

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

VINCENT VALDEZ, *Applicant*

vs.

**HOLDER CONSTRUCTION GROUP, LLC; NATIONAL UNION FIRE INSURANCE,
Adjusted By GALLAGHER BASSETT, *Defendants***

**Adjudication Number: ADJ10654013
San Jose District Office**

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

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings, Award and Order of May 23, 2023, wherein it was found that, while employed on August 30, 2016 as a laborer, applicant sustained admitted injury to his dominant right hand and fingers causing permanent disability of 24% after apportionment. In finding permanent disability of 24%, the WCJ followed the apportionment findings of agreed medical evaluator (AME) orthopedic hand specialist Leonard Gordon, M.D., who opined that 60 percent of applicant's permanent disability was due to the industrial injury, and 40 percent was due to non-industrial factors. The WCJ also rejected vocational evidence offered to rebut the permanent impairment rating garnered from the AME's medical evaluation.

Applicant contends that the WCJ erred in finding only 24 percent permanent disability, arguing that Dr. Gordon's apportionment determination did not constitute substantial medical evidence, and arguing that the WCJ should have followed the vocational evidence rebutting the medical whole person impairment rating. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

The current record does not sufficiently explain Dr. Gordon's apportionment determination. However, it appears that not all of Dr. Gordon's reporting has been admitted into the evidentiary record. We therefore grant reconsideration and return this matter to the trial level in order for the WCJ to admit Dr. Gordon's earlier reports (subject to objection from applicant) and reanalyze the issue of apportionment. Since we rescind on this basis, we do not reach the

applicant's arguments regarding vocational rebuttal. The applicant may raise this issue in the further proceedings at trial level.

Dr. Gordon's earliest report in the evidentiary record is dated June 28, 2019. In that report, Dr. Gordon wrote:

Mr. Valdez was previously seen on 4/24/2017, and I issued a detailed report at that time. I then wrote a supplemental report and subsequently saw him again on 8/20/2018, and he returns for re-evaluation at this time.

As stated previously, he is a right-hand dominant laborer employed by Holder Construction Company where he worked from February 2016 until November 2016, and he stopped working because of his hand problems.

He sustained a hyperextension injury of the fingers of his right hand when the hand was hit by a heavy two-by-four board. I provided apportionment between the enchondroma which was pre-existing and the hand injury, apportioning 40 percent to the underlying enchondroma and 50 percent to the traumatic episode that caused the fracture.

(June 28, 2019 report at p. 2.)

In a June 29, 2020 report, Dr. Gordon again summarized his earlier reporting stating that "When seen previously, he was examined and records were reviewed, and I noted in the assessment that he had problems with his right hand, I did discuss the complex nature of the causation of the problem, considering that he had an enchondroma which is a tumor of the metacarpal." (June 29, 2020 report at p. 2.) Dr. Gordon stated that in the earlier reporting, "I provided my best judgment regarding apportionment, noting that there was an underlying causative problem contributing to the ultimate disability with 40 percent apportioned to the underlying enchondroma and 60 percent to the traumatic episode at work." (June 29, 2020 report at p. 3.)

In the June 29, 2020 report, as corrected in an October 5, 2020 supplemental report, Dr. Gordon rated applicant's permanent impairment, assessing 10% whole person impairment based on loss of range of motion in the fingers and 9% whole person impairment based on chronic pain. (June 29, 2020 report at pp. 8-10; October 5, 2020 report at p. 2.)

With regard to apportionment, in addition to summarizing his earlier opinions, Dr. Gordon wrote in his June 29, 2020 report:

He did, however, have an enchondroma with a fracture through it requiring grafting. This is now fully healed, and x-ray shows no recurrence. In addition, he has developed a chronic regional pain syndrome.

This significant underlying problem does contribute to the patient's ultimate disability, and I have previously opined that 40 percent of the ultimate disability results from the underlying enchondroma and tumor processes and 60 percent results from the subsequent fracture that occurred with apportionment of 60 percent to industrial factors, and this remains my opinion.

(June 29, 2020 report at p. 8.)

While it is now well established that one may properly apportion to pathology and asymptomatic prior conditions (see, e.g. *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617 [Appeals Bd. en banc]), an apportionment opinion must still constitute substantial medical evidence. As we explained in *Escobedo*:

[A] medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citations.]

Moreover, in 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. [Citations.]

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.

(*Escobedo*, 70 Cal.Comp.Cases at p. 621.)

Dr. Gordon's explanation of apportionment in the current evidentiary record is conclusory and does not constitute substantial medical evidence. The reports that are in the current evidentiary record do not describe in detail how the non-industrial enchondroma is contributing to the loss of range of motion and the pain which constitute the applicant's permanent impairment. However, since Dr. Gordon suggests in his reports that he gave a detailed causation and apportionment

analysis in his prior reports, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level so that (pending valid objection by the applicant at the trial level), the prior reports may be received into evidence and analyzed. Since we rescind the WCJ's decision on this basis, we take no position on any other matter, including the issue of rebuttal of any future permanent disability rating by use of vocational evidence. The parties may raise this, and any other outstanding issue, at the trial level in the future proceedings.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings, Award and Order of May 23, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Order of May 23, 2023 is **RESCINDED** and that this matter is **RETURNED** for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 4, 2023

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

**VINCENT VALDEZ
JOHN C. DUNN
MULLEN & FILIPPI**

DW/oo

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