

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

**CHAD RICHARDSON, *Applicant***

**vs.**

**VICTOR VALLEY COMMUNITY COLLEGE, permissibly self-insured,  
administered by KEENAN & ASSOCIATES, *Defendants***

**Adjudication Number: ADJ14387238  
Santa Barbara District Office**

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

Applicant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on July 14, 2023, wherein the WCJ found that applicant sustained injury to his lumbar spine while employed by defendant as a custodian and that the injury caused 0% permanent disability. Applicant contends that the WCJ should have relied on the opinions of qualified medical evaluator (QME) Dilip Kelekar, M.D., rather than the opinions of primary treating physician David Wood, M.D., that if the opinions are not substantial evidence, the record should be further developed; and that he is entitled to future medical treatment.

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 Defendant.

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 grant reconsideration and we will amend the F&A to find that the issue of permanent disability and attorney's fees thereon is deferred, and that applicant is entitled to future medical treatment. We

note that since the parties stipulated to the payment of periods of temporary disability and the corresponding rates of indemnity, we will also include a finding to that effect.

### **BACKGROUND**

While employed by defendant on February 10, 2021, as a custodian, applicant sustained injury arising out of and in the course of employment to the lumbar spine.

We will briefly review the relevant facts as set forth in the WCJ's Opinion on Decision.

Applicant initially was seen by Dr. Moushbarek on February 17, 2021 for the February 10, 2021 injury to his lumbar spine. (Defendant Exhibit A.) Dr. David Wood later became the applicant's Primary Treating Physician (hereinafter PTP) and first evaluated applicant on March 31, 2021. (Defendant Exhibit B.) Dr. Wood found applicant to be Permanent and Stationary on May 26, 2021. (Defendant Exhibit C.) The parties agreed that the PTP report of Dr. Wood rated at 0%.

Dr. Dilip Kelekar acted as the PQME in orthopedics for this matter and issued reports on October 28, 2021, May 3, 2022 and October 24, 2022. (Joint Exhibits X-Z.) Dr. Kelekar was also deposed on February 24, 2023. (Joint Exhibit W.) The parties agree that the report of PQME Dr. Dilip Kelekar rates at 14%.

This matter proceeded to Trial on May 3, 2023 and May 30, 2023. The matter was submitted on May 30, 2023 on the sole issue of the extent of permanent disability. A Findings and Award and Opinion on Decision issued and served on July 14, 2023.

\* \* \*

Injury to the lumbar spine is accepted, but the parties disagree on the level of permanent disability. Applicant bears the burden of proving injury AOE/COE and the level of permanent disability caused by the injury. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298.) Applicant relies on the reporting of PQME Dr. Kelekar for permanent disability. Defendant relies on the reporting of PTP Dr. David Wood for permanent disability.

Defendant offered the PTP report from Dr. Wood, which reflects applicant has reached Maximum Medical Improvement and is Permanent and Stationary as of May 26, 2021. (Defendant Exhibit C page 7.) Dr. Woods notes the impression from the MRI on April 15, 2021 is normal. (Defendant Exhibit C page 4.) Dr. Wood gives a diagnosis of sprain strain lumbar spine. (Defendant Exhibit C page 7.) Dr. Wood finds that applicant "has 0% whole person impairment on a strict interpretation of the AMA guides. (Defendant Exhibit C page 7.)

Dr. Woods then states, "when looking at his activities of daily living [applicant] has significant restrictions. Under page 5 this would warrant that the patient needs to have a 3% whole person impairment for activity of daily living with their affected

lumbar spine.” (Defendant Exhibit C page 7.) However, a rating for subjective complaints cannot stand alone. Per chapter 18 of AMA Guides 5th edition, there a pain related impairment cannot be rated in absence of permanent impairment by the body part of organ system assessment. (AMA Guides Fifth Edition page 573.) Dr. Woods appears to be an attempting to rebut the strict AMA rating, but Dr. Woods does not provide the necessary discussion to substantiate his opinion.

To properly rate an injured worker's disability by applying an Almaraz/Guzman analysis, the doctor is expected to 1) provide a strict rating per the AMA Guides; 2) explain why the strict rating does not accurately reflect the applicant's disability; 3) provide an alternative rating using the four corners of the AMA Guides; and 4) explain why that alternative rating more accurately describes the applicant's level of disability. (Milpitas Unified School Dist. v. Workers' Compensation Appeals Board, (2010) 187 Cal. App.4th 808, at 828-829.) Since Dr. Wood’s opinion is devoid of the necessary discussion, the undersigned finds the strict AMA rating is not rebutted and the Award of 3% is not supported.

The parties jointly offered the PQME reporting of Dr. Dilip Kelekar dated October 28, 2021, May 3, 2022, October 24, 2022 and his deposition from February 24, 2023. (Joint Exhibits W-Z.) On October 28, 2021 Dr. Kelekar finds that applicant has not reached Maximum Medical Improvement from treatment and would benefit from additional treatment. (Joint Exhibit Z page 12.) After review of records, Dr. Kelekar issued a supplemental report on May 3, 2022 wherein he found applicant had reached Maximum Medical Improvement and requested a re-evaluation to give a current Permanent and Stationary report. (Joint Exhibit Y page 2.)

Applicant was re-evaluated by Dr. Kelekar on October 24, 2022. (Joint Exhibit X.) Dr. Kelekar gives the following diagnoses: 1) Sprain/strain of the lumbosacral spine with persistent slight to moderate and occasionally severe low back pain; 2) non-verifiable radiculopathy; and 3) normal MRI scans and bone scans. (Joint Exhibit X page 12.) He finds applicant reached Maximum Medical Improvement as of October 24, 2022. (Joint Exhibit X page 12.) Dr. Kelekar assigns DRE Category II with 5% whole person impairment and 2% whole person impairment for pain. (Joint Exhibit X page 14.)

In his deposition, Dr. Kelekar confirms his assessment of a DRE Category 2 finding was based on applicant’s subjective statement of radiculopathy. (Joint Exhibit W page 13 lines 1-5.) Dr. Kelekar testified, applicant “did not have a positive MRI. He did not have any abnormality on X- rays. His electrodiagnostic studies were unremarkable. [...] His bone scan was normal. In spite of that he was having the symptoms.” (Joint Exhibit W page 9 lines 1-6.) “He did not even have a bulging disc.” (Joint Exhibit W page 9 lines 7-8.) During his testimony, Dr. Kelekar agrees there are no objective findings to support his opinion placing applicant in lumbar DRE category II.

Dr. Kelekar relied on applicant's subjective reporting of symptoms, which were not validated by any objective data. Further, Dr. Kelekar attempts to bolster his opinion by stating "you had to explain it somehow, [as ...] he had radicular pain. This could be because of injury to the disc without the formation of the disc. You know, looking at the literature there are some biochemical factors and some inflammatory factors that can attribute to radicular symptoms. Otherwise, I couldn't explain why he had so much pain and radicular symptoms in spite of all the normal studies." (Joint Exhibit W page 9 lines 8 -15.) Notably, Dr. Kelekar does not apply this "literature" to the applicant's condition nor definitively state applicant had any biochemical or inflammatory factors which would warrant his findings. Dr. Kelekar discusses Dr. Woods' reporting and states Dr. Woods "did not give him any DRE impairment, and I did because I just did not understand his continuation of pain, persistent low back pain and pain to his upper thigh." (Joint Exhibit W page 12 lines 10-15.)

Having observed the applicant's manner and demeanor at trial, and having compared the applicant's testimony against documentary evidence, it is clear the applicant is embellishing the extent of his injuries. Therefore, the undersigned finds that the applicant lacks credibility such that his testimony cannot be relied upon to support an Award. Furthermore, it calls into question the veracity of applicant's reported subjective complaints.

A physician's report must not be speculative, it must be based upon pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Yeager Construction v. WCAB (Gatten)* (2006) 145 Cal. App. 4th 922). In light of the clear exaggeration documented throughout the medical reporting and continuing through the time of trial, the undersigned does not find applicant to be credible with respect to his reporting of subjective symptoms. Therefore, the reporting of Dr. Kelekar is not factually supported and is not persuasive.

The WCJ concluded that the reporting of Dr. Wood was supported by substantial medical evidence and was the better-reasoned and persuasive opinion. (See *Place v. WCAB* (1970) 3 Cal. 3d 372, 378 [35 Cal.Comp.Cases 525].) Therefore, she relied on the opinion of Dr. Woods to find 0% whole person impairment for the lumbar spine based on a strict interpretation of the AMA Guides, and that there was no ratable impairment or permanent disability.

#### **DISCUSSION**

It has long been established that any decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) 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. (*Place, supra*, 3 Cal.3d 372; *Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal. App. 3d 246 [54 Cal.Comp.Cases 349; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, the WCJ relied on the opinions of primary treating physician Dr. Woods. In coming to this conclusion, the WCJ determined that testimony by applicant was less than credible so that the medical reporting having relied on the applicant's description of events, contained an inaccurate history, and did not constitute substantial evidence. A WCJ's opinions regarding witness credibility are entitled to great weight, (*Garza, supra*, 3 Cal.3d 312), and we do not question the WCJ's opinion as to applicant's credibility. However, "the Appeals Board is entitled to reject the WCJ's findings on credibility matters if substantial evidence supports contrary findings. (*Garza, supra*, 3 Cal.3d at pp. 318-319.)

The issue of injury is a medical determination, which requires expert medical opinion. As the Court of Appeal explained in *Peter Kiewit Sons v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188]: "Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a [WCAB] finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. Expert testimony is necessary where the truth is occult and can be found only by resorting to the sciences." (See *Insurance Company of North America v. Workers' Comp. Appeals Bd. (Kemp)* (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) With respect to matters requiring medical knowledge, the WCJ cannot disregard a medical expert's conclusion when the conclusion is based on expertise in evaluating the significance of medical facts. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687].) Here, once the WCJ determined that Dr. Kelekar's reporting was not substantial evidence, further development of the record was appropriate.

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 our en banc decision in *McDuffie v. Los*

*Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we 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. (*Ibid.*) Thus, we will defer the issue of permanent disability and attorney’s fees. Upon return, we recommend that the WCJ set a conference to discuss how to proceed with further development of the record.

In his Petition, applicant also raises the issue of entitlement to future medical treatment. Labor Code section 4600 makes an employer liable for all “medical, surgical, chiropractic, acupuncture, and hospital treatment . . . that is reasonably required to cure or relieve from the effects of the injury . . . .” (Lab. Code, § 4600; see also, *Barnes v. Workers’ Comp. Appeals Bd.* (2000) 23 Cal.4th 679, 685 [65 Cal.Comp.Cases 780, 784] [“open-ended liability for medical treatment [is] consistent with section 4600’s mandate to employers to pay for medical treatment ‘to cure or relieve’ the effects of an industrial injury”]; *Granado v. Workmen’s Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 406 [33 Cal.Comp.Cases 647, 652] [“So long as the treatment is reasonably required to cure or relieve from the effects of the industrial injury, the employer is required to provide the treatment”].) Indeed, an employer will even be liable for the cost of treatment for a non-industrial condition, if that treatment is reasonably required to cure or relieve the effects of the industrial injury. (Lab. Code, § 4600; *Braewood Convalescent Hospital v. Workers’ Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 165-166 [48 Cal.Comp.Cases 566, 570]; *Granado, supra*, at pp. 405-406.)

As set forth in the WCJ’s Report: “Applicant is correct that this was an accepted injury to the lumbar spine and that both the reporting of Dr. Kelekar and Dr. Wood opine applicant is in need of future medical treatment on an industrial basis. This issue was not presented for decision at Trial, which is why it was not addressed in the Opinion on Decision. Had it been placed at issue; the undersigned would have found that applicant is entitled to further medical treatment to cure or relieve from the effects of this injury to the lumbar spine.” Thus, we will also find that applicant is entitled to future medical treatment.

Accordingly, we grant applicant's Petition for Reconsideration, amend the F&A to find that the issues of permanent disability and attorney's fees thereon is deferred, and that applicant is entitled to future medical treatment. We note that since the parties stipulated to the payment of periods of temporary disability and the corresponding rates of indemnity, we will also include a finding to that effect.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings and Award issued by the WCJ on July 14, 2023, is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

**FINDINGS OF FACT**

1. Chad Richardson, while employed on February 10, 2021, as a custodian, occupational group number 340 at Victorville, California, by Victor Valley Community College District, sustained injury arising out of and in the course of employment to the lumbar spine.
2. At the time of the injury, the employer was permissibly self-insured, administered by Keenan & Associates.
3. At the time of the injury, the employee's earnings were \$1,051.30 per week, warranting indemnity rates of \$700.87 for temporary disability and \$290 for permanent disability. The employer paid TTD at the weekly rate of \$700.87 for the periods of February 25, 2021 through March 31, 2021, and from April 8, 2021 through May 26, 2021.
4. The issue of permanent disability and attorney's fees thereon is deferred.
5. Applicant is entitled to future medical treatment.



**AWARD**

AWARD IS MADE in favor of CHAD RICHARDSON against VICTOR VALLEY COMMUNITY COLLEGE, permissibly self-insured, administered by KEENAN & ASSOCIATES as follows:

- a. Future medical treatment.

**WORKERS' COMPENSATION APPEALS BOARD**

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

I CONCUR,

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**



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

**September 19, 2023**

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

**CHAD RICHARDSON  
KAMPF SCHIAVONE & ASSOCIATES  
MICHAEL SULLIVAN & ASSOCIATES LLP**

**AS/mc**

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