WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROGELIO ROMAN, ***Applicant***

vs.

RECOLOGY SONOMA MARIN, permissibly self-insured;
adjusted by TPA CORVEL, ***Defendants***

Adjudication Numbers: ADJ18006784, ADJ15775315
Santa Rosa District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Joint Findings and Award (F&A) of August 9, 2023, wherein the workers' compensation administrative law judge (WCJ) found in relevant part that applicant sustained 27% permanent disability for applicant's continuous trauma injury after apportionment in case ADJ18006784.[1] We have considered the allegations of the Petition for Reconsideration, applicant's Answer, and the contents of the report of the WCJ with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

Labor Code section 3208.2 provides:

> When disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific, cumulative, or both, all questions of fact and law shall be separately determined with respect to each such injury, including, but not limited to, the apportionment between such injuries of liability for disability benefits, the cost of medical treatment, and any death benefit.

"[A] system of apportionment based on causation requires that each distinct industrial injury be separately compensated based on its individual contribution to a permanent disability." (*Benson*

---

[1] Applicant also sustained a specific injury in ADJ15775315 but did not seek reconsideration of the findings and award related to the injury that case.

v. Workers' Comp. Appeals Bd. (2009) 170 Cal.App.4th 1535, 1560 [89 Cal.Rptr.3d 166; 74 Cal.Comp.Cases 113] (*Benson*).) Labor Code section 4663(a) provides that "[a]pportionment of permanent disability shall be based on causation." Labor Code section 4664(a) provides that: "The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." Here, as explained by the WCJ, agreed medical evaluator (AME) Thomas Miles, M.D., determined that applicant's disability caused by his employment as a driver could be divided between his specific injury and his cumulative injury, and the WCJ issued her decision based on that substantial medical evidence.

Defendant contends that the foregoing principles of apportionment should apply to division of liability between liable industrial defendants. Specifically, it alleges that Dr. Miles further divided causation of applicant's industrial disability between it and previous industrial employers, and that the WCJ should have issued her decision based on that opinion. However, applicant has a single industrial cumulative injury due to his employment, and the apportionment of liability for causation of a single industrial injury between multiple industrial defendants is governed by the provisions of Labor Code section 5500.5.

Labor Code section 5500.5 was enacted in 1951 to codify the holding in *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79 [11 Cal.Comp.Cases 226] that an employee who sustains an injury as a result of a progressive occupational disease may obtain an award for the entire amount of permanent disability from any one employer or insurer and the defendant held liable will have the burden of seeking contribution from other employers.

Labor Code section 5500.5(a) states in relevant part that liability shall be imposed on the employer who employed the employee during a period of one year "immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first." Subdivision (a) also states in relevant part that "liability shall not be apportioned to prior or subsequent years" but that evidence of apportionment is admissible.

The "elected against defendant" may seek contribution for awarded benefits from another defendant by filing a Petition for Contribution within one year of an Award. (Lab. Code, § 5500.5(e); *General Accident Insurance Co. v. Workers' Comp. Appeals Bd.* (*Loterstein*) (1996) 47 Cal.App.4th 1141, 1148-1149 [61 Cal.Comp.Cases 648]; *Schrimpf v. Consolidated Film*

Industries, Inc. (1977) 42 Cal.Comp.Cases 602 [Appeals Bd. en banc].) "In other words, an employee may choose to obtain an award for his or her entire cumulative injury disability from one or more successive employers, or their insurance carriers, and the employers have the burden of adjusting the share that each should bear in an independent proceeding between themselves." (*Rex Club v. Workers' Comp. Appeals Bd.* (1997) 53 Cal.App.4th 1465, 1472 [62 Cal.Comp.Cases 441].) This procedure is intended to promote a prompt determination of an injured worker's entitlement to workers' compensation benefits. (*Id.*)

Defendant misapprehends section 5500.5 when it contends that it should only be liable for the percentage of disability resulting from applicant's relative brief period of employment with defendant of two and a half years of his forty-four and a half year work history. (Petition, p. 5.) The date of injury for the cumulative trauma was August 14, 2020, and defendant was the only employer in the one year preceding the injury. Moreover, defendant was the only employer in applicant's last year of employment in his occupation. Accordingly, by either analysis, defendant is liable for the entire 27% award of permanent disability and not the 5.5% it claims in its Petition. (Lab. Code, § 5500.5(a).) Defendant's attempt to avoid liability pursuant to section 5500.5 is unfounded. Instead, defendant may file a Petition for Contribution within one year to seek contribution from one or more defendants. (Lab. Code, § 5500.5(e).)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the August 9, 2023 Joint Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 30, 2023

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

ROGELIO ROMAN
KNEISLER & SCHONDEL
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP

JMR/*ara*

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

<u>REPORT AND RECOMMENDATION</u>
<u>ON PETITION FOR RECONSIDERATION</u>

I
INTRODUCTION

Defendant, by and through its counsel, Glenn Miller of Hanna Brophy, filed a timely and verified Petition for Reconsideration challenging the Joint Findings and Award dated August 9, 2023.

Two dates of injury were adjudicated at the July 27, 2023 Trial. In the first case (ADJ15775315), the applicant suffered an admitted industrial injury to his cervical and lumbar spine as the result of a specific injury on August 14, 2020 while employed as a driver for the employer, Recology Sonoma Marin when the applicant slipped getting out of his work truck. At the time of injury, Applicant was 64 years old.

In the second case (ADJ18006784), the applicant suffered an admitted cumulative trauma (CT) injury to his cervical and lumbar spine through August 14, 2020 while working as a driver for the employer, Recology Sonoma Marin. At the time of injury, the applicant was 64 years old.

In the Joint F&A, the undersigned WCJ found that the applicant sustained injuries to his cervical and lumbar spine on August 14, 2020 and on a cumulative trauma basis through August 14, 2020. The undersigned WCJ awarded a 19% permanent disability (PD) rating for the specific August 14, 2020 injury after apportionment, and a 27% permanent disability (PD) rating for the CT through August 14, 2020 after apportionment along with an award for future medical care for the neck and cervical spine for both injuries.

Petitioner does not seek reconsideration of the award in the specific injury case, ADJ15775315. (*Petition, page 2, line 7.*) Petitioner's sole contention for reconsideration is that the WCALJ did not correctly apportion the cumulative trauma case, ADJ18006784, resulting in the finding of 27% permanent disability. (*Petition, page 2, lines 7 thru 9.*)

II
FACTS

The parties utilized Dr. Thomas Miles as the Agreed Medical Evaluator for the specific injury on August 14, 2020 and the CT injury through August 14, 2020. Over the course of the claims, Dr. Miles issued three reports (Joint Exhibits J2, J3, J4), and submitted to one deposition. (Joint Exhibit Jl.)

In his initial evaluating report dated June 27, 2022, Dr. Miles did not find the applicant permanent and stationary, and as such, did not address permanent disability or apportionment. (Joint Exhibit J4, Dr. Miles, June 27, 2022.) In preparation for this report, Dr. Miles reviewed 434 pages of medical records and applicant's deposition transcript dated March 30, 2022. (Id. at page 1, and pages 8 through 10.) The listing of all records reviewed by Dr. Miles, items 1 through 37, does not list any employment or wage records reviewed by Dr. Miles. (Id.)

In his second report dated January 18, 2023, Dr. Miles noted that no new records were provided to him prior to preparing this report. (Joint Exhibit J3, Dr. Miles, January 18, 2023, page 7.) After examining the applicant, Dr. Miles found the applicant permanent and stationary, provided impairment ratings, and provided an apportionment analysis as follows:

> It is my opinion that for a period of at least one year prior to his work claim he was developing mild symptoms of ha.ck and neck pain that came to the fore once he sustained his work injury on 8/14/20. Approximately 60% of his current disability in my opinion came about cumulatively with 40% a consequence of his specific work injury.
> (Joint Exhibit J3, Dr. Miles, January 18, 2023, page 9.)

In his third and final report dated January 30, 2023, Dr. Miles reviewed an additional 684 pages of records and stated, "After reviewing these extensive records, opinions formulated in my 1/18/23 evaluation remain entirely unchanged." (Joint Exhibit J2, Dr. Miles, January 30, 2023, page 3.) The 684 pages of records reviewed were medical records and did not include any employment or wage records. (Id. at pages 1 thru 3.)

On May 2, 2023, Dr. Miles submitted to a deposition. (Joint Exhibit J1.) During the deposition, Dr. Miles testified that he recalled Applicant telling him about his prior employment history as a refuse collector/driver (Joint Exhibit J1, page 6, lines 6 thru 16.) Thereafter, regarding apportionment Dr. Miles testified, "40 percent due to the August 14, 2020. And, 60 percent would be cumulative trauma for Recology, and depending on the hours of work with prior employers." (Joint Exhibit J1, page 12, lines 9 through 12.)

Applicant was not called as a witness at Trial. (MOH/SOE, page 1, line 38.) Applicant's deposition transcript was not admitted into evidence. (MOH/SOE, page 4, lines 9 thru 13.) Applicant provided an offer of proof at Trial stating, "Prior to his injury of August 14, 2020, he had never suffered an injury to his neck or back as a consequence of any work he had ever done." (MOH/SOE, page 4, lines 18-26.) There was no objection to the offer of proof.

A Findings and Award issued awarding permanent disability of 27% for the CT injury based on the reporting and deposition testimony of Dr. Miles, and after apportioning 60% to the CT injury and 40% to the specific injury. The undersigned WCJ did not find sufficient evidence to apportion the 60% further amongst applicant's prior employers.

It is from this Findings and Award that petitioner seeks reconsideration.

III
DISCUSSION

While the employee holds the burden of proof regarding the approximate percentage of permanent disability directly caused by the industrial injury, the employer holds the burden of proof to show apportionment of permanent disability. (Lab. Code, § 5705; see also *Escobedo v. Marshalls* (2005), 70 Cal.Comp.Cases 604,613 (Appeals Board en banc); *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450 [45 Cal.Comp.Cases 170].)

To meet this burden, the employer "must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment." (*Gay v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo*, supra, 70 Cal.Comp.Cases at p. 620.)

It has been long established that 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. (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93].) 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. (*Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399, 407 [33 Cal.Comp.Cases 647].)

The parties stipulated to the dates of injury herein. (MOH/SOE, page 2, lines 15 through 21.) As between the stipulated injuries, the WCALJ found a legal basis for apportionment. Dr. Miles' reports and deposition testimony affirm that 60% of applicant's disability is apportioned to the cumulative trauma through August 14, 2020 and 40% is to the specific injury on August 14, 2020. (Joint Exhibit J3, page 9; Joint Exhibit J1, page 12.)

In all of Dr. Miles' reports, and in his deposition testimony, he never changed his opinion regarding apportionment between the specific and CT injuries. And, based upon Dr. Miles' review of over 1,000 pages of medical records relating to applicant's work at Recology Sonoma Marin, the undersigned WCJ found Dr. Miles' reporting and testimony to be substantial medical evidence to properly address apportionment between the two injuries.

However, the same is not true regarding further apportionment of the CT injury to multiple employers, which is the crux of Defendant's Petition for Reconsideration. Defendant asserts, "Agreed Medical Examiner Dr. Miles has offered the opinion that at least some measure of the applicant's cumulative trauma disability is the result of his employment during the years prior to Recology. Consequently, defendant is entitled to apportionment based on this employment history." (*Petition, page 4, lines 23 thru 26*.)

In his deposition, Dr. Miles testified that the 60% apportioned to the CT injury was due to his employment with Recology Sonoma Marin "and depending on the hours of work with prior employers." (Joint Exhibit J1, page 12, lines 9 through 12.) Unfortunately, Dr. Miles was never provided with applicant's work hours or employment records for review. And, neither the work hours nor employment records were submitted into evidence at Trial. Moreover, applicant's deposition transcript was not admitted into evidence (MOH/SOE, page 4, lines 9 thru 13), and defendants did not call applicant as a witness at Trial to testify under oath as to his employment history. (MOH/SOE, page 1, line 38.)

In its Petition for Reconsideration, Defendants assert that further apportionment for the CT injury can be proven because the applicant verbally provided Dr. Miles with his employment history. Defendant asserts, "WCJ Hengel's assertion that defendant did not provide any evidence to allow further apportionment of the cumulative trauma injury is not correct. A close review of AME Dr. Miles' reports shows that the applicant provided the doctor with his employment history." (*Petition, page 5, lines 8 thru 14*.)

However, Dr. Miles' reports do not include review of applicant's prior employment records to confirm applicant's statement to him about his employment history. Nowhere in the 1,000+ pages of records reviewed by Dr. Miles was it listed that any employment or wage information was reviewed. And, although Dr. Miles reviewed the applicant's deposition transcript for his initial report, the deposition transcript was not submitted into evidence at Trial, and applicant did not testify at Trial. As such, Dr. Miles' statements that he would apportion the CT injury equally between multiple employers is not supported by substantial evidence, but solely on applicant's verbal statements to him during the first evaluation. Without confirmation of applicant's employment history, further apportionment of the 60% would be speculative.

Defendant is asking the Court to rely on applicant's statement to Dr. Miles that he worked for each of his prior employers (that is, prior to Recology) for 14 years. Defendant asserts, "In his 6/27/2022 report (Joint Exhibit 4), AME Dr. Miles notes the applicant's prior employment by Santa Rosa Recycling, Waste Management, and Redwood Empire Disposal - He worked approximately 14 years with each of these companies." (*Petition, page 5, lines 8 thru 13.*)

However, Dr. Miles' testimony states that he was not clear on the years Applicant worked for his prior employers. (Joint Exh. J1, page 11, lines 12 thru 20.) Dr. Miles testified as follows:

> [I] would divvy it probably equally between those prior employers and the Recology people. Or maybe better yet, apportion to the number of years worked, if – I'm not sure if it's 14 years each. That was just what he said. He picked those numbers. He may be incorrect on the number of years served with prior employers.
> (Joint Exh. J1, page 11, lines 12 thru 17.)

Based on the above testimony, it is clear Dr. Miles was unsure about Applicant's prior employment history and is speculating as to the number of years worked for each employer.

To clear up the speculation prior to Trial, Defendant had an opportunity to submit employment or wage and hour records to Dr. Miles for review but did not do so. At Trial, Defendant had the opportunity to question the applicant under oath on employment history but did not do so. After Trial, Defendant had the opportunity to object to the WCALJ sustaining applicant's objection to applicant's deposition transcript coming in as evidence but did not do so. Therefore, it remains this WCALJ's opinion that Defendant failed to provide any substantial evidence regarding applicant's prior employment such that the CT injury could be apportioned beyond the 60%.

IV
RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Dated: September 6, 2023

Respectfully submitted,

Heidi K. Hengel
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE