WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RONALD PHILPOT, *Applicant*

vs.

PERFORMANCE DAIRY SERVICES INC.; IMPERIUM INSURANCE; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION by INTERCARE for ULLICO in liquidation, *Defendants*

Adjudication Numbers: ADJ7284005 (MF), ADJ7912473
Fresno District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In our Opinion and Decision After Reconsideration of March 2, 2023, we partially affirmed and partially rescinded the Joint Findings of Fact and Award issued by the workers' compensation administrative law judge ("WCJ") on July 28, 2020. We affirmed the WCJ's findings that on April 26, 2010 (ADJ7284005), applicant sustained industrial injury to his sense of taste, sense of smell, right shoulder, left knee, and brain (cognitive dysfunction and psyche), and that on July 14, 2011 (ADJ7912473), applicant sustained industrial injury to his sense of taste, sense of smell, lumbar spine, and brain (cognitive dysfunction and psyche). However, we rescinded the WCJ's findings that the two industrial injuries caused permanent and total disability, and that Imperium, insurer of the April 26, 2010 injury, is liable for a permanent disability award of 70%, while Ullico, insurer of the July 14, 2011 injury, is liable for a permanent disability award of 30%. We replaced those findings with our findings that the industrial injury sustained by applicant on April 26, 2010 resulted in permanent and total disability, without apportionment of disability to the second industrial injury of July 14, 2011. We also found that any permanent disability caused by the industrial injury of July 14, 2011 in ADJ7912473 duplicated or exceeded the permanent and total disability caused by the industrial injury of April 26, 2010, and was compensated in ADJ7284005.

Imperium filed a timely Petition for Reconsideration of our decision. Imperium contends that following his re-evaluation of the applicant on April 25, 2017, and in related reports, Dr. Munday cured the deficiencies in his initial reporting, so that the doctor's opinion is substantial evidence of apportionment between the two industrial injuries pursuant to *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113] ("*Benson*"). Imperium further contends that the reports, opinions and findings of Dr. Miner and Dr. Van Bittner are not substantial evidence, that the WCJ's original "range of evidence determination" should be reinstated because the reports of Dr. Feinberg, when considered in conjunction with the rest of the medical record, are more thorough and persuasive than the reports of Dr. Miner, and that the record should be further developed to clarify Dr. Feinberg's incorporation of Dr. Munday's apportionment of permanent disability between the two injuries.

Applicant filed an answer.

California Insurance Guarantee Association ("CIGA"), adjusting the claims of bankrupt insurance company Ullico, also filed an answer.

Both answers have been considered.

Based on our re-review of the record and applicable law, and for the reasons stated below, we will affirm our Opinion and Decision After Reconsideration of March 2, 2023, which we adopt and incorporate except the following sentence in the final paragraph on page twelve: "Earlier in [his]…report [of March 15, 2018], Dr. Van de Bittner had already addressed the issue of vocational apportionment by stating, "apportionment of employability and earning capacity based on the opinions of Dr. Miner is 100% due to the 4/26/10 work injury and 0% due to the 7/14/11 work injury."

We do not rely upon the above statement because re-review of the record discloses that Dr. Van de Bittner's opinion reflects his interpretation of Dr. Miner's February 26, 2018 deposition testimony rather than the testimony itself. Dr. Miner testified in her February 26, 2018 deposition that she likely "would have found [applicant] noncompetitive in the open labor market" on the day before the second car accident. (Applicant's exhibit 11, p. 134.) Dr. Van de Bittner did not recognize that this part of Dr. Miner's testimony pertains to the nature and extent of permanent disability, not apportionment. On the latter issue, Dr. Miner testified at one point in her deposition that causation of disability was "65/35" between applicant's two industrial injuries. (*Id*., p. 63.) However, Dr. Miner's deposition testimony on apportionment is insubstantial because it is

inconsistent. For instance, the doctor variously suggested apportionment ratios of "90/10" and "50/50" between the two injuries, but the doctor landed on "35/65" (not 65/35) because "25/75 is too much of a split." (*Id*., p. 112.)[1]

At pages nine through thirteen of its petition for reconsideration, Imperium alleges that the medical opinions of Dr. Munday dating from 2017 constitute substantial evidence of apportionment of permanent disability between the industrial injuries of April 26, 2010 and July 14, 2011. We remain unpersuaded. In our March 2, 2023 decision (pp. 10-11), we reviewed each of the 2017 medical opinions of Dr. Munday now relied upon by Imperium and explained why the opinions are not substantial evidence sufficient to meet Imperium's burden of proving apportionment.[2] Imperium's allegations to the contrary present nothing new; they simply reflect Imperium's disagreement with our prior decision, which does not persuade us to change it.

Imperium also alleges that the findings of "two separate, distinct, and specific brain injuries" in our Opinion and Order Granting Petitions for Reconsideration and Decision After Reconsideration of March 17, 2017 require apportionment of permanent disability between the injuries of April 26, 2010 and July 14, 2011. We disagree, because our decision of March 17, 2017 was not a "final order" on the issues of permanent disability or apportionment. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65 Cal.Comp.Cases 650].)

Next we address Imperium's contention that the medical opinion of Dr. Miner and the vocational opinion of Dr. Van de Bittner are not substantial evidence on the issue of permanent disability. To repeat, our March 2, 2023 decision relied, in part, upon Dr. Miner's February 26, 2018 deposition testimony that if applicant's employer had released him the day before the second injury, Dr. Miner would have found him noncompetitive in the open labor market. We also relied on Dr. Van de Bittner's vocational evaluation dated March 15, 2018, wherein he concluded that applicant was not able to benefit from vocational rehabilitation services and was not amenable to rehabilitation. Further, we relied upon Dr. Van de Bittner's May 23, 2018 deposition testimony

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[1] In *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741] ("*Nunes* I"), the Board held in relevant part that vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment under Labor Code section 4663. (Affirmed in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] ("*Nunes* II"). In this case, Dr. Miner's opinion on apportionment is not "otherwise valid medical apportionment," and we do not rely upon Dr. Bittner's "vocational apportionment."

[2] In 2017, Dr. Munday's issued reports dated May 19, 2017, June 19, 2017 and October 11, 2017, and the doctor had his deposition taken on September 27, 2017.

that the combination of medical, neuropsychological, psychological, vocational and labor market factors resulted in applicant being permanently and totally disabled due to the first car accident and April 26, 2010 injury alone. Finally, we relied upon Dr. Van de Bittner's May 23, 2018 deposition testimony that the job applicant was doing when he was injured in the second motor vehicle accident was especially designed for him; it was a protected or sheltered position that does not exist in the open labor market.

Imperium's challenge to the above opinions really goes to process rather than substance. That is, Imperium insists that because the WCJ's April 10, 2019 interlocutory ruling found flaw in the opinions of Dr. Miner and Dr. Van de Bittner, and because we reviewed and commented upon them in our prior decision of March 4, 2020, we are bound by the WCJ's ruling and by our March 4, 2020 decision. Imperium is incorrect. It is well-established that the Appeals Board may make factual determinations contrary to those of a WCJ upon an independent examination of the record. (*Wilhelm v. Workers' Compensation Appeals Board* (1967) 255 Cal.App.2d 30 [32 Cal.Comp.Cases 424, 426-427].) Moreover, our March 4, 2020 decision includes no statement, in agreement with the WCJ or otherwise, that the medical reports of Dr. Miner and the vocational reports of Dr. Van de Bittner are not substantial evidence on the issue of permanent disability.

Imperium next contends that the medical opinion of Dr. Feinberg should be followed on the issue of *Benson* apportionment. To support this contention, Imperium repeats previously-addressed arguments about apportionment, with Imperium alleging that although Dr. Miner's medical opinion is not substantial evidence, even she apportioned 35% of applicant's disability to the injury of April 26, 2010 injury and 65% to the injury of July 14, 2011. In the final analysis, however, Imperium maintains that we should follow Dr. Munday's 85%-15% apportionment ratio, which was adopted by Dr. Feinberg without explanation. In our March 2, 2023 decision, we already explained why we declined to follow Dr. Munday and Dr. Feinberg on apportionment. The fact that Imperium disagrees with our conclusion, without pointing out something previously overlooked in the record, does not persuade us to change our decision.

Further, it bears repeating that Dr. Miner testified at the close of her February 26, 2018 deposition that she would have found applicant "noncompetitive in the open labor market" on the day before the July 14, 2011 injury. Yet Imperium fails to address the express finding in our March 2, 2023 decision that any permanent disability caused by the second injury of July 14, 2011 (ADJ7912473) duplicates or exceeds the permanent and total disability caused by the industrial

injury of April 26, 2010 (ADJ7284005). Imperium did not waive the issue, but it presents no compelling reason to overturn the above finding.

Finally, Imperium contends that the record should be further developed so Dr. Feinberg can buttress his unexplained adoption of Dr. Munday's opinion on apportionment. However, Dr. Feinberg was provided an opportunity to do so following our prior decision of March 4, 2020, wherein we authorized Dr. Feinberg to review and comment upon the reports and depositions of Dr. Miner and Dr. Van de Bittner. Thereafter, Dr. Feinberg undertook a lengthy medical record review and historical review, and the doctor issued a supplemental report dated April 14, 2020. However, the record review and historical review made no impression on Dr. Feinberg, who simply stated: "I have no changes to make in the opinions I previously reported." (WCAB exhibit BB, p. 10.) Imperium characterizes Dr. Feinberg's indifference as an "insignificant" error, curable by "a sentence…synthesizing [the] facts into his own view of apportionment, [so that] his reports, findings, and opinions would no doubt constitute substantial medical evidence." (Petition for Reconsideration, p. 19:12-21.) This allegation reflects a misunderstanding of the requirements of substantial evidence set out in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 [Appeals Board en banc]. Therein the Board explained that a medical opinion 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, so that the Board can determine whether the physician is properly apportioning under correct legal principles.

In this case, Dr. Feinberg had ample opportunity to provide an opinion on apportionment consistent with the Board's standards but the doctor failed to do so. Under these circumstances, we are not persuaded that obtaining a supplemental report from Dr. Feinberg justifies further delay in reaching final resolution of this matter. (See *Schulke v. Xerox Corp.* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 601 [further development of record denied where defendant had four years but failed to obtain substantial evidence of alleged psyche injury].)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Opinion and Decision After Reconsideration of March 2, 2023 is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 25, 2023

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

APPEL LAW FIRM
LAUGHLIN, FALBO, LEVY & MORESI
PEARLMAN, BROWN & WAX, LLP
RONALD PHILPOT
MORLEY & MASON

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I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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OPINION AND DECISION
AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Joint Findings of Fact and Award of July 28, 2020, the workers' compensation judge ("WCJ") found that on April 26, 2010 (ADJ7284005), applicant sustained industrial injury to his sense of taste, sense of smell, right shoulder, left knee, and brain (cognitive dysfunction and psyche), and that on July 14, 2011 (ADJ7912473), applicant sustained industrial injury to his sense of taste, sense of smell, lumbar spine, and brain (cognitive dysfunction and psyche). For the above findings, the WCJ indicated that he relied upon the Independent Medical Evaluation ("IME") reports of Dr. Feinberg dated July 25, 2019 (WCAB Exhibit AA) and April 13, 2020 (WCAB Exhibit BB). In addition, the WCJ found that "causation for the two separate dates of injury is found to be solely industrial, with no apportionment to non-industrial causes or pre-existing conditions," that Imperium, the insurer for the April 26, 2010 injury, has "liability for permanent disability in ADJ7284005 [of] 70% equal to 433.25 weeks at $270.00 per week which amounts to $116,977.50, plus life pension of $77.31/week," with the two separate and distinct injuries resulting in the applicant being 100% permanently disabled (here the WCJ cited to *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113]), and that "Ullico's liability for permanent disability in ADJ7912473 [the July 14, 2011 injury] is 30% equal to 131.0 weeks at $230.00 per week which amounts to $30,130.00," with the two separate and distinct injuries resulting in the applicant being 100% permanently disabled (here the WCJ cited *Benson* again). The WCJ also found that "Imperium is deemed other insurance per Insurance Code section 1063.1, except where an injury occurred exclusively on July 14, 2011."

Applicant filed a timely Petition for Reconsideration of the WCJ's decision. Applicant contends, in substance, that the WCJ erred in failing to issue an award of permanent and total disability based solely on the industrial injury of April 26, 2010. Applicant further contends that the WCJ erred in relying upon the medical opinions of Dr. Feinberg (Physical Medicine and Rehabilitation) and Dr. Munday (AME in neuropsychology) because the doctors' opinions are not substantial evidence on the issue of apportionment.

The Board did not receive an answer to applicant's petition.

The WCJ submitted a Report and Recommendation ("Report"). We adopt and incorporate the Introduction and Statement of Facts, as set forth on pages one through three of the Report. We do not adopt or incorporate the remainder of the Report.

Based on our review of the record and applicable law, we find merit in applicant's contentions that the first injury of April 26, 2010 caused permanent and total disability, and that there is no legal basis for apportioning permanent disability to the second injury of July 14, 2011. Accordingly, we will amend the WCJ's decision to award permanent and total disability caused by the April 26, 2010 injury, without apportionment to the July 14, 2011 injury.

BRIEF FACTUAL STATEMENT

The essential facts have been outlined by the two WCJs who have handled this matter, and in the two prior opinions we have issued in this matter. As set forth in the current WCJ's Report, applicant, who did skilled work on the employer's machinery, sustained industrial injuries in successive motor vehicle accidents. The first accident happened on April 26, 2010, the second accident happened on July 14, 2011. In the first accident, applicant was hit by another vehicle and ejected from his own vehicle. In addition to injuring his right shoulder and left knee, applicant suffered a fractured skull, loss of brain tissue, and brain damage. The WCJ describes the second accident as "much less severe," resulting in injury to applicant's "spine and to the brain/psyche."

THE WCJ'S DECISION

In reviewing the WCJ's decision, we note it is undisputed that the injuries to applicant's various body parts, especially to his brain, have resulted in permanent and total disability, all of which is industrial in nature. This is apparent from Findings 5, 6 and 7 of the WCJ's decision and from the fact that no party contests the nature or extent of applicant's permanent disability. (See Lab. Code, § 5904.)

We further note that the WCJ incorporated *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113] into his findings of fact. In *Benson*, the Court of Appeal concluded, pursuant to Senate Bill 899 enacted in 2004, that the law of apportionment mandates that multiple injuries ordinarily require separate permanent disability awards. However, the Court also stated that "there may be limited circumstances…when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability. In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified." (170 Cal.App.4th at 1560.)

But the WCJ's incorporation of *Benson* into his findings of fact does not mean that the WCJ correctly applied *Benson's* principles. As noted above, *Benson* held that multiple injuries ordinarily require separate permanent disability awards. Here, on pages seven and eight of his Opinion on Decision, the WCJ determined that the 2010 injury caused permanent disability of 53% while the 2011 injury caused permanent disability of 23%.

At first blush, it appears that those two percentage figures might satisfy *Benson's* requirement that multiple injuries ordinarily require separate permanent disability awards. Indeed, the two percentage figures were based on a rating of the permanent disability caused by each injured body part for each of the two dates of injury. For the taste, smell and brain impairments, however, it appears the WCJ determined that the 2010 injury caused 85% of the permanent impairment while the 2011 caused 15% of the permanent impairment.[1] The WCJ then added the two percentages (53% plus 23%, totaling 76%) and applied ratios of 53/73 and 23/73 to arrive at 70% and 30% apportionment for the 2010 and 2011 injuries, respectively. However, the WCJ's calculations

[1] Although the WCJ's findings specifically reference the medical reports of Dr. Feinberg, it was Dr. Munday who apportioned disability 85% to the first injury and 15% to the second injury. Dr. Feinberg merely adopted Dr. Munday's opinion on apportionment.

resulted in apportionment of liability for compensation for the two injuries, not necessarily apportionment of permanent disability. That is, it is not clear that the findings of 70% and 30% permanent disability for the two injuries correspond to Dr. Munday's opinion that permanent disability should be apportioned 85% to the first injury and 15% to the second injury.[2]

In any event, although the WCJ issued separate findings of 70% and 30% permanent disability for the first and second injuries, the WCJ did not actually determine the permanent disability caused by each of the two injuries pursuant to *Benson*. Rather, the WCJ determined the issue of contribution for the permanent and total disability sustained by applicant, between the two insurers who covered the two injuries. This was error because "[t]he apportionment of liability cannot diminish, restrict, or in any way alter the employee's recovery." (See *Zenith Insurance Co. v. Workers' Comp. Appeals Bd.* (*Thweatt*) (1981) 124 Cal.App.3d 176, 188 Fn. 10 [46 Cal.Comp.Cases 1126], citing Labor Code section 5500.5 and *Flesher v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 322, 328.)

REVIEW OF PERTINENT MEDICAL AND VOCATIONAL OPINIONS

Dr. Munday issued his first report on August 29, 2011, not long after applicant's second motor vehicle accident. (Joint exhibit 1.) At that time, Dr. Munday assessed applicant with a 25% Whole Person Impairment ("WPI") under Tables 13-6 and 13-8 of the AMA Guides concerning impairment due to Emotional or Behavioral Disorders, with the doctor indicating that this was his evaluation of impairment pursuant to *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Almaraz-Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].[3]

Regarding apportionment, Dr. Munday acknowledged that applicant and his wife reported only "mild aggravation" of his emotional and behavioral issues after the second accident/injury, and that absent any other traumatic brain injury or brain-based anomaly, the two injuries were 100% the cause of applicant's emotional/behavioral impairment. Dr. Munday concluded that in apportioning between the two injuries, he would attribute 85% to the initial injury of April 26, 2010 and 15% to the subsequent injury of July 14, 2011. However, Dr. Munday provided no medical explanation for this apportionment. In fact, the doctor seems to have relied on the perceptions of applicant and his wife that his neuropsychological condition was "mildly aggravated" after the second accident, without the doctor mentioning his own observations, tests or other medical considerations. (Joint exhibit 1, p. 18.)

In his report dated July 9, 2012 (Joint exhibit 4), Dr. Munday opined that "[i]n terms of the brain injury, I have no reason to believe that anything has changed from my prior evaluation in August

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[2] It appears that the WCJ's approach may have resulted in the apportionment of disability between the two injuries more than once, with apportionment first applied within the WCJ's rating formula for the various injured body parts and then again by generating overall ratings for each of the two injuries.

[3] In *Almaraz-Guzman,* the Court of Appeal concluded that the language of Labor Code section 4660 permits reliance on the entire AMA Guides, including the instructions on the use of clinical judgment, in deriving an impairment rating in a particular case. The Court stated in relevant part, "the physician must be permitted to explain why departure from the impairment percentages is necessary and how he or she arrived at a different rating. That explanation necessarily takes into account the physician's skill, knowledge, and experience, as well as other considerations unique to the injury at issue." (75 Cal.Comp.Cases at 854.)

and I actually think, fortunately, I was able to get a cleaner read on his brain based cognitive and emotional functioning at that time." (*Id*., p. 13.) Dr. Munday also stated that he continued to see "the foundation of a substantial brain injury in the initial accident with some mild aggravation from the second accident. In terms of the brain-based disability, I would formally approximate apportionment as 85% to the initial injury and 15% to the 7/11/14 injury." Dr. Munday again provided no medical explanation for this apportionment. The doctor also seemed to contradict his 85%-15% apportionment ratio in stating that the second accident of July 11, 2014 did not cause any "brain based" *temporary* disability. Dr. Munday further commented on the potential jobs he believed applicant could perform, such as a member of a janitorial team directed by a supervisor, with applicant refraining from contact with the public. (*Id*., pp. 14-15.)

Dr. Munday re-evaluated the applicant almost five years later. In a report dated May 19, 2017, Dr. Munday discussed apportionment as follows:

> "I would argue that my numbers are not speculative as they are based on data. The initial injury of April 26, 2010 resulted in two different types of bleeding intracranially (subarachnoid hemorrhage and subdural hematoma), as well as contusing of the brain, in addition to whatever concussive effects were present. The presence of bleeding in the brain immediately puts the injury at least into the moderate traumatic brain injury category and I had previously commented that with regard to the April 26, 2010 event, "we have a foundation here of a moderate to severe traumatic brain injury." We have the loss of sense of smell which relates to orbital frontal pathology and very commonly correlates with decreased emotional control (which the patient clearly has). In turn, the July 14, 2011 event resulted in a very slight concussion at most. He was not rendered unconscious and there was no additional bleeding or bruising intracranially. Thus, it has been my perspective that one cannot completely ignore the July 14, 2011 incident, but clearly given the medical facts here, the initial injury of April 26, 2010 is by far the greater cause of his brain based mental impairment. I note in that regard that Ms. Ganz points out that the patient had returned to work after the April 26, 2010 injury and indeed was working when the July 14, 2011 event took place. One, of course, cannot ignore that fact either, but the medical data is far more compelling here. The patient himself, in retrospect, believes he should not have returned to work, probably was not safe to be driving, and he is of the belief that the July 14, 2011 accident would not have occurred if not for the residuals from the April 26, 2010 event. The patient's perspective may be correct, but we cannot know one way or the other, frankly. At any rate, I am aware that he had returned to work and I am not ignoring that fact. Once again, the medical facts are far more compelling in terms of application of apportionment.

> Thus, based on the data available, it continues to be my best approximation that 85% of the impairment I have rated was caused by the April 26, 2010 injury event. In turn, 15% of the brain based mental impairment has been caused by the July 14, 2011 injury event."
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> (Joint exhibit 11, pp. 21-22.)

In a supplemental report dated June 19, 2017, Dr. Munday further discussed apportionment as follows:

> "The initial brain injury of April 26, 2010, by standard classifications, would be considered a moderate traumatic brain injury. We had two different types of bleeding intracranially. That is, we had both subarachnoid bleeding and a subdural hematoma. The initial injury also resulted in anosmia, which is presumptive evidence of orbital frontal pathology. In contrast, the second event of July 14, 2011 resulted in a very mild concussion at most with no loss of consciousness, no bleeding or intracranial pathology detectable on scan. Indeed, strictly based on the medical facts, one might even mount an argument that the July 14, 2011 incident was of no influence in terms of the brain. My perspective is that it may well have been as much the emotional trauma or other issues of that July 14, 2011 event that led to this gentleman going off work. Once again, Mr. Philpot argues that he should not have been back to work and believes the first injury led to the second. I, of course, have no basis whatsoever to make a determination as to the accuracy of that allegation. However, one cannot completely ignore the July 14, 2011 incident and it was indeed subsequent to that incident that the patient stopped working completely. At this point I can only reiterate the medical facts and I would emphasize once again that from a medical perspective, we are talking about a discrepancy in severity of the brain injury sustained that is of tremendous magnitude with the first injury being far more serious and the second injury being relatively minor."
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> (Joint exhibit 12, p. 2.)

In a supplemental report dated October 11, 2017, Dr. Munday reviewed additional medical and litigation records and reiterated his opinion on apportionment:

> "All of the above said, I have no basis to alter my perspectives on this gentleman's condition and most specifically would not alter my perspective on apportionment. I am dealing with the brain injury and its effect on his mental capabilities. It is clear that the impact of the July 14, 2011 event was relatively modest in terms of the direct

impact on the brain and, again, I reference the fact that he was functioning reasonably well immediately post the July 14, 2011 event. The reader might also recollect that my initial evaluation of Mr. Philpot was on August 10, 2011, less than a month after the July 14, 2011 event, and it was subsequent to that evaluation that the patient fairly significantly deteriorated. On the other hand, there is some argument or question raised of whether or not the July 14, 2011 incident has any impact. Once again, we have a fellow who was in a significant accident, clearly hit his head, and while in contrast the July 14, 2011 head injury or brain injury was far less significant than the April 26, 2010 injury, one cannot completely discount the contribution of that July 14, 2011 incident.

Thus, it is my impression that it is apportionment that remains the biggest issue in terms of the parties getting a grasp on this case. I maintain the perspective that I have had consistently, that 85% of the impairment has been caused by the April 26, 2010 incident and, in turn, 15% of the impairment has been caused by the July 14, 2011 incident."

(Joint exhibit 13, p. 9.)

In his deposition of September 27, 2017, Dr. Munday, referring to his 15% apportionment of disability due to applicant's second injury of July 14, 2011, testified that "nothing has shown up on CT or MRI that could specifically be attributed to the second injury, as far as I know. And if I am correct in that belief, then there is no CT or MRI data that's going to show it." (Joint exhibit 15, p. 33.)

Turning to a review of Dr. Feinberg's medical opinion, the doctor evaluated the applicant and summarized his findings in a report dated July 25, 2019:

"Given the contentious nature of the issues, perhaps it is best to look at the affected body parts.

• Traumatic brain injury (TBI) with associated:

- o Cognitive and behavioral residuals.
- o Headaches.
- o. Nausea.
- o. Dizziness.
- o. Tinnitus.
- o Noise sensitivity.

• Psychiatric comorbidity (not associated directly with TBI but rather as a sequela and a confluence of events following the injuries resulting in psychiatric comorbidity and with a chronic pain syndrome).

• Cervical: Occasional neck pain but nothing of great significance by his report: I do not see this problem as industrial.
• Right upper back/shoulder & scapula discomfort: These problems appear to be myofascial in nature.
• Hand numbness left greater than right: I saw no clinical evidence to suggest a carpal tunnel syndrome and do not connect the symptoms with industrial causation.
• Low back pain: Occasional with activity.
• Left knee pain - Occasional.
• Sleep disturbance: This is not separately ratable but is not uncommon with brain injury.
• Urinary frequency and occasional diarrhea: It is not clear that these problems are industrial.
• Dental issues: It is not clear to me as to whether he has pursued this on an industrial basis but if he was to do so, a dental AME or QME would be needed. I would be happy to make such a recommendation if so requested.

After reviewing considerable information and, after examining him, I am not of the opinion that his orthopedic/physical problems are major but rather that issues surrounding his traumatic brain injury are primarily responsible for his disability.

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Regarding work status, when considering all the information presented, it is my opinion he could not return to his prior job. It does appear that there have been two vocational evaluators, although one has been excluded. It does appear though that both of them agree that Mr. Philpot is unemployable and therefore completely disabled. I am in agreement that he could not return to the open labor market when considering all factors."

(WCAB Exhibit AA, pp. 16-17.)

In the same report, Dr. Feinberg stated that he accepted Dr. Munday's opinion concerning applicant's cognitive and behavioral issues. Addressing the issues of causation and apportionment, Dr. Feinberg opined that applicant's loss of taste and smell should be "apportioned along the same lines as the cognitive behavioral apportionment provided by Dr. Munday; in other words, 85% to the 4/26/10 injury and 15% to the 7/14/11 injury." In reference to applicant's traumatic brain injury, Dr. Feinberg stated, "Dr. Munday has opined repeatedly that 85% of his cognitive/behavioral impairment was caused by the 4/26/10 motor vehicle accident and 15% was caused by the 7/14/11 motor vehicle accident. I will not repeat the rationale he provided in his reports and depositions. I have carefully reviewed his opinions and agree. Additionally, these injuries are separate and are not [inextricably] intertwined." (WCAB Exhibit AA, p. 18.)

In the meantime, applicant challenged a prior interim ruling by the WCJ that struck Dr. Miner's and Dr. Van Bittner's opinions from the record and precluded their review and consideration by Dr. Feinberg. We reversed the WCJ's ruling in our decision dated March 4, 2020. Thereafter, Dr.

Feinberg reviewed the medical and vocational opinions in question and issued a supplemental report dated April 13, 2020. (WCAB Exhibit BB.) The supplemental report consisted of an updated record review, a verbatim repeat of Dr. Feinberg's July 25, 2019 report, and the doctor's simple statement: "I have now reviewed the newly submitted records and I have no changes to make in the opinions I previously reported." (WCAB Exhibit BB, p. 10.)

NO APPORTIONMENT OF DISABILITY BETWEEN THE TWO INJURIES

The issue is whether applicant's permanent and total disability may be legally apportioned between the injuries he sustained in the first and second motor vehicle accidents. The burden of proof on apportionment is with the defense. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].)

We conclude that defendants have not met their burden of proof. We reach this conclusion for two reasons. First, the medical opinions of Dr. Munday and Dr. Feinberg do not rise to the level of substantial evidence of apportionment under *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [Appeals Board en banc]. Secondly, there is substantial evidence that the injuries sustained by applicant in the first motor vehicle accident left him permanently and totally disabled even before the second accident happened.

Returning briefly to the WCJ's decision, we reiterate that in ostensibly apportioning 70% of the permanent and total disability to the first injury of April 16, 2010 and 30% to the second injury of July 14, 2011, the WCJ specified his reliance upon Dr. Feinberg's medical reports. In truth, however, the WCJ must have relied primarily upon the medical opinion of Dr. Munday, the AME in neuropsychology. We describe the WCJ's reliance upon Dr. Munday as "primary" because applicant's brain injury, the main factor causing his permanent disability, is within Dr. Munday's field of expertise. Dr. Feinberg, on the other hand, specializes in physical medicine and rehabilitation. However, the more significant problem with Dr. Feinberg's opinion is that he adopted Dr. Munday's apportionment opinion without providing any medical analysis of his own.

As discussed above, Dr. Munday, in his very first report of August 29, 2011, apportioned disability 85% and 15% between the first and second motor vehicle accidents/injuries. Thereafter, the doctor never changed his mind despite applicant's fluctuating medical condition and the varying opinions of other medical and vocational evaluators. More importantly, Dr. Munday gave no medical reason for his 85-15 apportionment percentages in his August 29, 2011 report or in his subsequent report dated July 9, 2012. In both reports, the doctor referred to the second injury as a "mild aggravation" of the first injury. From the outset, Dr. Munday's failure to provide medical reasons for apportionment between the two injuries undermines the substantiality of his opinion, which does not comply with the requirements of substantial evidence as outlined by the Board in *Escobedo*:

> "[I]n the context of apportionment determinations, the medical opinion 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, so that the Board can determine whether the physician is properly

> apportioning under correct legal principles. (*Ashley v. Workers' Comp. Appeals Bd.*, *supra*, 37 Cal.App.4th at pp. 326-327; *King v. Workers' Comp. Appeals Bd.*, *supra*, 231 Cal.App.3d at pp. 1646-1647; *Ditler v. Workers' Comp. Appeals Bd*., *supra*, 131 Cal.App.3d at pp. 812-813.)
>
> Thus, to 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.
>
> (*Escobedo*, *supra,* 70 Cal.Comp.Cases at 621.)

Dr. Munday did provide a bit of reasoning for his 85%-15% apportionment determination in his report dated May 19, 2017. The doctor mentioned the severity of applicant's first injury that resulted in two different types of bleeding inside his skull, the bruising of his brain, and concussive effects. On the other hand, the second injury of July 14, 2011 resulted in a very slight concussion at most, according to the doctor. But Dr. Munday never described in detail the exact nature of the apportionable disability resulting from each of the two injuries, as required by *Escobedo*.

In his subsequent reports of June 19, 2017 and October 11, 2017, Dr. Munday essentially repeated the medical considerations discussed in his May 19, 2017 report, but he did not describe in detail the exact nature of the apportionable disability. Scattered throughout these reports are comments by Dr. Munday suggesting that any disability resulting from the second injury was negligible. The doctor stated that the July 14, 2011 event resulted in a very slight concussion, at most. (May 19, 2017 report.) In his June 19, 2017 report, Dr. Munday stated: "Indeed, *strictly based on the medical facts, one might even mount an argument that the July 14, 2011 incident was of no influence in terms of the brain*. *My perspective is that it may well have been as much the emotional trauma* or other issues of that July 14, 2011 event that led to this gentleman going off work." (Italics added.) In the same report, the doctor emphasized, "[f]rom a medical perspective, we are talking about a discrepancy in severity of the brain injury sustained that is of tremendous magnitude with the first injury being far more serious and the second injury being relatively minor." Then Dr. Munday admitted in his deposition of September 27, 2017 that "nothing has shown up on CT or MRI that could specifically be attributed to the second injury, as far as I know." In his October 11, 2017 report, Dr. Munday "reference[d] the fact that [applicant] was functioning reasonably well immediately [after] the July 14, 2011 event[,]" which suggests the second injury may not have caused disability.

As for Dr. Feinberg, he adopted Dr. Munday's 85%-15% apportionment determination for the first and second injuries concerning applicant's cognitive and behavioral impairment. Dr. Feinberg provided no explanation for his adoption of Dr. Munday's apportionment opinion, other than relying upon Dr. Munday's professional stature and expertise. In adopting Dr. Munday's

apportionment opinion, Dr. Feinberg carried into his own opinion the same flaws in Dr. Munday's opinion that we have discussed above.

In sum, we conclude that the opinions provided by Dr. Munday and Dr. Feinberg are not substantial evidence of apportionment of the permanent disability caused by the injuries suffered by applicant in the two motor vehicle accidents. The two learned physicians failed to describe in detail the exact nature of the apportionable disability, and they failed to set forth sufficient reasoning in support of their conclusions. Dr. Feinberg's opinion on apportionment suffers from the additional flaw that he failed to provide his own reasons for apportioning permanent disability between the two injuries.[4] Aside from the problems with adopting Dr. Munday's apportionment opinion, Dr. Feinberg's apportionment opinion is inherently flawed because a physician cannot simply mirror the apportionment opinion of another physician without providing an independent justification of his own. (See *Mayorga v. Dexter Axle Chassis Group* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 359.)

Having found no legal basis for apportioning permanent disability between the two injuries, we further note that other physicians and vocational experts who have evaluated the applicant found him permanently and totally disabled due to the injuries suffered in the first motor vehicle accident on April 26, 2010.

Dr. Maureen D. Miner served as the first AME in the specialty of physical medicine and rehabilitation. In a report dated April 12, 2018, Dr. Miner concluded that "[f]rom the functional perspective, it is clear that the combination of the two unfortunate motor vehicle accidents puts Mr. Philpot in a competitively unemployable state." (Applicant's exhibit 9, p. 21.) Before that report, however, Dr. Miner had testified in her (second) deposition of February 26, 2018 that if applicant's employer had released him the day before the second accident, the doctor would have found him noncompetitive in the open labor market. (Applicant's exhibit 11, p. 134.) Dr. Miner apparently considered applicant incapable of any employment even without considering his brain injury, which is not within her area of expertise.

In an evaluation dated March 15, 2018, applicant's vocational expert, Eugene E. Van de Bittner, PhD., reviewed the then-extant medical record, including Dr. Miner's reports and depositions. Dr. Van de Bittner concluded that applicant was not able to benefit from vocational rehabilitation services and had no capacity to be amenable to rehabilitation. (Applicant's exhibit 24, p. 83.) […] In his deposition of May 23, 2018, Dr. Van de Bittner elaborated further, testifying that "it is clear from the entire combination of medical, neuropsychological, psychological, vocational and labor market factors that [applicant] was totally disabled based on the effects of the April 26, 2010 injury, alone." (Applicant's exhibit 51, p. 13.) Dr. Van de Bittner also testified that the job applicant was doing when he was injured in the second motor vehicle accident was especially designed for him.

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[4] Dr. Feinberg did state that the two injuries are not inextricably intertwined, ostensibly precluding a combined award of permanent disability under the *Benson's* "limited circumstances" exception - where the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each industrial injury contributed to the employee's overall permanent disability. However, Dr. Feinberg offered no reasons for concluding that the two injuries are not inextricably intertwined. Therefore, we do not take the doctor's conclusion as substantial evidence. Moreover, our review of the overall record, including Dr. Munday's opinions, suggests that the two injuries probably are inextricably intertwined.

That job represented a protected or sheltered position that does not exist in the open labor market, as opposed to regular employment in the open labor market. (*Id*., p. 34.)

Based on our review of the entire record, we see no reason to disregard the opinions of Dr. Miner and Dr. Van Bittner as set forth above. We are persuaded that the opinions are substantial evidence that the injuries sustained by applicant in the first motor vehicle accident of April 26, 2010 left him permanently and totally disabled even before the second accident on July 14, 2011. According to Dr. Van Bittner, the job applicant was doing at the time of the second accident was created just for him; the job did not exist in the open labor market. Based on her expertise in physical medicine and rehabilitation alone, Dr. Miner agreed that applicant was noncompetitive in the open labor market before the second accident even happened. In light of these expert opinions, and in conjunction with our conclusion that defendants failed to meet their burden of proof on apportionment, it is our Decision After Reconsideration that applicant is entitled to a single award of permanent and total disability for the first injury of April 26, 2010.

Applicant's attorney is allowed a reasonable fee equivalent to 15% of the present value of the permanent and total disability award. Calculation of the fee will involve accounting for the annual cost-of-living adjustment (COLA) and State Average Weekly Wage (SAWW) pursuant to Labor Code section 4659(c). (See, e.g., *Gilmore v. Autoland Resale Ctr.* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 148; *Wilson v. Piedmont Lumber & Nursery* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 48.) We will defer calculation of the exact amount of the fee for determination by the WCJ, with assistance from the Disability Evaluation Unit as necessary or appropriate.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings of Fact and Award of July 28, 2020 is **AFFIRMED**, except that Findings 6, 7 and 16, and paragraphs A, B and G of the Award are **RESCINDED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the following new Findings 6, 7 and 16 are **SUBSTITUTED** in place of the rescinded Findings, that paragraph (B) of the Award is **DELETED** and the remaining paragraphs re-lettered to constitute letters (A) through (F), and that the following new paragraphs (A) and (F) are **SUBSTITUTED** in place of rescinded paragraphs (A) and (G):

FINDINGS OF FACT

6. The industrial injury sustained by applicant on April 26, 2010 resulted in permanent and total disability, without apportionment of disability to the second industrial injury of July 14, 2011.

7. Any permanent disability caused by the industrial injury of July 14, 2011 in ADJ7912473 duplicates or exceeds the permanent and total disability caused by the industrial injury of April 26, 2010 and is compensated in ADJ7284005.

16. The reasonable value of the services of applicant's attorney is 15% of the present value of permanent and total disability indemnity per Finding 6 above, with the exact amount of the fee to be determined by the WCJ with assistance of the Disability Evaluation Unit as necessary or appropriate, jurisdiction reserved.

…

AWARD

(A) Permanent disability of 100% in ADJ7284005, payable at the rate of $986.69 per week beginning December 19, 2012 and continuing for the remainder of applicant's life, subject to the COLA afforded by Labor Code section 4659(c), and less an attorney's fee of 15% of the award as set forth in Finding 16, with the weekly indemnity rate subject to adjustment to account for the attorney's fee, jurisdiction reserved.

(F) Applicant's attorney is awarded a reasonable fee equivalent to 15% of the present value of the permanent and total disability award, as set forth in Finding 16 and paragraph (A) above.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for calculation of the attorney's fee by the WCJ, consistent with this opinion.

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Date of Injury:	April 29, 2010; July 14, 2011
Age on date of injury:	50; 51
Occupation:	Service repair technician and manager
Body parts injured:	Brain; psyche; right shoulder, left knee; spine
Identity of petitioner:	Applicant
Timeliness:	The petition is timely filed.
Verification:	The petition is verified.
Date of the Award:	July 28, 2020

The contentions of Petitioner are: (1) that by the Findings and Order the WCJ acted in excess of his powers; (2) the evidence does not justify the Findings of Fact; (3) that the Findings of Fact do not support the Award.

II
FACTS

The applicant was involved in a severe motor vehicle accident wherein he was ejected from the vehicle sustaining injury to his right shoulder and left knee; but more importantly he sustained a fractured skull, loss of brain tissue and brain damage. Subsequently, after significant treatment, applicant was able to return to work for the employer, with major modifications to his usual and customary duties. The applicant was not declared permanent and stationary upon his return to work, and as time went along, the restrictions and modifications became less.

Approximately seven to eight months after applicant returned to work he was involved in a second motor vehicle accident. By all accounts, the second accident was much less severe than the first. The resulting injuries were to the spine and to the brain / psyche.

Applicant was evaluated by multiple AME/QME specialists, including but not limited to: pain management and rehabilitation; psychiatry; neuropsychology; orthopedics. The case first went to trial in 2015 with the prior WCJ issuing findings on three occasions and vacating same on two occasions, before ultimately issuing a Findings and Award on December 30, 2016. This was followed by Petition for Reconsideration on January 24, 2017.

The March 17, 2017 Decision on Reconsideration Ordered a new Findings of Fact (1) and (2) indicating the applicant sustained injury to his…brain…as a result of both dates of injury. The Appeals Board also ordered the parties to further the record. This order caused the parties to solicit no fewer than 18 reports and depositions from various doctors, AME/QMEs and vocational consultants. The parties thereafter went back on the trial calendar on October 18, 2018 with the

current WCJ, who was compelled to vacate the submission on December 11, 2018 to obtain further clarification at a Status Conference on February 7, 2019.

The WCJ was again compelled to vacate the second submission on April 10, 2019; struck the reports of lead evaluator Dr. Miner (AME) and Dr. Van de Bittner (vocational consultant) without objection at trial, and ordered Dr. Feinberg to act as an "IME" and take over as the lead evaluator. The WCJ also ordered the reports and deposition transcripts of Drs. Miner and Van de Bittner not be sent to Dr. Feinberg.

Upon receipt of Dr. Feinberg's July 25, 2019 report, and allowing the parties every opportunity to object, or obtain further discovery, the matter was again submitted and a Findings and Award issued December 19, 2019. This was followed by applicant Petition for Reconsideration dated January 6, 2020. Aside from some issues which have not been challenged at present, applicant's primary objection was the WCJ's order to not allow the IME to review the reports and deposition transcripts of Drs. Miner and Van de Bittner. The Appeals Board Granted Reconsideration and the WCJ's Findings of Fact were Ordered Rescinded and Substituted with the following:

> 1. The reporting and deposition transcripts of Dr. Maureen Miner and Eugene Van de Bittner, Ph.D. are admitted into the record and may be provided to the IME, Dr. Steven Feinberg.
> 2. The record requires further development to address the disputed issues between the parties.

On remand, Dr. Feinberg was provided with the noted materials and the parties were given the opportunity to conduct any additional discovery they felt necessary. No additional discovery was performed. The IME issued a supplemental report dated April 13, 2020 which the WCJ marked as WCAB Exhibit BB and admitted into evidence. A Notice of Intention to Submit was issued and the parties were again given the opportunity to request further discovery. The matter was again submitted for decision on May 26, 2020, as no party had objected, nor did any party request to conduct additional discovery, including to depose the IME.

A Joint Findings of Fact, Award and Opinion on Decision issued on July 28, 2020. The applicant filed the Petition for Reconsideration on August 8, 2020.