WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JAIME COBIAN, *Applicant*

vs.

DAVID E. KING and ZENITH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ13134719
Redding District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on May 28, 2021, wherein the WCJ found in pertinent part that applicant's March 6, 2014 back injury caused 16% permanent disability.

Applicant contends that the reports from orthopedic qualified medical examiner (QME) Daniel M. D'Amico, M.D., are not substantial evidence on the issue of apportionment, and that the March 6, 2014 injury caused 20% permanent 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 Findings of Fact to find that applicant's injury caused 20% permanent partial disability (Finding of Fact #2); and based thereon we will amend the Award.

BACKGROUND

Applicant claimed injury to his back while employed by defendant as a farm laborer on March 6, 2014.

QME Dr. D'Amico evaluated applicant on December 9, 2019. Dr. D'Amico examined applicant, took a history, and reviewed the medical record. The diagnoses included severe lumbar

disc pathology, contained herniation at L4-5 and L5-S1, and facet arthropathy with moderate stenosis at L4-5 and L5-S1. (Joint Exh. A, Dr. D'Amico, December 9, 2019, p. 10.) Dr. D'Amico stated that the cause of applicant's back condition was:

> [I]ndustrial aggravation of low back pathology with documented episodes of repeated injuries, documented episodes of repeated aggravation of the low back condition.
> (Joint Exh. A, p. 11.)

The doctor determined that the injury caused 10% whole person impairment (WPI) and that 20% of the disability was due to "genetic and developmental factors of low back pathology" with 80% of the disability caused by "aggravation of low back pathology and multiple episodes of injury…." (Joint Exh. A, p. 11.)

On November 9, 2020, Dr. D'Amico re-evaluated applicant. Dr. D'Amico re-examined applicant, took an interim history and reviewed additional medical records. The doctor said applicant's condition had remained permanent and stationary and the diagnoses included:

> 1. Lumbosacral injury, low back 03/06/2014.
> 2. Lumbar ligament muscle fascia sprain/strain.
> 3. Aggravation of mild degenerative L4-5 disc disease as a result of industrial injury.
> 4. Chronic low back pain secondary to industrial injury aggravation of mild degenerative low back pathology.
> (Joint Exh. B, Dr. D'Amico, November 9, 2020, pp. 18 – 19.)

The doctor reiterated his earlier opinion that the injury caused 10% WPI and regarding apportionment he stated:

> At the time of my initial evaluation, I apportioned 20% to the normal degenerative condition in the low back which was preexisting at the time of this 2014 injury. As part of this, 20% apportionment would then be the natural progression of the degenerative process in the last 6 years. So, the 20% nonindustrial is unchanged. Therefore, the 80% due to aggravation of low back pathology and multiple episodes of injury also remains unchanged.
> (Joint Exh. B, p. 19.)

The parties proceeded to trial on March 25, 2021. The issues submitted for decision were permanent disability/apportionment and attorney fees. (Minutes of Hearing and Summary of Evidence (MOH/SOE), March 25, 2021, p. 2.)

DISCUSSION

Employers must compensate injured workers only for the portion of permanent disability attributable to the current industrial injury, not for the portion attributable to previous injuries or nonindustrial factors. (Lab. Code §§ 4663, 4664; *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565].) The employer has the burden of proof to establish apportionment of permanent disability with substantial evidence. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1107, 1114-1115 [71 Cal.Comp.Cases 1229].)

Here, Dr. D'Amico apportioned 20% of applicant's disability "to the normal degenerative condition in the low back which was preexisting at the time of this 2014 injury." (Joint Exh. B, p. 19.)

It is clear that a physician may determine a pre-existing congenital or pathological condition is a contributing cause of an injured worker's disability, and the physician may apply apportionment based thereon. (*City of Jackson v. Workers' Comp. Appeals Bd. (Rice)* (2017) 11 Cal.App.5th 109 [82 Cal.Comp.Cases 437; *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687].) However, in order to constitute substantial evidence as to the issue of apportionment, a medical opinion must set forth reasoning in support of its conclusions. For example, if a physician states that a percentage of an injured worker's disability is caused by a pre-existing condition, the physician must explain the nature of the pre-existing 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 identified by the doctor. (*Acme Steel v. Workers' Comp. Appeals Bd. (Borman)* (2013) 218 Cal.App.4th 1137 [78 Cal.Comp.Cases 751]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

In his reports, as quoted above, Dr. D'Amico stated his conclusion that 20% of applicant's disability was caused by pre-existing non-industrial factors but he provided no explanation as to how and why the pre-existing condition was causing permanent disability at the time of the evaluations nor did he explain how or why it was responsible for 20% of applicant's disability. Thus, his reports do not constitute substantial evidence on the issue of apportionment and cannot be the basis for the Finding of permanent disability. (*Acme Steel v. Workers' Comp. Appeals Bd. (Borman), supra*; *Escobedo v. Marshalls, supra*; *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].)

Accordingly, we grant reconsideration and affirm the F&A, except that we amend the Findings of Fact to find that applicant's injury caused 20% permanent partial disability and based thereon we amend the Award.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award issued by the WCJ on May 28, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 28, 2021 Findings and Award is **AFFIRMED,** except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. Applicant's industrial injury has resulted in 20% permanent disability.

* * *

AWARD

* * *

1. Permanent disability of 20%, entitling applicant to 75.50 weeks of permanent disability indemnity at the rate of $290.00 per week, equal to $21,895.00, all due and payable; less 15% in reasonable and well-earned attorney's fees to be paid to The Law Office of Hodson and Mullin.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

I DISSENT,

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 18, 2021

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

JAIME COBIAN
HODSON MULLIN
CHERNOW LIEB

TLH/*pc*

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

DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent. The reports from QME Dr. D'Amico constitute substantial evidence on the issue of apportionment. Based thereon I agree with the WCJ's decision and I would deny reconsideration.

Dr. D'Amico examined applicant twice and reviewed the complete medical record, including the MRIs of applicant's lumbar spine. He explained that applicant's industrial injury was an aggravation of his pre-existing low back pathology. (Joint Exh. A, p. 11.) Dr. D'Amico also explained that applicant's disability was caused by the March 6, 2014 injury, and the progression of applicant's underlying degenerative lumbar spine condition, as indicated by the MRIs.

It is my opinion that Dr. D'Amico gave a thorough and well-reasoned analysis of applicant's disability caused by the injury and his pre-existing degenerative spine condition. He referred to the objective findings that support his conclusions and there is no evidence in the record that is inconsistent with Dr. D'Amico's expert medical opinions.

Dr. D'Amico complied with the requirements of the *Escobedo* decision and his reports constitute substantial evidence. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Thus, for these reasons, and for those stated by the WCJ in the Report, which I would incorporate, I disagree with the majority and I would deny reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

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