WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AMARJIT SANDHU, *Applicant*

vs.

SMART AND FINAL, Permissibly Self-Insured, Administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Numbers: ADJ7593685, ADJ7593673
Santa Ana 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.[1]

In the Joint Findings, Award and Order of February 26, 2021, the Workers' Compensation Administrative Law Judge ("WCJ") issued decisions in two case numbers.

In ADJ7593685, the WCJ found that on March 9, 2009, applicant, while employed as a stocker (by defendant Smart and Final), sustained industrial injury to his lumbar spine, sleep problem, gastroesophageal reflux disorder ("GERD"), hypertension, diabetes, and psyche, resulting in 100% permanent disability.

In ADJ7593673, the WCJ found that applicant, while employed by defendant as a stocker during the period March 9, 2009 to December 1, 2010, did not sustain industrial injury to his lumbar spine, sleep problem, GERD, hypertension, diabetes, or psyche.[2]

Defendant filed a timely petition for reconsideration and removal of the WCJ's decision in ADJ7593685. Defendant contends that the WCJ erred in denying defendant the opportunity to

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[1] Commissioner Marguerite Sweeney signed the Opinion and Order Granting Petition for Reconsideration dated April 30, 2021. As Commissioner Sweeney is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

[2] As the WCJ's decision in ADJ7593673 is not challenged upon reconsideration, we will affirm it. (Lab. Code, § 5904.)

have its vocational expert, Mr. Keith Wilkinson, undertake a re-evaluation of applicant based on his reduced need for medications, which previously contributed to his non-feasibility for vocational rehabilitation. Defendant further contends that it has newly discovered evidence, consisting of surveillance films obtained after trial, which depict applicant engaging in conduct inconsistent with his trial testimony, and that this evidence should be provided to the vocational and medical evaluators so their reports may constitute substantial evidence. Finally, defendant contends the WCJ erred in failing to consider the apportionment opinions of the Panel Qualified Medical Evaluators ("PQMEs"), Dr. Galarza in psychiatry and Dr. Fisher in internal medicine.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

At the outset, we observe that 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, injury arising out of and in the course of employment, 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 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 petition challenging a hybrid decision disputes a determination made on an interlocutory question, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions, i.e., significant prejudice or irreparable harm. (Cal. Code Regs., tit. 8, § 10955.)

In this case, the Minutes of Hearing of July 23, 2020 reflect that defendant objected to the matter going forward to trial without a re-evaluation by defendant's vocational expert, with defendant asserting that it had set an appointment for the re-evaluation before applicant filed his

Declaration of Readiness to Proceed ("DOR"). Although the record does not show that the WCJ explicitly denied defendant's objection, the WCJ issued the Joint Findings, Award and Order of February 26, 2021 without further evidence, thus denying defendant's objection by implication (confirmed by the WCJ on page six of his Report). The WCJ's denial of defendant's objection is in the nature of an interlocutory ruling. Yet we will treat defendant's petition for reconsideration and removal as a petition for reconsideration because the Joint Findings, Award and Order of February 26, 2021 includes final orders on the threshold issues of injury and permanent disability, which are properly challenged by petition for reconsideration.

Based on our review of the record and applicable law, we conclude that in ADJ7593685, the WCJ failed to adequately consider the possibility that the permanent disability resulting from applicant's internal and psychiatric conditions may be subject to non-industrial apportionment. We also conclude that further development of the medical record may be required concerning apportionment of applicant's psychiatric disability. Therefore, we will affirm those parts of the WCJ's decision in ADJ7593685 that were not challenged upon reconsideration, and we will rescind the WCJ's finding on permanent disability (and related issues) and return the issues to the trial level for further proceedings and new decision by the WCJ.

FACTUAL AND MEDICAL-LEGAL BACKGROUND

Briefly reviewing the relevant factual background, applicant sustained a low back injury in 2009 at age 22, while moving a pallet jack at Smart & Final; he had lumbar surgery and was diagnosed with a failed back surgery. Applicant has been on significant amounts of medications for pain, psyche and industrially-aggravated, pre-existing internal conditions. In addition, applicant was diagnosed with diabetes, GERD, hypertension and a sleep disorder. Applicant also developed psychiatric conditions, initially psychotic, and he was involuntarily hospitalized as suicidal. However, applicant was successfully treated to improve his diagnosis to moderate depression.

Turning to the medical record, we observe that applicant's orthopedic disability was found 100% industrial by Dr. Kim. However, applicant's internal medicine disabilities were apportioned by Dr. Fisher as follows:

> Sleep disorder 15% WPI, 50% industrial and 50% non-industrial (Robert Fisher, M.D. report of 8/27/2018, pg. 1 [Joint Exh. 15])

> GERD 10% WPI, 100% industrial (Robert Fisher, M.D. report of 8/27/2018, pg. 1 [Joint Exh. 15])
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> Hypertension 15% WPI, 33% industrial and 67% non-industrial (Robert Fisher, M.D. report of 8/27/2018, pg. 1 [Joint Exh. 15])
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> Diabetes 10% WPI, 25% industrial and 75% non-industrial (Robert Fisher, M.D. report of 8/27/2018, pg. 1 [Joint Exh. 15])

Concerning applicant's psychiatric condition, we note that two PQMEs in psychiatry, Dr. Jacovich followed by Dr. Galarza, provided their own impairment ratings and apportionment. In his Report, the WCJ points out that the vocational experts reviewed the reports of Dr. Jacovich, the initial PQME, but not Dr. Galarza's reports. Yet the WCJ concludes this was not significant because both PQMEs provided 30% non-industrial apportionment. However, we further note that the physicians' apportionment determinations pertained to different causes of disability.[3] Dr. Galarza apportioned to two non-industrial factors, 20% to applicant's impending divorce, and 10% to the death of his sister. Dr. Jacovich apportioned 15% to pre-existing depression and 15% to a non-industrial ankle injury:

> "[This] examiner opines that there was 70% apportionment of industrial causes and 30% of non-industrial causes (15% to pre-existing depression; and 15% to non-industrial factor of claimant's injury to ankle) to the development of the psychiatric injury; Major Depressive Disorder, recurrent with psychotic features." (Ex. C, 6/23/14 Dr. Jacovich, p. 11.)

As for Dr. Galarza, he provided a diagnosis of Major Depressive Disorder and Anxiety Disorder. In reference to apportionment, Dr. Galarza considered the issues of divorce and the death of applicant's sister, and the doctor offered the following assessment:

> Pending divorce:
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> Mr. Sandhu states that he and his wife are separated, and she currently wants to file a divorce. Mr. Sandhu states that over the last year, specifically over the last 2 to 3 months, the relationship has worsened. Mr. Sandhu states that she wants to leave and because he thinks that he has become too dependent on her and he has pain and mood problems. Mr. Sandhu notes

[3] Here it is important to note that the existence of a contributing factor in an industrial injury does not necessarily equate to a finding that the contributing factor likewise is causing permanent disability. The analysis of these two issues may be different. (See *Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 [Significant Panel Decision], citing *Employers Mutual Liability Ins. Co. of Wisconsin v. Industrial Acc. Com.* (*Gideon*) (1953) 41 Cal.2d 676 (18 Cal.Comp.Cases 286) [employee's head injury resulting from fall caused by non-industrial seizure found compensable].)

> that the he has been married to his wife for approximately 10 years and their relationship was very good. Mr. Sandhu also notes that she is his caretaker and he worries about what will happen after she leaves. His impending divorce accounts for 20 percent of his above-stated WPI can be apportioned to this nonindustrial factor.
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> Death of sister:
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> Mr. Sandhu states that in the year 2015 his sister died after complications of a C-section. Mr. Sandhu noted that he does miss her since that was his own sister. Mr. Sandhu notes that he does have contact with his twin niece and nephew and does get along well with his ex-brother-in-law, but nonetheless the death of his sister accounts for 10% of his above-stated WPI can be apportioned to this nonindustrial factor.
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> (Jt. Ex 18, 8/8/20 Dr. Galarza, p. 10.)

Thus, Dr. Galarza reported that applicant's divorce is due to the negative effects his injury is having on their relationship, as applicant's wife is his main caregiver. But the doctor did not address whether applicant's industrial injury and disability are the primary factors in this situation. Further, Dr. Galarza's apportionment to the death of applicant's sister does not discuss the "how and why" it is causing 10% of applicant's permanent disability, other than the fact that "he does miss her." Dr. Galarza's apportionment opinion is insubstantial under *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc). Therein the Board stated that 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 the Board can determine whether the physician is properly apportioning under correct legal principles.

As for the vocational evidence, both parties' experts found that applicant is precluded from returning to the labor market due to his industrial injuries. However, neither vocational expert reviewed Dr. Galarza's reporting or Dr. Fisher's final reports in internal medicine. The vocational experts only reviewed Dr. Fisher's preliminary report, before he found applicant to be permanent and stationary and before the doctor provided rating and apportionment determinations.

Applicant's vocational expert, Mr. Bonneau, discussed apportionment as follows:

> I have reviewed and considered the physician's statements on apportionment and causation as outlined previously by Dr. Donald Kim's report of October 13, 2014; Jerry Lee Morris, M.D., PTP, Orthopedic Permanent and Stationary Report of April 11, 2016; Alan Jacovich, D.O.,

> Psychiatric PQME Report of September 17, 2015; Nelson Flores, PhD, QME, Comprehensive Permanent and Stationary Psychological Evaluation of July 15, 2014; Kelly O'Neill, PhD, QME, Psychological Reevaluation Report of May 19, 2016; Beth Lo, M.D., Neurology/Sleep Medicine, Comprehensive Maximum Medical Improvement Sleep Study Report; Alexander Gershman, M.D., PhD, Initial Urological Consultation Report.
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> From a vocational standpoint, the orthopedic restrictions were highly significant. The pain was significant and the psychiatric issues were as well significant in the analysis using the VDARE 2016 and my clinical judgement. There was no apportionment on the orthopedic issues. Dr. Kim deferred on the pain issue to an appropriate specialist. Dr. Morris declared cervical spine, lumbar spine and bilateral wrists 100% industrial.
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> Depending on the evaluator, there was either no apportionment to non-industrial factors per Dr. O'Neill, there was some apportionment (15% per Dr. Flores and 30% per Dr. Jacovich) to non-industrial factors on psychiatric issues.
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> The small impact of this apportionment in relation to applicant's overall diminished physical and mental-emotional capabilities, along with the sleep issue and urological issue,[[4]] does not change the fact that applicant is totally permanently disabled.
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> (Ex. 4. 9/19/16 Bonneau Voc. Report, p. 16.)

Defendant's vocational expert, Mr. Wilkinson, addressed only the issue of psychiatric apportionment, stating: "When considering the opinions of Dr. Jacovich and Dr. Flores regarding psychological work restrictions, both before and after apportionment, Mr. Sandhu does not retain the psychological capacity to work." (Ex. 5. 12/20/17 Wilkinson Voc. Report, p. 3.)

As noted at the outset, defendant contends that the vocational experts failed to adequately consider apportionment to non-industrial causes of applicant's permanent disability. In his Report, the WCJ responds as follows:

> Although the vocational experts did not review Dr. Galarza's reports, they reviewed reports of the earlier psyche panel QME, Dr. Jacovich. The latter provided the same apportionment percentages as Dr. Galarza. Vocational expert, Michael Bonneau, noted that Dr. Jacovich apportioned 70% to industrial causes and 30% to non-industrial. Mr. Bonneau's vocational analysis is that even with apportionment, the applicant's overall diminished

[4] Defendant correctly points out that contrary to Mr. Bonneau's mention of it, there is no industrial "urological issue" in this case.

> physical and mental-emotional capacity, along with sleep issues and urological issues [see Board's fn. 5, *infra*] make him totally permanently disabled (Michael Bonneau, Vocational Feasibility Report of September 19, 2016, pg. 15 [Applicant's Exh. 4]). He concludes that Mr. Sandhu is not employable and is not amenable to vocational rehabilitation.
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> Keith Wilkinson reviews the reports of Dr. Fisher[[5]] and Dr. Jacovich and notes their comments on apportionment. He also concludes that even after considering the opinions of Dr. Jacovich regarding psychological work restrictions, both before and after apportionment, the applicant does not retain the psychological capacity for work. The applicant suffers from chronic pain syndrome and fibromyalgia and has lost sleep, pain, and fatigue. His use of opioid pain medications would make Mr. Sandhu unable to compete in the open labor market.

DISCUSSION

In its en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741] ("*Nunes* I"), the Appeals Board held that Labor Code section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment, and that 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. The Board affirmed these holdings in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] ("*Nunes* II").

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[5] Mr. Wilkinson only reviewed Dr. Fisher's August 10, 2016 report, not Dr. Fisher's May 30, 2018 apportionment report.

In this case, the record includes a formal rating by the Disability Evaluation Unit ("DEU") of 47% permanent disability, but the WCJ's determination that the vocational evidence successfully rebutted the scheduled rating failed to take into account Dr. Fisher's apportionment to non-industrial factors relevant to the disability caused by applicant's internal injuries.[6] We further note that contrary to *Nunes* I and II, neither vocational expert considered Dr. Fisher's apportionment of the disability caused by applicant's internal injuries, as the vocational experts issued their reports before Dr. Fisher provided his final report, which rated applicant's internal disability and which included various apportionment determinations. Likewise, neither vocational expert reviewed Dr. Galarza's reporting on applicant's psychiatric disability, making their vocational opinions insubstantial even without consideration of the doctor's failure to comply with the requirements of *Escobedo* on apportionment.

In summary, we conclude that the WCJ's award of 100% permanent disability, based on rebuttal of the scheduled rating of 47%, cannot be affirmed because the vocational experts did not consider Dr. Galarza's opinion on psychiatric disability and Dr. Fisher's final opinion on apportionment of disability resulting from applicant's internal injuries. Accordingly, we find it necessary to rescind the WCJ's permanent disability award in ADJ7593685 and to return this matter to the trial level for further proceedings and new decision by the WCJ. This disposition will ensure that there is a final determination of permanent disability and apportionment consistent with *Nunes* I and II. The WCJ may further develop the record, to the extent deemed necessary or appropriate, to resolve the issues discussed in this opinion and those arising by reason of the *Nunes* decisions, consistent with the manner of developing the record set forth in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 [Appeals Board en banc].) This may include providing Dr. Galarza an opportunity to supplement his opinion on apportionment, as well as providing the vocational experts of both parties an opportunity to undertake a complete review of the medical reporting and to issue supplemental vocational reports that take the complete medical record into account. The WCJ also should provide notice and opportunity for the parties to be

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[6] The burden is on the injured employee to affirmatively demonstrate that "the employee's diminished future earnings are directly attributable to the employee's work-related injury, and not due to nonindustrial factors." (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1275 [76 Cal.Comp.Cases 624].) In *Nunes* I, footnote 8, the Board stated that notwithstanding the statutory changes to the calculation of diminished future earning capacity (DFEC) made by Labor Code section 4660.1, *Ogilvie's* holding - that vocational evidence may be offered to rebut the permanent disability rating schedule - continues to apply to all dates of injury.

heard in revisiting whether or not defendant's surveillance videos should be admitted into evidence and considered by the medical and vocational experts.

We express no final opinion on the issues of permanent disability or apportionment in ADJ7593685. When the WCJ makes new findings on them, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings, Award and Order of February 26, 2021 is **AFFIRMED,** except that in ADJ7593685, Findings 7 and 10, and paragraphs (c) and (e) of the Award are **RESCINDED,** and the following new Findings 7 and 10, and paragraphs (c) and (e) of the Award are **SUBSTITUTED** in their place:

FINDINGS OF FACT

7. The issues of permanent disability and apportionment are deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved at the trial level.

10. Applicant's attorney is entitled to a reasonable fee equivalent to 15% of the temporary total disability compensation awarded herein. The issue of a reasonable attorney's fee against permanent disability compensation is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved at the trial level.

AWARD

(c) The award of permanent disability is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved at the trial level.

(e) The award of a reasonable attorney's fee against permanent disability compensation is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved at the trial level.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that case number ADJ7593685 is **RETURNED** to the trial level for further proceedings and new decision by the WCJ on the outstanding issues, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 13, 2023

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

AMARJIT SANDHU
CALIFORNIA LAW ASSOCIATES
SAMUELSEN, GONZALEZ, VALENZUELA & BROWN

JTL/*ara*

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