

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

**RICHARD DAUNCH, *Applicant***

**vs.**

**CEMEX CONSTRUCTION MATERIALS PACIFIC, LLC./CEMEX TRUCKING,  
INC., and AMERICAN HOME ASSURANCE COMPANY, administered by  
GALLAGHER BASSETT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ13681926**

**Riverside District Office**

**OPINION AND DECISION  
AFTER  
RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on March 10, 2023, wherein the WCJ found in pertinent part that the medical reporting of primary treating physician (PTP) Kambiz Hannani, M.D., was more persuasive than the reporting from the orthopedic qualified medical examiner (QME) Mitchell H. Geiger, M.D.; and that applicant's injury caused 46% permanent disability.

Defendant contends that the decision regarding apportionment of applicant's permanent disability should be based on the reports from QME Dr. Geiger, M.D., not the reports from the PTP Dr. Hannani.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the 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, and for the reasons discussed below, we will rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

## BACKGROUND

Applicant claimed injury to his cervical and lumbar spine while employed by defendant as a cement mixer truck driver during the period from January 3, 2020, through September 8, 2020. He initially received medical treatment from Khalid Ahmed, M.D., (see App. Exhs. 1 – 7, Khalid Ahmed, M.D., October 23, 2020 – July 12, 2021) and on, March 19, 2021, QME Dr. Geiger, evaluated applicant. The doctor examined applicant, took a history, and reviewed the medical record. He found that applicant had not reached maximum medical improvement (MMI) status. (Def. Exh. C, Mitchell H. Geiger, M.D., March 19, 2021, p. 31.) Applicant began treating with Dr. Hannani on September 2, 2021. (See App. Exh. 9, Kambiz Hannani, M.D., September 2, 2021.)

Dr. Geiger re-evaluated applicant on November 1, 2021. After re-examining applicant, taking an interim history, and reviewing additional medical records, Dr. Geiger diagnosed applicant as having cervical degenerative disc disease and lumbar degenerative disc disease, and he concluded that applicant had sustained a cumulative injury to his neck and low back with left leg radiculopathy. (Def. Exh. A, Mitchell H. Geiger, M.D., November 1, 2021, pp. 35 – 36.) Dr. Geiger stated that applicant had reached MMI, that he had 8% cervical spine whole person impairment (WPI), and that he had 21% lumbar spine WPI. (Def. Exh. A, pp. 38 – 39.) Regarding apportionment, he stated:

I find apportionment based on causation of disability, based on medical probability as 35% due to age-related degenerative changes and preexisting cervical degenerative disc disease preexisting his employment with the insured, and 65% due to the industrial cumulative trauma exposure. I find [lumbar spine] apportionment based on causation of disability, based on medical probability as 40% due to the prior industrial claim of 1995, 20% due to age-related degenerative changes and 40% due to the industrial injury due to cumulative trauma January 3, 2020, through September 8, 2020.  
(Def. Exh. A, p. 51.)

Dr. Geiger again re-evaluated applicant on August 12, 2022. (Def. Exh. F, Mitchell H. Geiger, M.D., August 12, 2022.) He found no change in applicant's cervical spine WPI (8%); but applicant's lumbar spine WPI had increased to 28%. (Def. Exh. F, pp. 46 – 47.) Regarding the issue of apportionment, Dr. Geiger stated, "My opinion as discussed in my November 1, 2021 report ... remains unchanged." (Def. Exh. F, p. 49.)

In his September 29, 2022 MMI report, PTP Dr. Hannani addressed the issue of apportionment, stating:

At this time, I will apportion 70% of his final impairment for his lumbar spine to the present industrial exposure, 20% to 1995 and 10% to underlying degenerative [sic] changes. ¶ In regards to the neck I will apportion 80% of the final impairment to his industrial exposure and 20% nonindustrial factors including degenerative [sic] changes with reasonable medical probability. (App. Exh. 21, Kambiz Hannani, M.D., September 29, 2022, pp. 8 – 9.)

The parties proceeded to trial on February 13, 2023. They stipulated that applicant sustained a cumulative injury to his cervical and lumbar spine; the issues submitted for decision included permanent disability/apportionment. (Minutes of Hearing and Summary of Evidence, February 13, 2023, p. 2.)

### DISCUSSION

Labor Code section 4663 states in part:

- (a) Apportionment of permanent disability shall be based on causation.
- (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. (Lab. Code, § 4663.)

The physician must “look at the current disability and parcel out its causative sources - nonindustrial, prior industrial, current industrial - and decide the amount directly caused by the current industrial source.” (*Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1328 [72 Cal.Comp.Cases 565].) The fact that a report addresses the issue of causation of the permanent disability and makes an apportionment determination by finding the approximate relative percentages of industrial and nonindustrial causation does not necessarily render the report one upon which the Appeals Board may rely. (*E.L. Yeager Construction v. Workers’ Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 927-928 [71 Cal.Comp.Cases 1687].) In order to constitute substantial evidence as to the issue of apportionment the reporting physician must identify the approximate percentages of permanent disability due to the direct results of the injury, the approximate percentage of permanent disability due to other factors, and the physician must explain the nature of the other factors, how and why those factors are causing permanent disability at the time of the evaluation, and how and why those factors are responsible for the percentage of disability assigned by the physician. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board *en banc*).)

Having reviewed the trial record, it appears that neither the reports from QME Dr. Geiger, nor treating physician Dr. Hannani constitute substantial evidence as to the issue of apportionment. For example, Dr. Geiger stated that 35% of the cervical disability and 20% of the lumbar disability was caused by age-related degenerative changes. (Def. Exh. A, p. 51.) Although he referred to numerous medical research articles (see e.g., Def. Exh. A, 42 – 48; Def. Exh. F pp. 49 – 56) at no point in his reports did Dr. Geiger discuss how and why the degenerative changes were causing permanent disability at the time of the evaluation, nor how and why those factors were responsible for the percentage of disability he assigned. (*Escobedo v. Marshalls, supra.*) Also, as quoted above, Dr. Hannani did not discuss those factors in his report. Thus, the reports from Dr. Geiger and Dr. Hannani are not substantial evidence and in turn, cannot be the basis for determining the disability caused by applicant's cumulative injury. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].)

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Kuykendall v. Workers' Comp. Appeals Bd.*, (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].) Normally the preferred procedure is to have physicians who have already reported in the case to provide supplemental reports. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc].) However, under the circumstances of this matter, it appears that it may be in the parties' interest to have applicant evaluated by an agreed medical examiner or in the alternative, for the WCJ to appoint a regular physician. (Lab. Code § 5701.)

Finally, we note that in various pleadings and documents in FileNet in the Electronic Adjudication Management System (EAMS), the employer is identified as Cemex Construction Materials Pacific, LLC or as Cemex Trucking Inc. Both entities are currently active in the Secretary of State list of corporations. Counsel are reminded that it is their responsibility to accurately identify the parties, subject to the proceedings and decision in this matter, and any subsequent litigation. (*Coldiron v. Compuware Corporation* (2002) 67 Cal.Comp.Cases 289 (Appeals Board en banc); Cal.Code Regs., tit. 8, § 10390.)

Accordingly, we rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 10, 2023 Findings and Award is **RESCINDED** and the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**



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

**June 16, 2023**

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

**RICHARD DAUNCH  
LAW OFFICES OF DR. PETER M. SCHAEFFER  
BRADFORD & BARTHEL, LLP**

**TLH/abs**

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