WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LARRY FLOSI, *Applicant*

vs.

SELCO HEATING AND AIR CONDITIONING;
ARCH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11649621
Sacramento District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks removal of the Findings of Facts and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 12, 2021. By the F&O, the WCJ found that the reporting of the qualified medical evaluator (QME) did not constitute substantial evidence and returning to the QME for development of the record would be "fruitless." Submission of the matter was vacated and the parties were ordered to advise the WCJ if they could agree to an agreed medical evaluator (AME) to replace the QME. If the parties could not agree to an AME, the WCJ was to appoint a regular physician per Labor Code[1] section 5701. (Lab. Code, § 5701.)

Applicant contends that the reporting of the QME is substantial evidence and it was error for the WCJ to order development of the record with another physician.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Applicant's Petition for Removal (Report) recommending that the Petition be denied.

We have considered the allegations of applicant's Petition for Removal, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant the Petition as one seeking reconsideration, rescind the F&O and return this matter to the trial level for further proceedings

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

consistent with this opinion.

FACTUAL BACKGROUND

Applicant claims injury to the neck, back, bilateral wrists, bilateral upper extremities, bilateral knees and left hip through July 10, 2018 while employed as a foreman/superintendent/HVAC sheet metal worker by Selco Heating & Air Conditioning. Defendant has denied this claim in its entirety. (Defendant's Exhibit A, Notice Regarding Denial of Workers' Compensation Benefits by Gallagher Bassett Services, Inc., March 5, 2020.)

Manijeh Ryan, M.D. evaluated applicant on June 30, 2020 as the pain medicine QME. (Applicant's Exhibit No. 1, QME Report by Manijeh Ryan, M.D., June 30, 2020.) Dr. Ryan opined as follows in the report's causation section:

> The proximate cause for the claimant's need for treatment, periods of temporary disability, current symptoms and level of permanent disability with regard to the cervical spine, left ulnar nerve, bilateral carpal tunnel syndrome, bilateral middle finger trigger, lumbar spine, left hip and bilateral knees arise out of the cumulative work injury of 7/10/2018.
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> (*Id.* at p. 66.)

Applicant's condition was considered permanent and stationary as of July 28, 2020. (*Id.*) Dr. Ryan further concluded that applicant "is disabled to perform any gainful employment in the competitive labor market." (*Id.*) Whole person impairment (WPI) ratings were provided for several body parts. (*Id.* at pp. 69-82.) Apportionment was provided for the cervical spine and lumbar spine: 90% to the cumulative trauma injury at work and 10% to the previous motorcycle accident and degenerative disc disease. (*Id.* at p. 84.) Dr. Ryan noted that applicant "was in ICU – I do not have the medical records" regarding the motorcycle accident. (*Id.*) Permanent disability for the bilateral carpal tunnel syndrome, left cubital tunnel syndrome, bilateral trigger finger and left hip were considered 100% to the cumulative trauma injury. (*Id.*) Disability for the bilateral knees was 90% to the cumulative trauma injury with "10% of the permanent disability as caused by previous right knee surgery and prior left knee injry [*sic*]." (*Id.*)

Dr. Ryan was cross-examined on November 12, 2020. (Applicant's Exhibit No. 3, Deposition transcript of Manijeh Ryan, M.D., November 12, 2020.) Dr. Ryan also issued a supplemental report dated March 31, 2021. (Applicant's Exhibit No. 2, QME supplemental report

by Manijeh Ryan, M.D., March 31, 2021.)[2] The report quotes a letter from applicant's attorney regarding the records for the motorcycle accident: "I have been working on obtaining these records from Washington Hospital. It appears that these records were destroyed after 10 years." (*Id.* at p. 9.) Dr. Ryan provided revised apportionment opinions: 90% to the cumulative trauma injury for the lumbar spine and cervical spine with 10% to degenerative disc disease for both parts of the spine. (*Id.* at p. 10.) There was no longer any apportionment to the motorcycle accident. (*Id.*)

The matter proceeded to trial on September 16, 2021. The disputed issues included injury arising out of and in the course of employment (AOE/COE) for all body parts pled, as well as permanent disability and apportionment. (Minutes of Hearing and Summary of Evidence, September 16, 2021, p. 2.) Applicant testified at trial in relevant part:

> Currently, applicant is not working. Applicant last worked on July 13, 2018, for Selco Heating and Air Conditioning, defendant employer. Applicant worked for defendant employer from October 1991 through July 13, 2018. Typically, defendant employer constructed industrial building structures like mid- to low-rise apartment buildings.
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> At defendant employer, applicant had multiple job titles: worker, foreman and superintendent. After working as a superintendent, the applicant worked again as a worker or foreman. He wore many hats. As a foreman, applicant did a lot of physical labor with sheet metal and in HVAC.
>
> Sheet metal work was done on steep, pitched roofs where applicant had to be tied off for balance. The work consisted of installing gutters and flashings to water tight the roofs. Applicant had to be in good shape for this work. This was the most intense and taxing work for him. Applicant did not do roof work every day. Sometimes he worked three days on and three days off.
>
> HVAC work is also physical work involving moving equipment, lifting and ladder work. For HVAC work, in buildings four stories or less, applicant was up and down stairs, working on ladders or scaffolds carrying his tools and/or materials and working overhead for ductwork.
>
> When doing ductwork, every 3 to 5 minutes applicant had to move. Applicant wore a 15-pound tool bag, carried a ladder and carried a drill gun which would weigh 1 to 5 pounds while he went up and down stairs. Some times applicant carried an extra bucket of supplies.
>
> At times, there was crane work or heavy lifting days. Equipment had to be lifted

[2] The date of this report was incorrectly identified as March 21, 2021 in the September 16, 2021 Minutes of Hearing and Summary of Evidence. (Minutes of Hearing and Summary of Evidence, September 16, 2021, p. 3.)

off the truck and put on a platform on the ground for the crane to lift it to the roof. Alone, applicant would lift up to 80 pounds. With another worker, applicant would lift 100 to 175 pounds. With overhead lifting, two men would lift and install equipment weighing up to 125 pounds.

Applicant used many tools at work: tin snips which require both hands, bulldog snips, Whitney punches, pop rivet guns, hammers, power drill guns, electric drills to drill through the floor, ladders and scaffolding, and tongs which bend metal. Applicant had to use a lot of hand force for snips and how much force depended on the type of metal being snipped. Applicant had to be strong.

Applicant stopped working because he was physically unable to do the job. Applicant had symptoms to his knees, hips, low back, wrists, and hands including left trigger finger.

In 2018, applicant missed work because of the symptoms especially in the low back and knees. Applicant had swelling in the knees and he could not bend them, move well or walk. Applicant had shooting low back pain and numbness in his lower extremities including his right foot.

In 2018, applicant did miss work. If he was up and down a lot of stairs carrying his tools, the next day he could not answer the bell. In 2018, applicant missed three or four days per month due to sore and swollen knees.
…
In 2015, applicant suffered an injury to his right knee. After four or five weeks, he returned to full duty without restrictions. From 2015 to his last day of work, applicant was doing the same full-duty job.

On July 10, 2018, applicant reinjured his right knee when hyperextending it, but his claim was denied. Applicant did not see a doctor. No doctor took him off work.
…
Applicant opted to retire sometime in 2019 after the SDI benefits stopped.

Applicant had left knee surgery sometime in 2019. Applicant does not know if the right knee injury from 2015 caused the subsequent symptoms in the left knee or the low back.

The applicant can walk. The applicant cannot mow his lawn. The applicant can vacuum but not every day. The applicant is not an invalid. A little or too much work can cause him pain.

Applicant traveled to Washington which is about 200 miles away from his home in Oregon for dog kennel work. Applicant is a co-owner in the Flosi dog kennel business. The applicant does not run with the dogs or pick up the dogs. The applicant occasionally does go to dog competitions or shows. In the past two

years, applicant went to one dog competition or show in Washington in August 2021.

Applicant's dog kennel business is more of a hobby than a job. Applicant does not make money from the kennel because of the costs.

(*Id.* at pp. 4-6.)

The WCJ issued the F&O as outlined above. The Opinion on Decision provided the rationale for the F&O as follows:

The applicant is a credible witness. The record supports a finding of injury to his neck, back, bilateral wrists, bilateral upper extremities, bilateral knees and left hip. However, the record is insufficient to make a determination as to whether or not the claimed injuries are industrial in nature (outside of the prior, May 11, 2015, right knee industrial injury). Injury AOE/COE must be determined before the other issues set for trial.

…

Again, the record in this matter is deficient with regard to the issues presented for trial. Dr. Ryan issued a report which is 270 pages including attachments and dedicated one paragraph of that report to address causation of injury. Dr. Ryan issued conclusory opinions without explanation. Dr. Ryan's opinions addressing apportionment are equally as conclusory, without explanation and without any discussion of pertinent facts.

Exhibit 1, page 36, Dr. Ryan reported she reviewed 2,146 pages of medical records. An excerpt of the records was prepared by her named assistants. Then, Dr. Ryan made changes to the excerpt. Unfortunately, this exercise was insufficient to allow the doctor to know and incorporate the content of the applicant's medical history into her determinations.

Lastly, Dr. Ryan's reporting lacks a probative force on the issues. Specifically, Dr. Ryan's work preclusion analysis is simply inconsistent with the facts of the case.

…

At trial, on cross-examination, applicant discussed his current employment. (MOH/SOE pp. 6-7.) The applicant is a co-owner in a dog kennel business and he breeds dogs for sale. For applicant, this is a "hobby" job. For these pursuits, in August 2021, the applicant traveled about 200 miles out of state to a dog competition or show.

It is not clear when this home business began for applicant or how many hours per week he works. However, it is clear this level of work activity is not consistent with Dr. Ryan's discussion of the applicant's work preclusions and/or ability to work.

> The defendant deposed Dr. Ryan on November 12, 2020, and reviewed multiple issues. (Exhibit 3). After Dr. Ryan's deposition, the record is still not clear and remains inconsistent. Applicant sought a supplemental report to clarify the apportionment assignment for the neck and low back, Dr. Ryan did not deviate from her original opinion. (Exhibit 2.)
>
> Here, it does not appear that returning to Dr. Ryan would be in the best interest of ensuring substantial justice expeditiously. It is unlikely the reporting of Dr. Ryan can be rehabilitated. Dr. Ryan's reports indicate a failure to discuss pertinent facts, provide cursory conclusions without any explanation or basis and lack probative force.
>
> Accordingly, the parties have 10 days to meet and confer and advise the court whether an agreement can be reached on an AME to address the issues in this matter. In the absence of such an agreement, a regular physician will be appointed pursuant to Labor Code section 5701.
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> (Opinion on Decision, November 12, 2021, pp. 11-12.)

DISCUSSION

I.

Applicant sought removal of the F&O. If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury AOE/COE, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes a finding that applicant claims injury while employed through July 10, 2018 as a foreman/superintendent/HVAC sheet metal worker by defendant. Employment is a threshold issue fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

II.

Although the decision contains a finding that is final, applicant is only challenging the finding of fact that Dr. Ryan's reporting is not substantial evidence and order for the record to be developed with either an AME or a regular physician per section 5701. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3202.5, 3600(a).) It is sufficient to show that work was a contributing cause of the injury. (See *Clark*, *supra*, 61 Cal.4th at p. 298; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) The burden of proof "manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

It is acknowledged that evaluating causation for a cumulative trauma injury generally requires medical evidence. (See *Peter Kiewit Sons v. I.A.C.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188] [lay testimony alone generally cannot establish industrial causation in a cumulative trauma injury claim].) Furthermore, decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence ". . . 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 v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board 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." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

In the Opinion on Decision, the WCJ acknowledges that the record supports a finding of injury to the pled body parts. However, the WCJ takes issue with the QME Dr. Ryan's opinions as conclusory. The Opinion on Decision identifies deficiencies with respect to Dr. Ryan's opinions regarding applicant's ability to work and apportionment. No specific deficiencies regarding Dr. Ryan's causation opinions were identified other than noting that the causation discussion was limited to one paragraph in her first report.

The trier of fact may find a physician's opinions regarding apportionment to be deficient, but still rely on that physician's opinion to determine other issues in dispute if those opinions constitute substantial medical evidence. (See e.g., *County of El Dorado v. Workers' Comp. Appeals Bd.* (*Farrar*) (2007) 72 Cal.Comp.Cases 1149 (writ den.) [the Appeals Board made a finding of injury AOE/COE based on applicant's QME's opinion, although the QME did not adequately address apportionment].) Causation of injury is distinct from causation of permanent disability and therefore, a medical report that is not substantial evidence on the issue of apportionment may nonetheless be substantial evidence on the issue of injury AOE/COE. (*Id.*; see also *Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 611 [the analysis of causation of the injury differs from the analysis of causation of permanent disability because the percentage to which an applicant's *injury* is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's *permanent disability* is causally related to his or her injury].) Thus, the trier of fact in this matter could have relied on Dr. Ryan's opinions with respect to causation to find injury AOE/COE to certain body parts, but ordered development of the record with respect to other issues in dispute that were not adequately addressed by Dr. Ryan.

While the employee holds the burden of proof regarding the approximate percentage of permanent disability directly caused by the industrial injury, defendant holds the burden of proof to show apportionment of permanent disability. (Lab. Code, § 5705; see also *Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 613, *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450 [45 Cal.Comp.Cases 170].) Physicians are required to address apportionment when

evaluating permanent impairment. (Lab. Code, § 4663(b)-(c).) With respect to medical reports addressing apportionment, the Court of Appeal has recognized that:

> It is certain the mere 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 nonindustrial causation does not necessarily render the report one upon which the Board may rely.
>
> (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 927-928 [71 Cal.Comp.Cases 1687]; see also *Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 621 [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].)

"[A]n expert's opinion which does not rest upon relevant facts or which assumes an incorrect legal theory cannot constitute substantial evidence upon which the board may base an apportionment finding." (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].)

We agree with the WCJ that Dr. Ryan's opinions to date regarding apportionment are not substantial evidence. Additionally, Dr. Ryan opined that applicant is unable to obtain gainful employment in the competitive labor market, but does not explain how this conclusion comports with applicant's continued activities for his dog kennel business.

The Appeals Board has the discretionary authority under section 5701 to develop the record when the medical record is not substantial evidence or when necessary to adjudicate the issues in dispute. (See Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Per *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138, 142 (Appeals Board en banc), the preferred procedure for developing a deficient record is to first allow supplementation of the medical record by the physicians who have already reported in the case. In *McDuffie*, the WCJ had found the reporting of the existing physicians was inadequate and appointed a new physician to evaluate applicant. The en banc panel stated in response:

> We disagree, however, that the first and best option for further developing the medical record is the appointment of a new medical examiner unfamiliar with

the case.

> Rather, where the WCJ determines after trial or submission of a case for decision that the medical record requires further development, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. Each side should be allowed the opportunity to obtain supplemental or additional reports and/or depositions with respect to the area or areas requiring further development, i.e., the deficiencies, inaccuracies or lack of completeness previously identified by the WCJ and/or the Board. [Citation omitted.] Only if the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, should other physicians be considered.

(*Id*.)

The *McDuffie* decision went on to state that "[i]f the use of physicians new to the case becomes necessary, the selection of an AME by the parties should be considered at this stage in the proceedings." (*Id.*) Thereafter, "if none of the procedures outlined above is possible, the WCJ may resort to the appointment of a regular physician, as authorized by Labor Code section 5701." (*Id.* at pp. 142-143.)

In this matter, the WCJ found that the record must be developed and that returning to the existing QME Dr. Ryan would be fruitless. As outlined above, the preferred procedure to develop a deficient record is to return to the existing physicians first before considering the selection of physicians new to the case. While there are circumstances where returning to the existing physicians is unlikely to create a record that constitutes substantial evidence and is consequently futile, the current record does not support a conclusion that Dr. Ryan is incapable of curing the deficiencies in her opinions.

Therefore, upon return of this matter to the trial level, we recommend the parties initially conduct further discovery with Dr. Ryan. If Dr. Ryan is unable to adequately address the issues in dispute, the parties should be given another opportunity to agree to an AME to develop the record, the second preferred method under *McDuffie*. If the parties are unable to agree to an AME, then the WCJ may appoint a physician to evaluate applicant per section 5701.

In conclusion, we will grant reconsideration, rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Facts and Orders issued by the WCJ on November 12, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Facts and Orders issued by the WCJ on November 12, 2021 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 21, 2022

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

CUNEO BLACK WARD & WISSLER
LARRY FLOSI
SAMUELSEN GONZALEZ VALENZUELA & BROWN
SMOLICH & SMOLICH

AI/*pc*

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