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that the decision of August 21, 2023 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 21, 2023

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

ANDRES VIZCARRA
LAW OFFICES OF SOLOV & TEITELL
LAW OFFICES OF TOBIN LUCKS

SAR/abs

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