

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRANK TOWE, *Applicant*

vs.

STUDEBAKER SERVICES AUTO BODY; FARMERS INSURANCE GROUP/MID CENTURY INSURANCE; STATE COMPENSATION INSURANCE FUND, *Defendants*

**Adjudication Numbers: ADJ2515690 (VNO 0429947); ADJ497686 (VNO 0429946);
ADJ518952 (VNO 0429948)
Van Nuys District Office**

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

Applicant Frank Towe, and defendant, Farmers Insurance Group/Mid-Century Insurance Company, on behalf of its insured, Studebaker Services Auto Body, have filed petitions seeking reconsideration of the Findings, Award and Order, served December 22, 2020, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as an autobody prep man, sustained two industrial injuries to his neck and low back, on May 23, 1995 and on January 7, 1999, resulting in permanent total disability, apportioned equally between both dates of injury. Applicant was awarded 50% permanent disability for each injury, each equivalent to 266.25 weeks of indemnity, payable at the rate of \$170.00 per week, in the sum total of \$45,262.50, commencing January 15, 2003, less credit according to proof. The WCJ awarded a period of temporary total disability from January 11, 1999 through January 15, 2003, at the weekly rate of \$398.03. The WCJ also found applicant did not sustain a cumulative trauma injury as alleged in ADJ518952.

Applicant contests the apportionment of his permanent disability award, contending that he is entitled to an unapportioned award of 100% permanent disability as defendant failed to provide substantial medical evidence to meet its burden of proof to establish apportionment between the specific injuries. Applicant argues that the apportionment determination of Dr. Silbart, upon whom the WCJ relied, failed to account for the non-orthopedic injuries and, in the absence

of unanimity of medical apportionment covering all of applicant's disability and both specific injuries, he is entitled to an unapportioned award.

Defendants Farmers Insurance Group/Mid-Century Insurance Company and State Compensation Insurance Fund filed Answers to applicant's Petition for Reconsideration. SCIF argues that Dr. Silbart's opinion constitutes substantial medical evidence to justify the WCJ's apportionment between the two specific injuries. Farmers Insurance argues that no reliance may be placed upon Dr. Nagleberg's most recent medical report because it was not admitted into evidence. Farmers Insurance further argues that there is no requirement for unanimity of medical opinion to support a finding on apportionment, and the WCJ properly relied upon Dr. Silbart's apportionment determination.

In its Petition for Reconsideration, defendant contests the award of four years of temporary disability indemnity, contending that the WCJ lacked jurisdiction to make the award as the parties did not raise the issue of temporary disability for determination at the Mandatory Settlement Conference, and did not offer evidence on the issue. Defendant further argues that the finding that applicant is permanently totally disabled is not supported by substantial medical evidence, and that the award should be based on Dr. Silbart's impairment ratings.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that both defendant and applicant's Petitions be granted and the Findings and Award be amended and the matter returned for further proceedings.

We have considered the allegations and arguments of the Petitions for Reconsideration, as well as the Answers filed by defendants, and have reviewed the record in this matter and the WCJ's Report and Recommendation on Petition for Reconsideration of January 20, 2021, which considers, and responds to, each of the defendant's and applicant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, we will grant reconsideration of the WCJ's Findings, Award Order, and return this matter to the WCJ to issue a new final determination on all outstanding issues.

In his Report, the WCJ identified matters not raised for determination that remain issues in this case from the prior determination in 2006, involving injury to non-orthopedic body parts, as well as contribution and prior attorney fees. While the WCJ recommends that we amend and reissue his findings, there should be a single final determination of all issues, rather than piecemeal determinations. This will provide the WCJ with the opportunity to make a determination on the

admissibility of evidence submitted at trial, and to fully explain the evidentiary basis for his finding on apportionment between applicant's dates of injury.

Accordingly, we will grant reconsideration, rescind the Findings, Award and Order and return this matter to the trial level for a new final determination.

For the foregoing reasons,

IT IS ORDERED that Applicant's and Defendant's Petitions for Reconsideration of the Findings, Award and Order, served December 22, 2020, are **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the Findings, Award and Order is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings and a new final determination.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 11, 2021

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

**FRANK TOWE
HITZKE & FERRAN
LAW OFFICES OF MICHAEL P. BARNARD
STATE COMPENSATION INSURANCE FUND**

SV/pc

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