WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANGIE SMITH, *Applicant*

vs.

ALAMEDA COUNTY MEDICAL CENTER, permissibly self-insured, administered by BETA HEALTHCARE GROUP *Defendants*

Adjudication Numbers: ADJ13070871; ADJ8391042; ADJ5798023

Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on June 28, 2023, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her cervical spine and low back, that the injury caused 55% permanent disability, and that the record needs to be further developed regarding whether applicant had additional periods of temporary disability prior April 4, 2022.

Defendant contends that the April 19, 2023 report from primary treating physician (PTP) Brandan P. Morely, M.D., should not have been admitted into evidence; that the November 30, 2021 report from chiropractic qualified medical examiner (QME) Don D. Smallie, D.C., is substantial evidence that applicant has 18% cervical spine whole person impairment (WPI), less 15% apportionment; and that the reports from Dr. Smallie are substantial evidence that applicant's condition reached permanent and stationary status on May 20, 2021.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to her cervical spine and low back while employed by defendant as a registered nurse, during the period ending March 5, 2020. Applicant had previously claimed that she had sustained injury to her lumbar spine on March 31, 2003, and to her lumbar spine and psyche on July 13, 2006.

QME Dr. Smallie evaluated applicant on December 7, 2020. He concluded that applicant's condition had not reached maximum medical improvement (MMI) and she could not be considered permanent and stationary. (Def. Exh. A, Don D. Smallie, D.C., December 7, 2020, p. 5.) Dr. Smallie re-evaluated applicant on May 20, 2021. Based on his re-examination of applicant, Dr. Smallie stated his opinions regarding applicant's condition as follows:

> Diagnosis:
> Non industrial:
> Multiple sclerosis 12/19/2019
> Small old stroke left cerebellar
> Peripheral neuropathy 11/18/2005
> Obesity 04/01/2004
> Cervical spine disc, spondylosis 03/16/2020
> Industrial:
> CT 03/05/2020 and 03/31/2003 and 07/13/2006
> Cervical disc C5-6-disc protrusion, compression of cord.
> Lumbar strain
> Lumbar bulging disc with radiculopathy
> Maximum Medical Improvement - Permanent And Stationary:
> Angie Smith has now reached maximum medical improvement for her CT 03/05/2020 injury. She is permanent and stationary and able to be rated at this time.
> Rating:
> 1. Angle Smith is a DRE category III cervical impairment. Page 392 in the 5th Edition AMA Guides table 15-5. She is 18% impairment of whole person.
> 2. DRE Category II lumbar impairment. Page 389 [sic] AMA 5th Edition Guides, Table 15-3 = 8% whole person impairment.
> This is a total of 26% whole person impairment.
> Apportionment:
> 1. Lumbar, SI joint rating.
> 100% old settled work comp cases of 03/31/2003 and 07/1/2006
> 0% CT 03/05/2020 irritation

2. Leg pain and weakness
40% old, settled work comp cases of 03/31/2003 and 07/13/2006
50% CT 03/05/2020 work comp
10% multiple sclerosis
3. Cervical spine condition causing compression of cord-C5-6-disc protrusion.
0% old settled work comp cases of 03/31/2003 and 07/13/2006
100% CT 03/05/2020 work comp
0% multiple sclerosis
(Def. Exh. B, Don D. Smallie, D.C., May 20, 2021, pp. 6 – 7.)

Applicant underwent a course of treatment by Dr. Morley, from April 4, 2022, through April 19, 2023, regarding her cumulative injury claim. (See App. Exh. 8, Brandan P. Morely, M.D., April 19, 2023, pp. 4 – 6.) The parties requested that Dr. Morley submit a permanent and stationary report. He again evaluated applicant, took an interim history, reviewed the extensive medical record (see App. Exh. 8, pp. 6 – 31), and diagnosed applicant as having intervertebral disc disorder with radiculopathy, L4-L5 and L5-S1; and cervical spondylosis, C5-C6, with resulting spinal stenosis and bilateral cervical radiculopathy. (App. Exh. 8, p. 32.) Regarding his review of the reports from QME Dr. Smallie, Dr. Morley stated:

> I have above provided some comment in regards to the QME evaluations done by Dr. Smallie. ¶ These reports were difficult for me to understand. In his first QME Evaluation, performed on 12/7/2020, I could not find any evidence of physical examination being performed, seeming to make it difficult to conclude that this QME provided any credible medical evidence. Dr. Smallie noted that he did not feel the patient was at maximum medical improvement at that point in time for the diagnosis of lumbar strain and lumbar bulging disc with radiculopathy. ¶ Dr. Smallie did perform a reevaluation on 4/20/2021. He did now include the cervical spine, noting a diagnosis of cervical disc bulging, compression of the cord, with lumbar disc bulging, and lumbar sprain. He did describe the patient as a DRE Cervical Category III with an 18% whole person impairment, and a Lumbar DRE Category II with an 8% whole person impairment. ¶ In the addendum pages of the report, he does provide some evidence for range of motion measurements performed of the patient, but these do not seem to be performed in accordance with the AMA Guides. He provides no range of motion measurements for the sacral portion of the spine, and the interested parties are aware that when performing range of motion evaluation of the lumbar spine, one must use the two inclinometer technique, and essentially subtract the measurements of flexion and extension from the lumbar values of sacral flexion and extension to yield net lumbar flexion and lumbar extension values. He did not seem to perform these measurements in compliance with the AMA Guides, or at least record the results. ¶ … Clearly, this patient has a recurrent injury to the same spinal region, necessitating the use of the range of motion methodology, and clearly this patient has a bilateral, multilevel lumbar radiculopathy, which also necessitates the use of the range of motion

> methodology, as described in the AMA Guides on page 380, in this instance with the relative paragraphs being those labeled [sic] #2 and #4. I do not feel Dr. Smallie's rating provided for the lumbar spine is compliant with the instructions to physicians utilizing the AMA Guides, at least in regards to providing a "strict" rating. Potentially, Dr. Smallie's DRE Lumbar Category II rating could be considered a rating by analogy, consistent with the various Almaraz/Guzman decisions; however, he does not provide any rationale in his report in regards to why an Almaraz/Guzman rating for the lumbar spine should be provided, rather than utilizing a strict methodology applicable in this case; that is, the range of motion methodology, as outlined in the AMA Guides.
> (App. Exh. 8, pp. 33 – 34.)

Dr. Morley then stated, "We do feel the patient is at maximum medical improvement and appropriate for a permanent and stationary rating. I do feel the patient reached maximum medical improvement on or about 9/7/2022." (App. Exh. 8, p. 34.)

The parties proceeded to trial on June 13, 2023. The parties stipulated that: "The trial judge is to determine the admissibility of the PR-4 (permanent and stationary/maximum medical improvement) report issued by the primary treating physician …".[1]

The issues submitted for decision included periods of temporary disability, permanent disability/apportionment, and the admissibility of the PR-4 report issued by Dr. Morely (Minutes of Hearing and Summary of Evidence (MOH/SOE), June 13, 2023, p. 2.) In the Issues section of the MOH/SOE, the parties asserted:

> 5. On February 28, 2023, Dr. Morley faxed a Request for Authorization requesting defendant authorize CPT Code ML 201 X units [comprehensive medical-legal evaluation]. Dr. Morley's office again faxed the adjuster on April 10, 2023, and March 21, 2023, asking about the then-late response. …
> 6. Defendant contends that PTP found applicant to be permanent and stationary on September 7, 2022, but failed to respond to defendant's request dated September 29, 2022, for a P&S report. Opposing counsel made no efforts to obtain a PR-4 after the Mandatory Settlement Conference on January 31, 2023, and WCJ Griffin set the matter for trial on April 11, 2023. Defendant contends that the QME reports are substantial evidence.
> (MOH/SOE, p. 3.)

[1]The report was submitted as Applicant's Exhibit 8 at the June 13, 2023 trial. In the Petition, defendant states that it received the PR-4 report from Dr. Morley on June 6, 2023.

DISCUSSION

Pursuant to Labor Code section 5703:

> The appeals board may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing:
> (a) Reports of attending or examining physicians.
> (1) Statements concerning any bill for services are admissible only if made under penalty of perjury that they are true and correct to the best knowledge of the physician.
> (2) In addition, reports are admissible under this subdivision only if the physician has further stated in the body of the report that there has not been a violation of Section 139.3 and that the contents of the report are true and correct to the best knowledge of the physician. The statement shall be made under penalty of perjury.
> (Lab. Code, § 5703.)2

Having reviewed the April 19, 2023 report from Dr. Morley (App. Exh. 8), it is clear that the doctor complied with the requirements of section 5703. Therefore, we agree with the WCJ that the report was properly admitted into evidence.

Defendant also argues that:

> … [T]he WCJ failed to appreciate the good cause shown by Defendants in requesting a continuance to allow for discovery as to the just received PR-4 report by Dr. Morley, which unjustly prejudiced Defendants by not allowing them to produce evidence in explanation or rebuttal before a decision is rendered.
> (Petition, p. 8.)

It must be made clear that review of the issues raised by the parties, and submitted for decision, do not include a request for continuance to allow further discovery. Defendant stated that the "QME report and is received 5 business days before trial." (Petition, p. 8.) Clearly, defendant had adequate time to review the report from Dr. Morley before the day of trial. If it chose to do so, defendant could have asserted at the trial that, having received the report after the Mandatory Settlement Conference but before the trial date, it was entitled to have the matter taken off calendar so that it could conduct further discovery pertaining to the newly received report. However, as stated above, defendant did not raise that issue at trial, and an issue that could have been raised at trial cannot be raised for the first time in a petition for reconsideration. (*Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1265 [54 Cal.Comp.Cases 145, 148] (issue not raised

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

at trial level is waived; *Davis v. Interim Health Care* (2000) 65 Cal.Comp.Cases 1039, 1044 (Appeals Board en banc).) A party's waiver of an issue, whether intentional or not, does not in any way constitute a denial of that party's due process rights.

Finally, it is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence and the Appeals Board may rely on the medical opinion of a single physician unless it is "based on surmise, speculation, conjecture, or guess." (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Market Basket v. Workers' Comp. Appeals Bd*. (1978) 86 Cal.App.3d 137 [46 Cal.Comp.Cases 913.) Again, having reviewed the trial record, we agree with the WCJ that the report from Dr. Morley is not based on surmise, speculation, conjecture, or guess, and that it constitutes substantial evidence. Thus, there is no legal for factual basis for disturbing the WCJ's decision.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on June 28, 2023, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 15, 2023

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

ANGIE SMITH
JEREZ LAW GROUP
BOXER & GERSON
FINNEGAN, MARKS, DESMOND & JONES

TLH/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

1.	Applicant's Occupation:	Registered Nurse
	Applicant's Age:	55
	Date of Injury:	March 5, 2020
	Parts of Body Inured:	Cervical spine and low back
2.	Identity of Petitioner:	Defendant
	Timeliness:	Yes
	Verification:	Yes
3.	Date of Findings and Award	June 28, 2023
4.	Defendants' Contentions:	The Findings and Award must be set aside because basing the Award on the April 19, 2023 report from the primary treating physician was a violation of defendant's due process rights and that the Award of permanent disability and temporary disability should have been based on the reports issued by the qualified medical evaluator.

II.

STATEMENT OF THE CASE AND FACTS

Applicant sustained injury arising out of and in the course of her employment for defendant as a registered nurse to her low back and neck during the period ending on March 5, 2020 (ADJ13070871). In addition, applicant had two prior injuries while working for defendant in the same position. On March 31, 2003, she injured her low back (ADJ8391042) and on April 13, 2006, she injured her low back and psyche (ADJ5798023). Both of these prior injuries settled in one Stipulations with Request for Award. Those stipulations reflect that the occupational code was in dispute, that case number ADJ8391042 caused permanent disability of 15% and that case number ADJ5798023 caused permanent disability of 39%. The Stipulations do not reflect how much of the permanent impairment in case number ADJ5798023 was attributed to the low back as opposed to the psyche.

On November 10, 2020, applicant testified as follows during her deposition: She retired because she "could not continue to work." (Exhibit E, Deposition of Applicant, November 10, 2020, p. 18:12-19:2.) Before she retired, she could not open doors and had to have staff open

for them and she could not sit for 15 minutes because she was covering two units. (*Id*. at p. 19:3-19:12.) She filed for retirement because it was becoming stressful to walk and sit for long periods and she believed she needed restrictions. (*Id*. at pp. 23:24-24:18.) She was provided with restrictions, but "it was a disaster and did not work." (*Id*. at p. 24:19-25:7. She filed the instant claim because her pain was worsening. (*Id*. at p. 19:16-19:24.) Applicant's pain caused her to have to take time off work approximately two to four times a month. (*Id*. at p. 20:11-20:17.) Applicant's back pain worsened if she walked too much and she developed leg pain because of walking and standing "years ago." (*Id*. at p. 21:10-21:25.) She purchased a walker to take the pressure off her legs. (*Id*. at p. 25:22-26:4.)

On December 7, 2020, Don D. Smallie, D.C., the qualified medical evaluator (QME), issued a report after evaluating applicant. (Exhibit A, Report of Don Smallie, D.C., December 7, 2020.) In relevant part, he stated that: Applicant's medical records from Kaiser reflected that her doctors believed that severe central stenosis, and not multiple sclerosis, was causing applicant's weakness and problems walking. (*Id*. at p. 2.) Applicant's low back pain gradually worsened and her condition deteriorated. (*Ibid*.) Applicant's employment put a "heavy strain" on her back. (*Id.* at p. 3.)

On May 20, 2021, Dr. Smallie performed a re-evaluation and issued a report stating in relevant part that: Applicant told him that she has no multiple sclerosis symptoms and that her next neurologist appointment would be in one year. (Exhibit B, Report of Don Smallie, D.C., May 20, 2021, at p. 5.) Applicant was permanent and stationary, and he would place her in cervical DRE category III with 18% impairment, and Lumbar DRE category II with 8% impairment. (*Id*. at p. 6.) Applicant required work restrictions, including standing for 10 minutes every half hour and walking with a walker for 1/8 of a mile. (*Id*. at p. 8.) Dr. Smallie described apportionment as follows:

> 1. Lumbar, SI joint rating.
> 100% old settled work comp cases of 03/31/2003 and 07/1/2006
> 0% CT 03/05/2020 irritation
>
> 2. Leg pain and weakness
> 40% old settled work comp cases of 03/31/2003 and 07/13/2006
> 50% CT 03/05/2020 work comp
> 10% multiple sclerosis

3. Cervical spine condition causing compression of cord-C5-6-disc protrusion.
0% old settled work comp cases of 03/31/2003 and 07/13/2006
100% CT 03/05/2020 work comp
0% multiple sclerosis
(*Id*. at p. 7.)

On November 8, 2021, Dr. Smallie testified that he found applicant maximally medically improved because "it didn't seem like the insurance company was providing any other care, and with the lack of any further treatment, it would appear to be that it was – she was going to be maximum medical improvement if she didn't have further care." (Exhibit D, Deposition of Don Smallie, D.C., November 8, 2021 at p. 11:3-11:11.)

On February 10, 2022, defendant filed a Declaration of Readiness to Proceed (DOR) stating that the case was ready for resolution. (DOR, February 10, 2022) Then on February 15, 2022, applicant objected stating that "Discovery is ongoing applicant requested PR-4 from Dr. Morley and no written proposal has been provided to applicant's counsel. (Objection to DOR, February 15, 2022.)

On March 23, 2022, the mandatory settlement conference was continued for further discovery from the treating physician. (Minutes of Hearing (MOH), March 23, 2022.)

On April 4, 2022, Brendan Morley, M.D., the primary treating physician, issued a new patient evaluation stating that: In December of 2020, he began to treat applicant for the 2006 low back injury, and that applicant previously treated with Dr. Behravan. (Exhibit 1, Report of Brendan Morley, M.D., April 4, 2022, pp. 1-2.) Applicant's condition "worsened to the point that new, more restrictive work limitations were provided by Dr. Behravan and a new cumulative trauma claim was filed, and that applicant treated for that claim under her private health insurance. (*Id*. at p. 2.) Applicant underwent an MRI of the brain, which revealed changes consistent with multiple sclerosis, but she has been asymptomatic and did not require treatment. (*Ibid*.) He disagreed that applicant was maximally medically improved and recommended work restrictions. (*Id*. at p. 6.) He had a number of concerns about the QME's determinations. (*Ibid*.)

On May 17, 2022, the mandatory settlement conference was taken off calendar over defendant's objection for further discovery from the treating physician. (MOH, May 17, 2022.)

On July 13, 2022, Dr. Morley issued a PR-2 report stating in relevant part that applicant was not maximally medically improved and that she still required work restrictions. (Exhibit 7, Report of Brendan Morley, M.D., July 13, 2022, pp. 4-5.)

On July 18, 2022, defendant filed a second DOR stating that the parties were at an "impasse regarding settlement." (DOR, July 18, 2022.) Then on July 24, 2022, applicant objected to the DOR stating in relevant part that Dr. Morley did not believe applicant was maximally medically improved and that further discovery was still needed. (Objection to DOR, July 24, 2022.)

On September 7, 2022, Dr. Morley issued a PR-2 report stating in relevant part that applicant was "P&S for this claim on 9/7/2022." (Exhibit F, Report of Brendan Morley, M.D., September 7, 2022, pp. 4-5.) Dr. Morley issued other reports on October 5, 2022, November 30, 2022, and December 28, 2022, indicating that applicant remained permanent and stationary, but in those reports he did not describe applicant's level of impairment. (Exhibit G, Report of Brendan Morley, M.D., October 5, 2022, pp. 5-6; Exhibit H, Report of Brendan Morley, M.D., November 30, 2022,pp. 4-5. Exhibit 4, Report of Brendan Morley, M.D., December 28, 2022, pp. 7, 8.)

On September 27, 2022, the mandatory settlement conference was taken off calendar over defendant's objection for further discovery from the treating physician. (MOH, September 27, 2022.)

On September 29, 2022, defendant's attorney wrote a letter to Dr. Morley asking the doctor to prepare a PR-4 report. (Exhibit J, Defendant's Letter to Dr. Morley, September 29, 2022, p. 2.)

On December 13, 2022, defendant filed a third DOR stating in relevant part that applicant was permanent and stationary, and the matter could not be informally resolved. (DOR, December 13, 2022.) Then on December 19, 2022, applicant filed an objection to the DOR. (Objection to DOR, December 19, 2022.)

On January 31, 2023, the Mandatory Settlement Conference was continued and the MOH reflected that the parties were pursuing a report from the PTP addressing permanent impairment. (MOH, January 31, 2023.)

On February 28, 2023, Dr. Morley issued a request for authorization to prepare a permanent and stationary report, and he issued a medical report regarding that request. (Exhibit 2, Report of Brendan Morley, M.D., February 28, 2023.) In the report, Dr. Morley stated that he received a letter dated November 12, 2021 asking him to prepare such a report, that he submitted the request to the adjuster, and that he needed pre-authorization. (*Id*. at p. 2.)

On March 21, 2023, Dr. Morley's office notified defendant that there had not been a timely response to the request for authorization. (Exhibit 3, Report of Brendan Morley, M.D.)

On April 11, 2023, the matter was set for trial, and the pre-trial conference statement (PTCS) reflected that applicant objected to the matter being set for trial, and that the parties stipulated that the trial judge would determine the admissibility of the forthcoming PR-4 from the primary treating physician. (PTCS, April 11, 2023, pp. 2-3.)

On June 3, 2023, Dr. Morley signed his April 19, 2023, PR-4 report stating in relevant part that: In December of 2020, he began to treat applicant for the 2006 date of injury and that in April of 2022, he began to treat her for the current injury. (Exhibit 8, Report of Brendan Morley, M.D., April 19, 2023, p. 1.) Dr. Jamasbi, the QME for applicant's prior injuries, described a 19% whole person impairment for applicant's lumbar spine using the ROM method, and Dr. Jamasbi apportioned 80% of that impairment to the 2006 date of injury and the remainder to the 2003 date of injury. (*Id*. at p. 2.) Dr. Lossy, the psychiatric QME for the 2006 date of injury, described a whole person impairment of 18% for the psyche. (*Ibid*.) After her prior claims settled, applicant continued working full duty for defendant. (*Id*. at p. 2.) During that time, applicant's condition worsened leading to new work restrictions and the filing of this claim. (*Id*. at p. 3.) Applicant had an MRI of the brain that lead to a diagnosis of Multiple Sclerosis, that diagnosis was not based on symptomatology or impairment, but rather incidentally on the MRI, and applicant has not required treatment for that condition because she is asymptomatic. (*Ibid*.) Applicant can walk for less than 15 minutes with a walker. (*Id*. at p. 4.) Towards the end of 2022, he received a request for a PR-4, but they did not receive authorization until the time the April 19, 2023 examination was scheduled. (*Id*. at p. 5.) Applicant frequently uses a scooter when she is not home and has difficulty getting up if she falls. (*Ibid*.) Applicant walked with a slow, wide-based gait, used a walker, and had intervertebral disc disorder with radiculopathy L4-L5 and L5-S1. (*Id*. at p. 32.) Applicant became maximally medically improved in September of 2022. (*Ibid*.) A January 30,

2021 of applicant's lumbar spine showed degenerative findings that were somewhat advanced from her 2011 lumbar MRI. (*Ibid*.)

In his April 19, 2023 report, Dr. Morley stated that Dr. Smallie's reports were "difficult" to understand. (*Id*. at p. 33.) For example, Dr. Smallie provided some evidence for range of motion measurements in the addendum pages[1] of his report, but those measurements did not seem to be performed in accordance with the Guides. (*Ibid*.) Dr. Morley explained that Dr. Smallie did not provide measurements for the sacral spine or appear to use the two-inclinometer technique required by the Guides. (*Ibid.*) Dr. Morley further stated that Dr. Smallie found 8% whole person impairment for the lumbar spine, which was "significantly less than the previous 19%" provided by Dr. Jamasbi. (*Ibid.*) Dr. Morley also stated that Dr. Smallie only provided impairment to two body parts, but described apportionment determinations for three different body parts. (*Id*. at pp. 33-34.) Dr. Morley stated that page 380 of the Guides mandate use of the ROM methodology because the applicant had bilateral multilevel radiculopathy and a recurrent injury to the same spinal region. (*Id*. at p. 34.) Dr. Morley also stated that Dr. Smallie's May 2021 report described a host of functional limitations that would imply "rather larger impairment of activities of daily living referable to the lumbar spine than an 8% whole person impairment would reflect, and that Dr. Smallie's description of applicant's functional limitations was "grossly incompatible with the 8% whole person impairment rating" that was provided. (*Ibid*.)

Dr. Morley stated that applicant had a whole person impairment of 18% for her cervical spine pursuant to the DRE, and a whole person impairment of 36% for the lumbar spine using the ROM. (*Id*. at pp. 35-36.) He further stated that,

> I do believe that the whole person impairment values described above do provide an accurate description of the patient's decreased ability to perform activities of daily living if the values are added rather than combined. I do believe that the impairments affecting both the patient's cervical and lumbar spines and bilateral upper and lower extremities provides a synergistic increase in the patient's whole person impairment than if she had had injury and limitation in ability to perform activities of daily living to just one spinal region.
>
> For instance, in this patient with problems with lower extremity sensation and strength, she has a decreased ability to compensate by stabilizing herself with her upper extremities and utilizing assistive device or navigating because she also has a condition affecting the cervical spine

[1] These addendum pages are not in filenet.

> with weakness in her bilateral upper extremities. There is also a further synergistic effect on her impairment secondary to her radiculopathy affecting not one side of her body, but both sides of her body. For these reasons, in order to obtain an accurate description of the patient's global decreased ability to perform her activities of daily living, the impairment values provided above must be added rather than combined[.]
> (Id. at p. 36.)

Dr. Morley described apportionment as follows,

> On a pathological basis, the impairment and disability described above arose out of and was caused by cumulative trauma. I would therefore combine the cumulative trauma, the natural progression of disease, and the previous history of injuries from 2003 and 2006.
>
> In regards to the cervical spine, there was no previous record of any injury to the cervical spine or any decreased ability to perform activities of daily living secondary to any injuries pertaining to the cervical spine.
>
> I would, therefore, apportion 100% of the causation of medical impairment and resulting disability described for the cervical spine to cumulative trauma. However, I do not feel all of this cumulative trauma was occupationally caused. The patient used her cervical spine in activities of daily living outside of work which contributed on a pathological basis to the current pathology about the cervical spine bringing about impairment and disability.
>
> I would apportion 90% of the causation of medical impairment and resulting disability described for the cervical spine to occupationally caused cumulative trauma through 3/5/2020, and the remaining 10% to nonoccupationally caused cumulative trauma through 3/5/2020.
>
> In regards to the lumbar spine, we note that there was a previously described 19% whole person impairment described referable to the lumbar spine, based on the reporting from Dr. Jamasbi, acting as a QME, first authored on 10/15/2009. We currently have described a 36% whole person impairment referable to the lumbar spine. Therefore, utilizing a subtraction methodology, I would apportion 53% of the medical impairment and resulting disability described in this report as it relates to the lumbar spine to previous injuries to the lumbar spine from 2003 and 2006.

> As it relates to the lumbar spine, I would apportion 5% of the medical impairment and resulting disability to nonoccupationally-caused cumulative trauma and the natural progression of the spine disease described as emanating from the 2003 and 2006 injuries, and the remaining 42% to cumulative trauma through 3/5/2020.
>
> There is no apportionment to multiple sclerosis. This diagnosis was identified from findings on a brain imaging studies done for headaches and serologic studies. She has been found to by asymptomatic for this condition by her treating neurologist and no treatment have ever been prescribed for this condition. There is no effect on ADL's from this condition.
> (*Id*. at pp. 36-37.)

On June 13, 2023, the matter proceeded to trial. Defendant contended that the matter should not proceed because it had just received Dr. Morley's report, and that Dr. Morley's report was inadmissible. Defendant's request was denied, and the report was admitted into evidence. The primary issues were applicant's entitlement to temporary disability indemnity, applicant's level of permanent disability, and apportionment. Defendant contended that Dr. Smallie's reports were substantial evidence.

During the trial, applicant testified in relevant part that she retired a few months before reaching her 20-year anniversary because she could not do her job correctly. She had not planned to retire before her 20-year anniversary, and the early retirement adversely affected her pension. She would "guesstimate" that she receives $6,000.00 a month from her pension and that she would have received $10,000.00 a month if she retired after the 20-year anniversary.

On [June] 28, 2023, the Findings and Award issued.

On July 18, 2023, defendant filed its Petition for Reconsideration.

III.

DISCUSSION

Defendant's Due Process Rights

The Labor Code states that,

> If the claim is not resolved at the mandatory settlement conference, the parties shall file a pretrial conference statement noting the specific issues in dispute, each party's proposed permanent disability rating, and listing the exhibits, and disclosing witnesses. 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.
> (Lab. Code § 5502(d)(3)[2].)

Also, it is well established that all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158.) A fair hearing is ". . . one of 'the rudiments of fair play' assured to every litigant . . ." (*Id.* at p. 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, "the commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law." *(Id.* at p. 577.) A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295; *Rucker*, *supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com.* (*Baskin*) (1952) 109 Cal.App.2d 54, 58; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710.)

Here, defendant could have waited for Dr. Morley to issue his report before requesting that the matter could have been set for trial. Alternately, defendant could have expedited the issuance of that report by authorizing the doctor to issue the report. (Exhibit 2, Exhibit 3.) Either of these courses of action would have enabled defendant to determine whether further discovery was necessary before the day of trial. Instead, defendant filed multiple Declarations of Readiness to Proceed stating that it had completed all discovery. (DOR, February 10, 2022; DOR July 18, 2022; DOR December 13, 2022.) Further, defendant knew that Dr. Morley had been asked to issue a permanent and stationary report, that Dr. Morley was waiting for authorization to issue that report, and that the forthcoming report was described as a trial exhibit. (Objection to DOR February 15, 2022; MOH March 23, 2022; MOH May 17, 2022; Objection to DOR, July 24, 2022; MOH, September 27, 2022; Objection to DOR December 19, 2022; MOH January 31, 2023; PTCS, April 11, 2023; Exhibit 2, Exhibit 3,

[2] Unless otherwise specified, all future statutory references are to the Labor Code.

Exhibit 8 at p. 5, PTCS at pp. 2, 5.) Additionally, defendant requested that the matter be set for trial over applicant's objection. (PTCS, April 11, 2023, pp. 2-3.) Thus, although, I am sympathetic to defendant's desire to conduct further discovery, there is no good cause to reopen discovery so that defendant can obtain evidence to rebut Dr. Morley's opinions. (Lab. Code, §5502(d)(3).) As stated in the Opinion on Decision, defendant is not entitled to be rescued from the ramifications of its litigation strategies.

The QME Reports Cannot be the Basis of an Award

All decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627.) 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." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169.)

Here, Dr. Smallie's reports are conclusory, incomplete, illogical, and based on inadequate histories. It is also possible that Dr. Morley is correct that Dr. Smallie's physical examination does not comply with the AMA Guides, but this cannot be verified since the addendums describing those exams were not submitted into evidence. (Exhibit 8 at p. 8.) For example, Dr. Smallie stated that applicant's low back condition worsened while working for defendant (Exhibit A at p. 2.) However, he inexplicably found that applicant's impairment was far less than described by Dr. Jamasbi. (Exhibit 8, p. 2.) He also did not address the worsening in her spine as described in the two MRIs. In fact, his described impairment of 8% is less than the value of the 15% stipulations for case number ADJ5798023, and Dr. Smallie failed to explain this discrepancy. Next, as observed by Dr. Morley, Dr. Smallie had three distinct apportionment determinations, but only provided impairment to two body parts. Moreover, Dr. Smallie failed to explain why he would apportion to applicant's multiple

sclerosis when that condition did not cause a need for treatment or impairment. (Exhibit B at p. 7; Exhibit 8 at p. 3.) He also failed to provide any explanation as to how applicant's cervical spondylosis contributed to applicant's current level of impairment. (Exhibit C.) Further, Dr. Smallie never addressed whether applicant had any periods of temporary total disability and appears to have only found applicant to be maximally medically improved because she was not receiving treatment on a denied claim. (Exhibit D at pp. 11:3-11:11.) Additionally, he never reviewed treatment reports. In addition, as explained by Dr. Morley, page 380 of the Guides would appear to mandate the use of the ROM method since applicant has had multiple injuries to the same spinal region and because she has multilevel radiculopathy. However, Dr. Smallie failed to provide any explanation for his determination to use the DRE method. Finally, I am in complete agreement with Dr. Morley that the functional limitations, including a limitation to walking an eighth of a mile with a walker, that Dr. Smallie described in his May 20, 2022 report are grossly incompatible with an 8% whole person impairment for the lumbar spine. (Exhibit B at p. 8; Exhibit 8 at p. 34.) Therefore, since Dr. Smallie's reports are not substantial evidence, they cannot be the basis of an Award.

Permanent Disability

Unlike the report from the QME, Dr. Morley's report is well reasoned, not speculative, not conclusory, based on an accurate history, and based on a complete examination. He also provided persuasive reasoning regarding why applicant's impairments should be added as opposed to combined. (*Id*. at p. 36.) Accordingly, his report was found to be substantial evidence, and it formed the basis of the Award.

Further, as explained in the Opinion on Decision, apportionment pursuant to Labor Code 4664(b) cannot be applied because the Stipulations at 39% for case number ADJ5798023 were for both the low back and the psyche, and the Stipulations did not describe the impairment for applicant's low back in that injury. Accordingly, Dr. Morley's apportionment determinations were followed. Likewise, Dr. Morley's determination that applicant's impairments should be added because of the synergistic effects of her injuries was substantial evidence, and therefore, it was also followed.

Temporary Disability

Temporary disability indemnity is a workers' compensation benefit which is paid during the time an injured worker is unable to work because of a work-related injury and is primarily intended to substitute for lost wages. (*Gonzales v. Workers' Comp. Appeals Board* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 333 [49 Cal.Comp.Cases 224].) The purpose of temporary disability indemnity is to provide a steady source of income during the time the injured worker is off work. (*Gonzales, supra*, at p. 1478.)

Generally, a defendant's liability for temporary disability payments ceases when the employee returns to work, is deemed medically able to return to work, or becomes permanent and stationary. (Lab. Code, §§ 4650-4657; *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868; *Bethlehem Steel Co. v. I.A.C. (Lemons)* (1942) 54 Cal.App.2d 585, 586-587; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 236.)

In *Huston*, the Court of Appeal stated more specifically that:

> In general, temporary disability indemnity is payable during the injured worker's healing period from the injury until the worker has recovered sufficiently to return to work, or until his/her condition reaches a permanent and stationary status. [] Temporary disability may be total (incapable of performing any kind of work), or partial (capable of performing some kind of work). [] If the employee is able to obtain some type of work despite the partial incapacity, the worker is entitled to compensation on a wage-loss basis. [] If the partially disabled worker can perform some type of work but chooses not to, his 'probable earning ability' will be used to compute wage-loss compensation for partial disability. [] If the temporary partial disability is such that it effectively prevents the employee from performing any duty for which the worker is skilled or there is no showing by the employer that work is available and offered, the wage loss is deemed total and the injured worker is entitled to temporary total disability payments.

Thus, the language used by the *Huston* Court reflects that an employer's failure to show that modified work was available and offered affects an injured worker's entitlement to temporary disability. A resignation cannot be interpreted as a refusal of modified work and cannot be used as a basis for denying temporary disability if modified work was not offered. (*City of Seaside v. Workers' Comp. Appeals Bd.* (*Sanchez*) (1991) 56 Cal.Comp.Cases 598 (writ den.).) Moreover, where an injured worker's resignation is a result of the injury, the worker cannot

be said to be unwilling to work. (See *Gonzales v. Workers' Comp. Appeals Board* (1998) 63 Cal.Comp.Cases 1477, 1479.)

Here, Dr. Morley's reports reflect that applicant was temporarily disabled for at least the period April 4, 2022 through September 6, 2022, when she became maximally medically improved. (Exhibit 1, Exhibit 7, Exhibit F, Exhibit 8.) Applicant's resignation does not affect her entitlement to temporary disability because her credible and unrebutted testimony reflects that her resignation was as a result of her injury. In deposition and in trial, she testified that she resigned because she could no longer physically perform her job and that the work restrictions that her treater provided in reports for the 2006 claim were a disaster and not working. (Exhibit E, at pp. 19:3-19:12; 23:24- 25:7.) Therefore, an award of temporary disability is made for the period April 4, 2022 to September 7, 2022. Since these payments were ordered to be made more than two years from the date of injury, they were ordered payable at 2023 rates. (Lab. Code, § 4661.5 [when any temporary total disability indemnity payment is made two years or more from the date of injury, the amount of this payment shall be computed in accordance with the temporary disability indemnity average weekly earnings amount specified in Section 4453 in effect on the date each temporary total disability payment is made].)

The Record Requires Further Development on Whether Applicant had Additional Periods of Temporary Disability

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. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In its en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), the Appeals Board 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." (*McDuffie, supra,* 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*.)

As discussed above, one of the issues raised for trial, was applicant's claim for temporary disability, and again, as discussed above, I was able to make a determination regarding one period of disability. However, the evidence reflects that applicant may also be entitled to temporary disability before she began treating with Dr. Morley. For example, on December 7, 2020, Dr. Smallie wrote that applicant was not permanent and stationary and that applicant required work restrictions. (Exhibit A, pp. 5-6.) However, there is no evidence that defendant made applicant an offer of modified work upon receipt of that report. Similarly, the record reflected that applicant required work restrictions before she resigned, that she was missing up to four days a month from work because of pain, and that applicant believed that her employer was not accommodating her restrictions. (Exhibit E at pp. 23:24-25:7; Exhibit 8 at p. 8.) However, none of Dr. Behraven's reports are in evidence, and it is unknown what the restrictions were, whether there was an attempt to accommodate them, or why they were a "disaster." Moreover, it appears that applicant was receiving treatment for the instant injury through the 2006 claim, but none of those reports are in evidence, and it cannot be known whether they could support a finding of additional temporary disability once she went off work. Since the issue of applicant's entitlement to temporary disability before April 4, 2022, cannot be fully adjudicated, the record requires further development.

Based upon the above, I recommend that defendant's Petition be denied.

Date: July 25, 2023

Alison Howell

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE