WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JACQUES MAILHOT, ***Applicant***

vs.

FRESNO FALCONS, LLC;
STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Number: ADJ15603997
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Finding of Fact and Award (F&A) issued on October 13, 2023, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a professional hockey player from September 15, 1998, to November 19, 1999, sustained industrial injury to the bilateral hands, bilateral shoulders, lumbar spine, right ankle, bilateral knees, neuro, neuropsyche, dental, TMJ, and sleep. Relying on the medical-legal reporting of various physicians including that of neurological Qualified Medical Evaluator (QME) Dr. Hendel, the WCJ found that applicant's injuries caused 65 percent permanent disability after apportionment to nonindustrial factors. The Award did not specify the commencement date or rates for the corresponding indemnity.

Applicant contends the reports of Dr. Hendel are not substantial medical evidence, and that the date of injury in 2022 establishes the indemnity rates which should be integrated into the WCJ's Award.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted, and that the matter be returned to the WCJ for development of the record with respect to

the correct indemnity rate and for reevaluation of applicant's claims with respect to alleged internal medicine injury.

We have considered the allegations in the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&A and issue new Findings of Fact. We will also 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.

FACTS

Applicant claimed injury to the brain, neck, upper extremity, legs, head, shoulders, back, hips, knees, ankles, feet, internal system, neurological system, in the form of neuropsychiatric injury, psyche, dental, TMJ, pain, sleep disorder, hands, and fingers, while employed as a professional hockey player by defendant Fresno Falcons, LLC, from September 15, 1998, to November 19, 1999. Defendant denies the injury arose out of and in the course of employment.

The applicant has been evaluated in orthopedic medicine by Michael Einbund, M.D., and Osep Armagan, M.D.; in neurology by Kenneth Nudleman, M.D., and Jay Jurkowitz, M.D.; in internal medicine by Nachman Brautbar, M.D., and Eli Hendel, M.D.; in neuropsychology by Barry Halote, Ph.D., and Yassi Zarrin, Psy.D.; and in dentistry by Michael Wells, DDS.

The parties proceeded to trial on August 2, 2023, and placed in issue injury arising out of and in the course of employment (AOE/COE) and injured body parts. (Minutes of Hearing and Summary of Evidence (Minutes), August 2, 2023, at p. 2:14.) The parties also placed in issue temporary and permanent disability, the permanent and stationary date, apportionment, and attorney fees. (*Id.* at p. 2:17.) Applicant testified, and the parties submitted the matter for decision.

On October 13, 2023, the WCJ issued the F&A, determining in relevant part that applicant sustained injury AOE/COE to the bilateral hands, bilateral shoulders, lumbar spine, right ankle, bilateral knees, neuro, neuropsyche, dental, TMJ, and sleep. (Finding of Fact No. 1.) The WCJ also determined there were no periods of temporary disability, and that applicant's condition became permanent and stationary as of November 4, 2022. The WCJ awarded 65 percent disability and attorney fees but did not specify the indemnity rates or commencement date.

Applicant's Petition for Reconsideration (Petition) asserts the date of injury pursuant to Labor Code section 5412 was "2022," and that indemnity rates and the commencement date of

permanent disability should have been included in the WCJ's decision. (Petition, at p. 4:8.) Applicant further contends it was error for the WCJ to rely on the internal medicine reporting of Dr. Hendel. (Petition, at p. 2:5.)

Defendant's Answer responds that the WCJ's decision addressed the issues raised by the parties, and that there is no statutory requirement for the WCJ to explain why one medical report was deemed more persuasive than another. (Answer, at p. 2:19.)

The WCJ's Report observes that the indemnity rates were not fixed as the parties specifically withdrew the issue of earnings from the submitted issues at trial. (Report, at p. 2.) The WCJ also observes with respect to the internal medicine evaluations of applicant, various diagnostic tests were requested but not obtained. Accordingly, the WCJ recommends we grant reconsideration and return the matter to the trial level for development of the record as it pertains to the indemnity rate and the internal medicine reporting. (*Ibid*.)

DISCUSSION

Applicant contends the WCJ "should have identified the appropriate indemnity rate, the weekly payment schedule, when payments commenced and for how many weeks payments would progress." (Petition, at p. 2:7.) However, as the WCJ points out, the parties neither stipulated to applicant's average weekly wages, nor did they place it in issue, going so far as to remove earnings from the issues listed on the pre-trial conference statement. (Report, at p. 2.) Nonetheless, the WCJ agrees that the weekly indemnity rates as well as the permanent disability commencement date must be determined, and recommends we return the matter to the trial level for development of the record. We concur and will grant reconsideration as recommended by the WCJ.

Applicant further contends that the reporting of Dr. Hendel in the specialty of internal medicine does not constitute substantial medical evidence. Applicant contends that Dr. Hendel evaluated applicant's injury as an alleged specific injury of June 14, 1999, when applicant is pleading a cumulative injury from September 15, 1998 to November 19, 1999. (Petition, at p. 6:14.) Applicant also contends Dr. Hendel reviewed 289 pages of records, while internist Dr. Brautbar reviewed at least 827 pages. Applicant argues the reporting of Dr. Hendel is not based on a complete review of the medical record and is therefore not substantial evidence. Applicant contends that Dr. Hendel's conclusions with respect to applicant's hypertension are not based on the evidence of hypertension located in the medical record, and do not comport with the

impairment instructions of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides). Applicant further contends that Dr. Hendel's diagnosis of obstructive sleep apnea without corresponding discussions of causation and impairment further erodes the substantiality of the reporting. (Petition, at p. 8:4.) Applicant contends that the reporting of Dr. Brautbar is not susceptible to these deficiencies and is the more persuasive and comprehensive internal medicine reporting.

We agree. Although the Appeals Board must rely on expert medical opinion in resolving the issue of apportionment, an expert's opinion which does not rest upon relevant facts or which assumes an incorrect legal theory cannot constitute substantial evidence upon which the board may base an apportionment finding. (*Zemke v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798 [69 Cal.Rptr. 88, 441 P.2d 928].) Such a report "cannot rise to a higher level than its own inadequate premises." (*Id.* at p. 801.) Here, Dr. Hendel states:

> I have been asked to address any internal medicine issues that can be attributed to the specific injury that he had while playing for Fresno Falcons. This is the present claim. I have not been told that there is a CT claim for multiple injuries over a period of time.
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> (Ex. E, Report of Eli Hendel, M.D., dated November 1, 2022, at p. 25.)

The reporting of Dr. Hendel thus fails to either address the claimed cumulative injury at issue or to offer a discussion as to why the claimed injury is specific or cumulative in nature. We also agree with the WCJ's assessment that the report discounts asthma for want of pulmonary function testing, but no such testing was obtained or submitted to the physician. (*Id.* at p. 25.) Accordingly, the reporting of Dr. Hendel in the specialty of internal medicine fails to address the issues presented, and is based on an inadequate medical history, and therefore does not constitute substantial medical evidence.

The reporting of Dr. Brautbar, on the other hand, reflects a correct understanding of the cumulative nature of the injury claimed by applicant, and appropriately discusses the issues of causation of applicant's disability as related to the claimed cumulative injury. (Ex. 14, Report of Nachman Brautbar, M.D., dated April 6, 2022, at p. 23.) The reporting of Dr. Brautbar is premised on a review of applicant's medical history, including at least 853 pages of medical records over four reports. Dr. Brautbar finds multifactorial industrial causation of applicant's sleep apnea and

hypertensive heart disease, including a full discussion of applicant's medication history and industrial weight gain.

It is well-established that the Appeals Board may rely upon the relevant and considered opinion of one physician, though inconsistent with other medical opinions, so long as the reporting is based on substantial evidence. (*Smith v. Workmen's Comp. Appeals Bd.* (1969) 71 Cal.2d 588, 592 [34 Cal.Comp.Cases 424].) Here, following our independent review of the medical-legal reporting in evidence, we find that the reporting of Dr. Brautbar to be the more persuasive and comprehensive. Accordingly, we will enter a finding of fact that the reporting of Dr. Brautbar constitutes substantial medical evidence, while the reporting of Dr. Hendel does not constitute substantial medical evidence. Consequently, we will also rescind the award of permanent disability, which is based in part on the reporting of Dr. Hendel, and will return the matter to the WCJ for calculation of permanent disability based on the reporting of Dr. Brautbar. We will also rescind the award of attorney's fees and defer the issue pending determination of applicant's permanent disability.

Finally, we observe that following the grant of reconsideration, the Appeals Board has the authority to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223 [2006 Cal. Wrk. Comp. LEXIS 35, 51-17] (Appeals Bd. en banc).) Following our review of the record, we are persuaded that the apportionment analyses of Drs. Armagan, Nudleman and Wells do not constitute substantial evidence. Section 4663 provides, in relevant part, as follows:

> (a) Apportionment of permanent disability shall be based on causation.
>
> (b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address 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, it 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.
>
> (Lab. Code, § 4663.)

In order to comply with section 4663, a physician's report in which permanent disability is addressed must also address apportionment of that permanent disability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Bd. en banc) (*Escobedo*).) However, the mere fact that a physician's report addresses the issue of causation of permanent disability and makes an apportionment determination by finding the approximate respective percentages of industrial and non-industrial causation does not necessarily render the report substantial evidence upon which we may rely. Rather, the report must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and *set forth the basis for the opinion that factors other than the industrial injury at issue caused permanent disability.* (*Id.* at p. 621.) Our decision in *Escobedo* summed up the minimum requirements for an apportionment analysis as follows:

> [T]o be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, 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.
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> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, *how* and *why* it is causing permanent disability at the time of the evaluation, and *how* and *why* it is responsible for approximately 50% of the disability.
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> (*Ibid.*, italics added.)

Here, the F&A awards permanent disability based on the WCJ's ratings, as set forth at pp. 4-5 of the Opinion on Decision. Therein, the WCJ applies apportionment to nonindustrial factors as identified in the field of orthopedics by Dr. Armagan, in neurology by Dr. Nudleman, and in dentistry by Dr. Wells.

However, the reporting of Dr. Armagan broadly attributes medical apportionment to applicant's "recreational hockey participation since 2006," and applicant's "post-hockey employments at Best buy (sic) and Amazon." (Ex. B, Report of Osep Armagan, M.D., dated November 21, 2022, at pp. 63-64.) Dr. Armagan's analysis is fundamentally conclusory and does not explain how and why applicant's recreational hockey or employment at Best Buy or Amazon are causative of his permanent disability. Similarly, with respect to applicant's left shoulder injury in 2018, Dr. Armagan does not explain how that injury is presently manifesting in permanent disability, or the interaction of the industrial shoulder injury with applicant's 2018 shoulder injury. Nor does Dr. Armagan explain how he arrived at the percentages of apportionment described in his reporting. Because the reporting of Dr. Armagan does not explain the relationship between the identified factors of apportionment and his present disability, or how and why nonindustrial factors are presently manifesting in permanent disability, the apportionment analysis is not substantial evidence.

Similarly, the apportionment analysis of Dr. Nudleman does not explain how or why nonindustrial factors are contributing to applicant's current permanent disability. Dr. Nudleman describes 10 percent apportionment of applicant's impairment for headaches, but the exact nature of the factors or conditions being apportioned is unclear. (Ex. 6, Report of Kenneth Nudleman, M.D., dated May 14, 2022, at p. 5.) Similarly, apportionment of 10 percent of applicant's posttraumatic head syndrome to "junior hockey and high school related activities" is nonspecific and does not provide a reasonable basis to ascertain the specific factors or conditions being apportioned, or their relationship to applicant's current permanent disability. (*Escobedo, supra*, at p. 621.) Accordingly, the apportionment analysis described by Dr. Nudleman is not substantial evidence.

Additionally, dental evaluator Dr. Wells describes factors of apportionment as follows: "When considering causation, there are non-industrial factors to consider, like aging, and his amateur hockey career, and normal wear and tear. With all these factors taken into consideration, I calculated his WPI to 61% industrial and 39% to nonindustrial factors." (Ex. 15, Report of

Michael Wells, DDS, dated April 9, 2022, at p. 12.) The report identifies and aggregates multiple factors of apportionment, without discussion how and why each individual factor is presently manifesting in permanent disability, or how the factors were weighed and assigned percentage values. Accordingly, the apportionment analysis described by Dr. Wells is not substantial evidence.

Thus, and following our review of the entire record occasioned by applicant's Petition, we find that none of the apportionment described by Drs. Armagan, Nudleman, or Wells, constitutes substantial evidence. We will enter a corresponding finding of fact, accordingly.

In summary, we agree with the WCJ's conclusion that reconsideration should be granted and the matter returned to the trial level for determination of indemnity issues. We also agree that that the reporting of internal medicine evaluator Dr. Hendel is incomplete and not substantial medical evidence. Following our review of the record, we find that the reporting of Dr. Brautbar to be the more persuasive and well-reasoned, and we will enter a corresponding finding of fact determining that the reporting of Dr. Brautbar is substantial medical evidence, while the reporting of Dr. Hendel is not. Because we conclude the reporting of Dr. Hendel is not substantial medical evidence, we will rescind the finding of permanent disability that is based in part on the permanent disability identified by Dr. Hendel and will defer the issue of permanent disability for further determination by the WCJ using the reporting of Dr. Brautbar. We will also defer the issue of attorney's fees. Finally, and following our independent review of the evidentiary record, we are persuaded that the apportionment analyses of Drs. Armagan, Nudleman or Wells do not constitute substantial medical evidence of apportionment, because none of the apportionment analyses meets the standards required by section 4663 or our en banc decision in *Escobedo, supra*.

Upon return of the matter to the trial level, we also recommend that the WCJ enter a determination as to the applicant's entitlement to further medical treatment to cure or relieve from the effects of his industrial injuries.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Award issued by the WCJ on October 13, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Award issued on October 13, 2023, is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Jacques Mailhot, while employed during the periods 09/15/1998 through 11/19/1999, as a professional hockey player, occupation code 590, by Fresno Falcons, LLC, sustained injury arising out of and in the course of employment to: bilateral hands, bilateral shoulders, lumbar spine, right ankle, bilateral knees, neuro, neuropsyche, dental, TMJ, and sleep.
2. There is no finding of temporary total disability for the period November 20, 1999 through February 20, 2000.
3. Applicant's condition became permanent and stationary on November 4, 2022.
4. The apportionment analyses of Osep Armagan, M.D., Kenneth Nudleman, M.D., and Michael Wells, DDS, do not constitute substantial evidence of apportionment.
5. The medical-legal reporting of Dr. Brautbar constitutes substantial medical evidence, while the reporting of Dr. Hendel does not constitute substantial medical evidence.
6. The issue of the date of injury pursuant to Labor Code section 5412 is deferred.
7. The issue of permanent disability is deferred.
8. The issue of attorney's fees is deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ to conduct 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/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 2, 2024

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

JACQUES MAILHOT
LAW OFFICES OF LYSETTE RIOS
STATE COMPENSATION INSURANCE FUND

SAR/abs

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