WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

PATRICK WALSH, *Applicant*

vs.

SKYLINE STEEL ERECTORS; ZURICH, *Defendants*

Adjudication Number: ADJ9880634
Redding 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 Order Granting Petition for Reconsideration and Decision After Reconsideration of April 5, 2021, we granted reconsideration of the Findings and Award issued by the Workers' Compensation Judge ("WCJ") on January 12, 2021. In the Findings and Award, the WCJ found that on December 15, 2014, applicant, an ironworker, sustained industrial injury to (seventeen) stipulated body parts and conditions, resulting in permanent and total disability. In our decision of April 5, 2021, we amended the WCJ's decision, as relevant here, to find that the industrial injury resulted in permanent disability of 91%.

Applicant filed a timely petition for reconsideration of our April 5, 2021 decision. Applicant contends that the combined opinions of Dr. Anderson, the Qualified Medical Evaluator (QME) in internal medicine, and Mr. Sidhu, applicant's vocational expert, support a finding of permanent and total disability under Labor Code section 4662(b). Applicant further contends that Dr. Anderson provided specific work restrictions that support a finding of permanent and total disability based upon applicant's internal injuries alone, and that Mr. Sidhu found a total loss of earning capacity based upon applicant's internal work restrictions alone. Citing *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679] and *County of Santa Clara v. Workers' Comp. Appeals Bd.* (*Justice*) (2020) 49 Cal.App.5th 605 [85 Cal.Comp.Cases 467], applicant also contends that there is no basis for apportionment because his

permanent and total disability was caused by the consequences of medical treatment. In addition, applicant contends that consideration of his orthopedic injury is unnecessary to support a finding of permanent and total disability, that Mr. Sidhu's vocational opinion is consistent with the law of apportionment, that Dr. Sommer's apportionment findings are insubstantial and irrelevant, and that if the Board finds fault with the record it should return this case to the WCJ to "fully assess and address the evidence of internal work restrictions supporting a finding of permanent total disability."

Defendant filed an answer.

Based on our review of the record and applicable law, we conclude that this matter must be returned to the trial level for further proceedings and new decision on permanent disability and apportionment by the WCJ, in light of and consistent with the Appeals Board's recent en banc decisions in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741] ("*Nunes* I") and *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases --] ("*Nunes* II"). The WCJ may further develop the record, to the extent deemed necessary or appropriate, to resolve any issue(s) arising under the *Nunes* decisions, consistent with the manner of developing the record discussed in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 [Appeals Board en banc].)

In *Nunes* I, the applicant sustained a specific injury to her neck, upper extremities, and left shoulder, and a cumulative trauma injury to her bilateral upper extremities. Dr. Brown, Qualified Medical Evaluator (QME) in orthopedics, assigned impairment to applicant's cervical spine, left upper extremity, and carpal tunnel syndrome. The doctor also found 100 percent industrial causation of the left shoulder impairment, and 60 percent industrial causation of the cervical spine impairment, with 40 percent apportioned to preexisting degenerative factors. Dr. Brown ascribed applicant's carpal tunnel symptoms to cumulative injury, with 40 percent apportioned to industrial factors, and 60 percent apportioned to nonindustrial diabetes. Applicant and defendant both retained vocational experts, who along with Dr. Brown agreed that applicant was not feasible for vocational retraining. However, the Board did not uphold the WCJ's finding of permanent and total disability, without apportionment. The Board concluded the opinion of the defense vocational expert, who found 10 percent non-industrial apportionment, was speculative, while the opinion of

applicant's vocational expert included an invalid "vocational apportionment" determination that none of applicant's permanent and total disability was non-industrial.

According to the Board, applicant's vocational expert erroneously asserted that applicant's prior award of disability and degenerative changes could be disregarded because they did not manifest in an inability to perform pre-injury job functions or reduced earning capacity. The Board explained that in disregarding prior impairment because it did not manifest in the form of diminished pre-injury earnings, applicant's vocational expert failed to adequately address the issue of apportionment because he failed to account for disability that formerly could not have been apportioned (e.g., pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions); applicant's vocational expert also failed to determine whether there was substantial medical evidence establishing that the asymptomatic condition or pathology was a contributing cause of the disability. (*Nunes* I, 88 Cal.Comp.Cases at 754, citing *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 607 (Appeals Board en banc) and *City of Petaluma v. Workers' Comp. Appeals. Bd.* (*Lindh*) (2018) 29 Cal.App.5th 1175 [83 Cal.Comp.Cases 1869, 1882], internal quotations omitted.)

Accordingly, the Board held in *Nunes* I: Labor Code section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment, and the Labor Code makes no statutory provision for "vocational apportionment." The Board further held that vocational evidence may be used to address issues relevant to the determination of permanent disability, and that vocational evidence must address apportionment, but such evidence may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. The Board explained that an analysis of whether there are valid sources of apportionment is still required, even when applicant is deemed not feasible for vocational retraining and is permanently and totally disabled as a result. In such cases, the WCJ must determine whether the cause of the permanent and total disability includes nonindustrial or prior industrial factors, or whether the permanent disability reflected in applicant's inability to meaningfully participate in vocational retraining arises solely out of the current industrial injury.

For the above reasons, and because the WCJ's findings and opinion failed to address and explain in detail the WCJ's analysis of permanent disability and apportionment for each of the two industrial injuries, the Board rescinded the WCJ's decision and returned the matter to the trial level for further proceedings and new decision by the WCJ, addressing each claimed injury. The Board

further stated, "the parties may wish to obtain supplemental reporting from their respective medical and vocational experts to address apportionment in accord with the principles explained above." (*Nunes* I, 88 Cal.Comp.Cases at 756.)

In *Nunes* II, the Board denied applicant's petition for reconsideration of *Nunes* I, reiterating its holdings and further explaining them. The Board observed that Dr. Brown had described apportionment related to each of the various injured body parts or conditions, but had not been asked to address apportionment in relation to the factors identified by the vocational experts. The Board rejected applicant's contention that evaluating physicians are ill-equipped and unwilling to assess vocational evidence. Rather, treating and evaluating physicians regularly review, assess, and opine on vocational issues, from the gathering of vocational information relevant to the determination of causation, to the final assessment of permanent disability and work restrictions. Further, vocational evidence is an important, and often integral, consideration in the preparation of medical-legal reporting, and is fully within the purview of the evaluating physician to offer an opinion responsive to the vocational evidence either at the request of the parties, or of the physician's own accord. (*Nunes* II, 23 Cal. Wrk. Comp. LEXIS 46, slip opinion at pp. 12-16.)

Thus, in *Nunes* II the Board rejected applicant's contention that a vocational expert may substitute a competing theory of apportionment in place of otherwise valid legal apportionment. The Board further explained that the consideration of valid medical apportionment in vocational reporting is not properly characterized as "pass-through" apportionment, because the vocational evaluator is not statutorily authorized to render an apportionment opinion in the first place. (*Nunes* II, 23 Cal. Wrk. Comp. LEXIS 46, slip opinion at p. 20.)

In the instant case, we conclude that the WCJ must revisit the record and issue a new decision on the disputed issues of permanent disability and apportionment, according to the principles set forth in *Nunes* I and *Nunes* II. We reach this conclusion because, as noted in our decision of April 5, 2021, applicant's vocational expert, Mr. Sidhu included a "vocational apportionment" opinion in his October 20, 2017 report that either ignored or disregarded the 25% non-industrial apportionment of applicant's orthopedic disability assessed by Dr. Sommer in his report dated August 1, 2017. In her Opinion on Decision accompanying the Findings and Award (F&A) of January 12, 2021, the WCJ similarly discounted Dr. Sommer's medical opinion on apportionment, and the WCJ did so again in her Report on defendant's petition for reconsideration of the January 12, 2021 F&A. Thus, Mr. Sidhu's vocational opinion, and the WCJ's apparent

adoption of it, are contrary to the Board's holding in *Nunes* I that vocational evidence may be used to address issues relevant to the determination of permanent disability, and vocational evidence must address apportionment, but such evidence may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.

Therefore, in order to ensure that this matter results in a final decision on permanent disability and apportionment that is consistent with *Nunes* I and II, we will rescind our previous decision in part,[1] on the issues of permanent disability, apportionment and attorney's fees. Further, we will return this case to the WCJ to revisit and resolve the issues of permanent disability and apportionment as set forth in *Nunes* I and II. As noted at the outset, the WCJ may further develop the record as necessary or appropriate to address and resolve the issues raised by *Nunes* I and II.

Finally, we note that our Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration of April 5, 2021 did not address applicant's present contention that there is no basis for apportionment because his permanent and total disability was caused by the consequences of medical treatment. (See *County of Santa Clara v. Workers' Comp. Appeals Bd.* (*Justice*) (2020) 49 Cal.App.5th 605 [85 Cal.Comp.Cases 467]; *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679].) The WCJ should address and resolve this question, as well as the other contentions raised by applicant in his petition for reconsideration herein.

It should be noted that we express no final opinion on the issues of permanent disability or apportionment. When the WCJ issues new findings on those issues, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq*.

[1] We will affirm those parts of our Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration of April 5, 2021 that were not challenged by either party upon reconsideration.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration of April 5, 2021 is **AFFIRMED,** except that Findings of Fact 4 and 6, and Paragraph (a.) of the Award are **RESCINDED,** and the issues of permanent disability, apportionment and attorney's fees are **DEFERRED,** jurisdiction over said issues reserved to the trial level.

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 further proceedings and new decision by the WCJ on the issues of permanent disability, apportionment and attorney's fees, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 28, 2023

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

PATRICK WALSH
JONES, CLIFFORD, LLP
STOCKWELL, HARRIS, WOOLVERTON & HELPHREY

JTL/*ara*

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