

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

ROMANA ALVAREZ, *Applicant*

vs.

**SKYLINE HEALTHCARE AND WELLNESS CENTER LLC;
COMPWEST INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ12758878
Los Angeles District Office**

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

Defendant Skyline Healthcare and Wellness Center, LLC., seeks reconsideration of the February 20, 2024 Findings and Award (F&A) issued and served by a workers' compensation administrative law judge (WCJ), wherein the WCJ found that applicant sustained injury arising out of and in the course of employment (AOE/COE) during the period October 25, 2018, through October 25, 2019, to her thoracic spine, left shoulder, and left knee, causing 43% permanent disability, and need for future medical care. Issues involving temporary disability were ordered deferred.

Defendant contends that the finding of AOE/COE is not based on substantial medical evidence; that it met its burden to show that applicant's claim was filed post-termination under Labor Code section 3600(a)(10); that the finding of 43% permanent disability is based on an incorrect rating; and that it met its burden to show apportionment and that the WCJ should have allowed further discovery by way of a deposition of the panel qualified medical evaluator (QME).

Applicant did not file an Answer to the Petition. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), recommending reconsideration be denied.

We have considered the Petition for Reconsideration, and the contents of the Report. For the reasons discussed below, we will grant the Petition for Reconsideration to amend Finding number 1 to find injury to applicant's lumbar spine, shoulders, wrists, and right knee, and otherwise affirm the F&A.

PROCEDURAL BACKGROUND

Applicant filed an Application for Adjudication, alleging an injury arising out of and in the course of her employment as a housekeeper to her back, wrists, hands, fingers, left knee, stress, insomnia, and shoulders during the period October 25, 2018, through October 25, 2019.

This matter initially proceeded to trial on August 24, 2022, on the issues of injury AOE/COE to her bilateral shoulders, wrists, middle back, low back, bilateral knees, and psyche, earnings, temporary disability, permanent disability, permanent and stationary date, apportionment, need for further medical care, liability for self-procured medical treatment, and attorney fees. (8/24/22 Minutes of Hearing (MOH), pp. 2-3.) Defendant raised the affirmative defense of post-termination under Labor Code¹ section 3600(a)(10).

The parties presented evidence and the applicant testified at trial. On March 27, 2023, the WCJ issued a Findings and Award in which the WCJ found applicant sustained industrial injury to her thoracic spine, left shoulder, and left knee, causing permanent disability of 43%.

Defendant thereafter petitioned for reconsideration on April 20, 2023, and on May 16, 2023, the WCJ served an Order to Vacate the decision, and further ordered that the parties request a supplemental medical report from Steven Perry, M.D., the QME in this case. The WCJ advised that the parties were to provide the QME with a joint letter requesting that the QME "Please address issues of apportionment related to the Applicant's orthopedic complaints, specifically regarding prior motor vehicle accident in 2015." The Order further stated that "Discovery is CLOSED other than this clarification of the reporting required." (Order to Vacate and Discovery Orders, May 15, 2023.)

Thereafter, the parties again proceeded to trial on December 28, 2023, at which time the supplemental medical report of Dr. Perry dated September 18, 2023, was admitted into evidence and the matter was resubmitted for decision, over the objection of the defendant. (Ex. AA, Dr. Perry PQME Supplemental Report dated 9/18/23.)

¹ All further references are to the Labor Code unless otherwise stated.

On February 20, 2024, the WCJ served his F&A in which he finds applicant sustained injury to his thoracic spine, left shoulder and left knee causing permanent disability of 43% during the period October 25, 2018, through October 25, 2019 while employed by defendant. Future medical care and attorney fees were awarded.

This Petition for Reconsideration followed.

DISCUSSION

Defendant alleges that the existing evidence does not support a continuous trauma injury, and that further, the applicant did not testify to such an injury, but instead pointed to a specific incident in 2018 as the cause of her problems. Defendant further contends that this testimony is in conflict with the QME's finding of a cumulative trauma and thus the physician's reporting is not substantial medical evidence upon which the court may rely. In addition, defendant asserts that the post-termination defense under section 3600(a)(10) bars applicant's claim for injury. Finally, the defendant states that the rating is incorrect and that the WCJ erred in not finding apportionment or allowing the deposition of Steven Perry, D.C.

I.

At the outset, we admonish defense counsel, Stuart Nagel, of the law firm Malmquist, Fields & Camastra, for filing a petition for reconsideration that violates WCAB Rule 10945. (Cal. Code Regs., tit. 8, § 10945.) In violation of subdivision (b) of Rule 10945, Mr. Nagel failed to support his evidentiary statements by specific references to the record. Rule 10945(b)(2) requires that specific references must be made to the documentary evidence, including exhibit numbers, the date of the document, as well as relevant page numbers and other details. The failure to fairly state all of the material evidence relative to the point or points at issue may be a basis for denying or dismissing the petition. (See Cal. Code Regs., tit. 8, § 10972.) Mr. Nagel is admonished to follow the Board's Rules of Practice and Procedure, including but not limited to Rule 10945, in all future matters. Failure to comply with the Rules may subject the offending party to sanctions. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421.)

II.

As an initial matter, we note that the F&A does not address all of the body parts found to be industrial by the panel QME, Dr. Perry, and upon whose reporting the WCJ relies.

QME Dr. Perry found industrial causation for injury to the applicant's thoracic spine, lumbar spine, right and left shoulder, right and left wrist, and right and left knee. (Ex. 1, Report

of Dr. Perry dated 2/19/21, p. 69; Ex. AA, p. 4.) After submission of the case, the WCJ issued Formal Rating Instructions for applicant's thoracic spine, lumbar spine, left shoulder, left knee based on Dr. Perry's QME Report of February 19, 2021, and all four of those body parts were rated as part of applicant's permanent disability by the disability evaluator on March 14, 2023.

However, in the F&A, the WCJ found that applicant sustained "labor disabling injury" arising out of and occurring in the course of employment only to the thoracic spine, left shoulder, and left knee. (F&A, Finding no. 1.) The WCJ did not identify any other body parts in the F&A, including to lumbar spine, right shoulder, right and left wrist, and right knee.

"Injury" in workers' compensation is broadly defined to include: "any injury or disease arising out of the employment[.]" (Lab. Code, § 3208.) An injury is an incident that causes the need for medical care or causes lost time from work. (Lab. Code, § 3208.1.) Notwithstanding this broad definition, exceptions exist in the Labor Code for first aid injuries, which do not require formal reporting. (Lab. Code, § 5401(a).)

First aid is defined as follows:

"[F]irst aid" means any one-time treatment, and any follow up visit for the purpose of observation of minor scratches, cuts, burns, splinters, or other minor industrial injury, which do not ordinarily require medical care. This one-time treatment, and follow up visit for the purpose of observation, is considered first aid even though provided by a physician or registered professional personnel. "Minor industrial injury" shall not include serious exposure to a hazardous substance as defined in subdivision (i) of Section 6302.

(Lab. Code, § 5401(a).)

Per the medical reporting of Dr. Perry upon which the WCJ relies, applicant sustained an industrial injury, which was not merely a first-aid injury,² to her thoracic spine, lumbar spine, right and left shoulder, right and left wrist, and right and left knee. The F&A did not include the lumbar spine, for which permanent disability had been found. Additionally, there was no finding of injury to the shoulders, wrists, and right knee, even though no permanent disability was found. (Ex. AA, p. 4; 3/14/23 Formal Rating Instructions.) Accordingly, we must amend the Findings of Fact to reflect that applicant sustained industrial injury to those body parts.

² Applicant's injuries were more than just first aid as shown by the medical reports of Primary Treating Physician Renee Kohanim, DC. (Ex. 2, Dr. Renee Kohanim MMI Report, dated 2/17/21; Ex. 8, Dr. Renee Kohanim PTP Reports, dated 7/15/20.)

III.

Turning to the merits of the Petition, based on our review of the record we conclude the evidence justifies the finding of the WCJ in this matter.

With respect to the issue of applicability of Labor Code section 3600(a)(10), as stated by the WCJ in his Report:

Labor Code Section 3600(a)(10) states, when the claim for compensation is filed after notice of termination or layoff including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:

The employer knew about the injury prior to termination; the applicant has medical records existing prior to termination that show injury; the specific injury occurs after notice of termination but before the last day of work; **the date of injury, pursuant to Labor Code section 5412, is subsequent to the date of the notice of termination or layoff.**

The Applicant has alleged cumulative trauma claim October 25, 2018 to October 25, 2019.

There is no evidence the Applicant had disability plus knowledge prior to termination.

(Report, pp. 1-2.)

We agree with the WCJ that applicant had no knowledge of having sustained a cumulative trauma injury. In fact, the applicant advised the QME and further testified that she had an injury but attributed the cause of her complaints to an incident at work in 2018. Dr. Perry stated he had to explain to the applicant the difference between a specific injury and a continuous trauma. (Ex. 1, p. 68.) Further, it was the QME Dr. Perry, the medical evaluator, who determined that “considering that the applicant worked at this job for 14 years and the mechanism of injury of a fall which could cause acute aggravation of a developing continuous trauma,” he found causation for injury to the applicant’s thoracic spine, lumbar spine, right and left shoulder, right and left wrists, and right and left knee. (Ex. 1, p. 69.) He left the final determination of causation to the trier of fact. (Ex. 1, p. 69.) He found the causation as industrial with reasonable probability. (Ex. 1, pp. 72, 76).

Medical evidence is required if there is an issue regarding the compensability of the claim. (Lab. Code, §§ 4060(c)(d), 4061(i), 4062.3(l).) A medical opinion must be framed in terms of

reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. en banc).) “Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board’s findings if it is based on surmise, speculation, conjecture or guess.” (*Heggin v. Workmen’s Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Here, the WCJ found that the reporting of Dr. Perry constituted substantial medical evidence on the issue of injury and permanent disability, as well as apportionment, after development of the record on the singular issue of potential apportionment to a motor vehicle accident in 2015.

IV.

A physician addressing the employee’s level of permanent disability must address apportionment of permanent disability. (Lab. Code § 4663(c).) However, apportionment is a factual matter to be determined by the trier of fact and must be based on substantial evidence. (See *Escobedo v. Marshalls, CNA Ins. Co.* (2005) 70 Cal.Comp.Cases 604, 607; see also *Gay v. Workers’ Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817] [“Apportionment is a factual matter for the appeals board to determine based upon all the evidence.”].)

In his supplemental medical report dated September 18, 2023, Dr. Perry advised that:

The apportionment noted in my February 19, 2021 report stands. “With regard to apportionment, I found that 100% of the permanent disability described herein to have industrial cause. It is medically reasonable to attribute her permanent disability to the injuries arising out of her employment as described herein. Therefore, it was my medical opinion that 100% of the permanent disability for the thoracic spine, lumbar spine and left knee, as described above is the direct result of her injuries and 0% is the result of other factors.”

(Ex. AA, p. 16)

The WCJ accepted this analysis by the medical specialist in this case as substantial evidence and we find no reason to disagree.

As to the issue of rating, we reject that there is any error with same. While the WCJ is considered an expert rater (*Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-625), he relied upon the rating specialist and a formal rating. The disability evaluator correctly utilized the proper age based upon applicant's date of birth, as well as the ending date of the continuous trauma to obtain the rating. While the WCJ listed 59 as applicant's age, the formal rating corrected this to indicate the correct age of 63. (Amended Formal Rating Instructions, March 14, 2023, p. 2.)

Moreover, the argument regarding the inclusion of left leg gait derangement as not being warranted "if the left leg gait derangement is not associated with the left knee findings" is meritless. (Petition for Reconsideration, p. 8.) Both the medical reporting of Dr. Perry and the formal rating instruction by the WCJ clearly confirms a permanent disability rating based upon: "PQME report of Dr. Steven B. Perry, February 19, 2021, pages 70-71", and states under "Left Knee: Chapter 17 table 17-5 lower limb impairment due to gait derangement wpi 7%." (Amended Formal Rating Instructions, March 14, 2023; Ex. 1, pp. 70-71.)

Accordingly, we will grant the Petition for Reconsideration to amend Finding of Fact number one to find injury to applicant's lumbar spine, shoulders, wrists, and right knee, and otherwise affirm the F&A.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the February 20, 2024 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the February 20, 2024 Findings and Award is **AFFIRMED** except that Finding number 1 is **AMENDED** as follows:

1. ROMANA ALVAREZ, while employed during the period between October 25, 2018 to October 25, 2019 as a housekeeper, occupational group number 340 at Los Angeles, California, by SKYLINE HEALTHCARE AND WELLNESS CENTER LLC, whose workers' compensation insurance carrier was COMP WEST sustained injury arising out of and occurring in the course of employment to thoracic spine, lumbar spine, right and left shoulder, right and left wrist, and right and left knee.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 13, 2024

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

**ROMANA ALVAREZ
LAW OFFICES OF A. ALEXANDER SOLHI & ASSOCIATES
MALMQUIST, FIELDS & CAMASTRA**

LAS/JMR/ara

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