

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

SHANNON RITCHIE, *Applicant*

vs.

BACARA RESPORT AND SPA; MARRIOTT INTERNATIONAL, INC., permissibly self-insured and self-administered, *Defendants*

**Adjudication Number: ADJ11343119
Oxnard District Office**

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

Applicant seeks reconsideration of the Findings of Fact and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on April 9, 2021, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her cervical spine, right shoulder, lumbar spine, and left ankle, and that the injury caused 33% permanent partial disability.

Applicant contends that the reports of orthopedic agreed medical examiner (AME) Peter M. Newton, M.D., are not substantial evidence as to the issue of apportionment, and that she is entitled to an unapportioned award of 45% permanent partial disability.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition for Reconsideration (Petition) 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 affirm the F&A except that we will amend the F&A to defer the issue of applicant's permanent partial disability caused by her injury (Finding of Fact 5), and to defer the issue of attorney fees (Finding of Fact 8). The Award will be amended based thereon and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to her cervical spine, right shoulder, lumbar spine, and left ankle while employed by defendant as a massage therapist on March 30, 2018.

AME Dr. Newton evaluated applicant on June 2, 2020. (App. Exh. 1, Dr. Newton, June 2, 2020.) Dr. Newton examined applicant, took a history, and reviewed the medical record. He stated that:

Because of her ongoing symptoms and findings on exam, I will refer her for an MRI of the cervical and lumbar spine, electrodiagnostic studies of the extremities, and soft tissue ultrasound of the shoulder and knee.
(App. Exh. 1, p. 21.)

On July 7, 2020, Dr. Newton re-evaluated applicant. (App. Exh. 2, Dr. Newton, July 7, 2020.) Dr. Newton re-examined applicant and reviewed additional medical records, including the diagnostics he had previously requested. He diagnosed applicant as having chronic neck and low back strain, left anterior knee pain, and he stated that she was status post left ankle surgery and right shoulder arthroscopy. (App. Exh. 2, p. 25.) Dr. Newton found applicant's condition had reached maximum medical improvement (MMI), and he assigned 8% WPI for applicant's cervical spine, 8% WPI for her lumbar spine, 8% WPI for her right shoulder, and 8% WPI for her left ankle. (App. Exh. 2, pp. 28 and 37.) Regarding apportionment, Dr. Newton stated:

To a reasonable degree of medical probability, 100% of the applicant's right shoulder condition/disability/impairment is apportioned to 03/30/18 injury. ¶ To a reasonable degree of medical probability, 25% of the applicant's cervical and lumbar spine condition/disability/impairment is apportioned to the chronic symptoms documented in the medical records, which existed prior to 03/30/18 and 75% to the 03/30/18 injury. ¶ To a reasonable degree of medical probability, 75% of this applicant's left ankle condition/disability/impairment is apportioned to the longstanding pre-existing symptoms documented in the medical records and documented in the abnormal MRI dated 02/19/18, and 25% to the 03/30/18 injury, which aggravated this applicant's left ankle condition.
(App. Exh. 2, p. 28.)

In his supplemental report, Dr. Newton stated that he did not agree with the disability rating assigned by applicant's primary treating physician Amy M. Wickman, M.D., and he did not change his previously stated opinions as to applicant's disability and the apportionment thereof. (App. Exh. 3, Dr. Newton, September 30, 2020.)

The parties proceeded to trial on December 23, 2020, and the issues submitted for decision included permanent disability and apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 23, 2020, p. 3.) In the Opinion on Decision, the WCJ rated applicant's disability based on Dr. Newton's conclusions regarding WPI and apportionment. (Opinion on Decision, p. 1.)

DISCUSSION

It is well established that any award, order, or 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, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].)

Labor Code section 4663 sets forth various requirements for doctors' reports on the issue of apportionment, including that each report must "address" the issue of causation of the permanent disability and must make an "apportionment determination" by finding the approximate relative percentages of permanent disability directly caused by the industrial injury and the portion of the permanent disability caused by other factors. The fact that a report "addresses" the issue of causation of the permanent disability and makes an "apportionment determination" by finding the approximate relative percentages of industrial and non-industrial causation does not necessarily render the report one upon which the Appeals Board may rely. Substantial medical evidence supporting apportionment of permanent disability must be based on the correct history and legal theory, and it must include the reasoning for the physician's opinion not merely an unsupported conclusion. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928-929 [71 Cal.Comp.Cases 1687]. If as here, the doctor states that a portion of the injured worker's disability is caused by a pre-existing condition, the physician must explain the nature of that condition, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for the percentage of the disability assigned by the physician. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Here, as quoted above, in his July 7, 2020 report, Dr. Newton stated, in part, that:

25% of the applicant's cervical and lumbar spine condition/disability/impairment is apportioned to the chronic symptoms documented in the medical records, which existed prior to 03/30/18 and 75% to the 03/30/18 injury...75% of this applicant's left ankle condition/disability/impairment is apportioned to

the longstanding pre-existing symptoms documented in the medical records and documented in the abnormal MRI dated 02/19/18, and 25% to the 03/30/18 injury, which aggravated this applicant's left ankle condition. (App. Exh. 2, p. 28.)

Dr. Newton stated his opinions regarding apportionment to applicant's pre-existing conditions but he did not explain the nature of those pre-existing conditions, he did not explain how and why those conditions were causing disability at the time he re-examined applicant, and he did not explain the basis for his conclusions as to how and why those conditions were responsible for the percentage of disability he assigned to them. Thus, his opinions in regard to the issue of apportionment, are not substantial evidence and they are not an appropriate basis for determining the level of permanent disability caused by applicant's March 30, 2018 injury.

As the AME, Dr. Newton was presumably chosen by the parties because of his expertise and neutrality. Therefore, his opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114, 117].) As discussed herein, Dr. Newton did not provide an adequate explanation of his conclusions on the issue of apportionment and in turn, his opinions on that issue are unpersuasive and cannot be relied upon. The Appeals Board has the discretionary authority to develop the record when there is insufficient evidence to determine a threshold issue, which includes applicant's right to permanent disability indemnity benefits. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal. Comp. Cases 261].)

When the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Upon return of this matter, we recommend that the parties request Dr. Newton submit a supplemental report to clarify and explain his opinions regarding apportionment. If the supplemental report constitutes substantial evidence, the parties may choose to resolve the matter based thereon or to have the report admitted into evidence for further proceedings as appropriate.

Accordingly, we grant reconsideration, and we affirm the F&A except that we amend the F&A to defer the issue of applicant's permanent partial disability caused by her injury (Finding of

Fact 5), and to defer the issue of attorney fees (Finding of Fact 8). The Award is amended based thereon and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Award issued by the WCJ on April 9, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 9, 2021 Findings of Fact and Award, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. The issue of applicant's permanent partial disability caused by her injury is deferred.

* * *

8. The issue of attorney fees awarded to applicant's counsel is deferred.

AWARD

* * *

a. The award of permanent disability indemnity is deferred pending development of the record.

* * *

d. The award of attorney fees to applicant's counsel is deferred pending development of the record.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 18, 2021

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

**SHANNON RITCHIE
GHITTERMAN, GHITTERMAN & FELD
FLOYD, SKEREN, MANUKIAN, LANGEVIN**

TLH/pc

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