

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

OLIVER WINSTON, *Applicant*

vs.

**CDCR-WASCO STATE PRISON, legally uninsured;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ1480768
Bakersfield District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the November 13, 2018 Orders Admitting Evidence, Findings of Fact, & Award (F&A) issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained 72% permanent disability after apportionment.

Defendant contends that the WCJ should have found 58% permanent disability based on a strict application of the American Medical Association Guides to the Evaluation of Permanent Impairment (5th Edition) (AMA Guides) to the September 29, 2017 agreed medical examination (AME) report of Glenn D. Cohen, M.D.

We did not receive an Answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons stated below, we will rescind the WCJ's decision and substitute it with new Findings of Fact that defer the issues of permanent disability and attorney fees and return this matter to the trial level for further proceedings.

I.

Applicant sustained admitted industrial injury to his bilateral upper extremities, hands, and wrists while employed as a correctional officer during the period from October 1985 to December 22, 2002. (Minutes of Hearing and Summary of Evidence (MOH/SOE), 7/9/15, at p. 2:23-29.) In a Findings of Fact & Award issued on October 15, 2015, the WCJ found the injury herein caused 54% permanent disability after apportionment. Defendant sought reconsideration contending that the WCJ erred in applying the 1997 Schedule for Rating Permanent Disabilities (1997 Schedule). We issued an January 8, 2016 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration finding that the 2005 Schedule for Rating Permanent Disabilities (2005 Schedule) applied, deferring the issues of permanent disability and attorney fees, otherwise affirming the WCJ's decision, and returning this matter to the trial level for further proceedings.

Following additional proceedings, this case returned to a mandatory settlement conference (MSC) on July 3, 2018 and trial on August 31, 2018. The three issues framed for trial at that time were (1) the extent of permanent disability, (2) apportionment, and (3) defendant's objection to a July 11, 2018 Recommended Permanent Disability Rating issued by the Disability Evaluation Unit (DEU).

Dr. Cohen's September 27, 2017 orthopedic AME report was admitted as defendant's Exhibit E. The narrative discussion of Dr. Cohen's report states in its entirety:

Mr. Winston was last seen by me on August 29, 2012. Since that time, he has apparently undergone physical therapy for his neck as well as the upper extremities, with no additional treatment, testing, or procedures reported. He has been diagnosed with congestive heart failure and reports having lost a significant amount of weight. His range of motion and strength have decreased since the last time I evaluated him.

Dr. Montgomery has stated that the patient remains permanent & stationary, and at this time it is requested that I issue impairment ratings per the AMA Guides Fifth Edition in addition to determining apportionment. Please see the attached Report of Impairment Ratings as well as the Apportionment section

....

(Dr. Cohen's 9/27/17 report, at p. 9, defendant's Exhibit E.)

The apportionment section of the report states in its entirety that:

It is the opinion of this examiner that there was no significant presence of pre-existing or non-industrial disability or injury, and therefore 100% of his

disability and impairment arose out of and occurred in the course of his employment with CDC Wasco and 0% can be attributed to pre-existing or nonindustrial factors.

(*Id.* at p. 8.)

Dr. Cohen's September 27, 2017 report contains no narrative discussion on impairment as measured by the AMA Guides but instead directs the reader to "see the attached Report of Impairment Ratings...." (*Id.* at p. 9.) The attached Report of Impairment Ratings consists of six (6) pages of tables and measurements with no narrative analysis but identifies impairment measurement from both sensory deficits and abnormal motion. The Report of Impairment Rating concludes with the following statement:

IMPAIRMENT SYSTEM AND RATIONALE: Organ system and whole person impairment. *All calculations are based on the Guides to the Evaluation of Permanent Impairment, Fifth Edition. Combined values chart (Page 604) has been used throughout the application to combine impairments wherever necessary, Table 16-1 (digits to hand), Table 16-3 (hand to upper extremity). If both limbs are involved, calculate the whole person impairment for each on a separate chart and combine the percents (Combined values chart)*

[Body Part or Systems: Upper Extremity
Chapter No: 16
Impairment %: 42]

(Dr. Cohen's 9/27/17 report, Report of Impairment Ratings, defendant's Exhibit E, emphasis in original.)

Dr. Cohen was deposed on May 25, 2018 and was asked whether the limitations in the range of motion measurements were a result of the carpal tunnel. Dr. Cohen responded that "It can be. The – there's a lot of moving parts here. I mean, ultimately there is no – there is no definitive answer to that." (Deposition of Dr. Cohen, 5/25/18, at p. 34:18 – 35:1, defendant's Exhibit F.) No further questioning was made regarding the interaction between impairments in the form of sensory deficits and range of motion.

The WCJ requested a recommended permanent disability rating from the DEU, stating "Rate the impairment identified in the report of Glenn D. Cohen, M.D., dated September 27, 2017." On July 7, 2018, the DEU issued a Recommended Rating of Permanent Disability which includes factors of impairment related to decrease in range of motion in addition to impairment from compression neuropathies. (WCAB Exhibit X.) Defendant objected to the DEU's rating and

requested to cross-examine the rater. The DEU rater was cross-examined on August 31, 2018.

The MOH/SOE summarizes the rater's testimony as follows:

She was asked to rate the report of Dr. [Cohen] dated September 27, 2017. She took the factors of impairment not from the text of the report but from the Impairment Rating Summary attached to the report. It is noted that Page 3 and Page 6 of the summary talk about impairment to the peripheral and sensory nervous system. This is carpal tunnel syndrome.

The witness's attention was directed to Table 16-15 on Page 492 of the AMA Guides. The table discusses compression neuropathy. It is proper to rate carpal tunnel syndrome as a compression neuropathy.

There was no indication that Applicant has suffered from a complex regional pain syndrome or causalgia.

The witness's attention was directed to the first paragraph on Page 494 of the AMA guides. That paragraph appears to prohibit rating impairments from decreased range of motion in addition to impairments from compression neuropathies. The witness testified that she understands that this means that decreased range of motion resulting from the carpal tunnel syndrome is not rateable in addition to the rating for the compression neuropathy but decreases in range of motion from other causes maybe separately rateable.

There was an extensive list of diagnoses in the report. She assumed from the number of diagnoses that the doctor understood the rating requirements and that the range of motion impairment was from one of the other diagnoses. The report does not expressly say that. The report also does not indicate that the doctor was aware of the restriction on rateable impairment for decreased range of motion in addition to compression neuropathies.

The rating also includes range of motion ratings for the thumbs and various fingers. There was no discussion in the report as to whether or not these were separately rateable from the compression neuropathy.

If decreased range of motion is not separately rateable from the compression neuropathy, the proper rating would be 35 percent impairment for each upper extremity. Combining 35 percent with 35 percent equals 58 percent.

....

She does not believe a change in her rating is needed in light of the questions asked of her. She stands by the Formal Rating she provided.
(MOH/SOE, 8/31/18, at p. 2:33-3:33.)

The WCJ relied on the July 11, 2018 Recommended Rating to issue a finding of 72% permanent disability. In his report, he recommends that we deny reconsideration asserting that defendant failed to meet its burden of proof on the issue of overlap which the WCJ described as “a sub-species of apportionment for which the employer has the burden of proof.”

II.

It is well established that any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code,¹ § 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].) In order to consist of substantial medical evidence on the issues of permanent disability and apportionment, 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, 621-622 (Appeals Board en banc).)

Section 4663(a) provides that “[a]pportionment of permanent disability shall be based on causation.” (Lab. Code, § 4663(a).) Section 4664(a) states that “[t]he employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.” (Lab. Code, § 4664(a).)

Overlap occurs when factors of disability resulting from an injury are the same as factors of disability **resulting from a different injury**.² (*Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576, 585 (Appeals Board en banc).) The attribution of overlapping factors of disability to different causes is called apportionment. (*Id.*) The employer has the burden of proving apportionment. (*Kopping v. Workers’ Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc).)

However, the issue in this case is not overlap or apportionment as between different injuries. Rather, the question in this case is whether duplication exists between factors of disability **resulting from a single injury**. “Duplication occurs when the combining of different factors of disability does not further reduce an injured workers’ ability to compete in an open labor market

¹ All further statutory references are to the Labor Code, unless otherwise noted.

² While the definition of overlap in *Todd* is taken from the 1997 Schedule, it applies equally to the 2005 Schedule.

beyond that resulting from a single factor standing alone.” (*Todd, supra*, 85 Cal.Comp.Cases at p. 585.) Duplication should be avoided. In *Todd*, we stated that

‘ ... [I]n cases involving multiple factors of disability caused by ***a single industrial accident*** the [Worker's Compensation] Board must, in any instructions it may direct to the rating bureau, fully describe each separate factor of disability. Any overlap of the factors of disability thus described is adequately taken into account, and the pyramiding of disabilities is properly avoided, by application of the multiple disabilities rating schedule.’ [citations omitted.]

The 2005 schedule incorporates the CVC and provides instructions “for combining two or more disabilities or two or more impairments.” (2005 schedule, pp. 8-1 to 8-4.) The 2005 schedule also includes a formula for combining impairments and disabilities (*Id.* at pp. 1-10 to 1-11) and examples of how to rate multiple impairments and disabilities using the CVC (*Id.* at pp. 7-1 to 7-4).

Like the 1997 schedule, the 2005 schedule contains language that it is to be used for rating a single injury. The introduction to the 2005 schedule provides that “[t]he extent of permanent disability that results from an industrial injury can be assessed once an employee’s condition becomes permanent and stationary.” (2005 schedule, p. 1-2; emphasis added.) Under the heading “Impairment Standard,” the 2005 schedule provides that “[a]” single injury can result in multiple impairments of several parts of the body. ... and “[i]t is not always appropriate to combine all impairment standards resulting from a single injury, since two or more impairments may have a duplicative effect on the function of the injured body part.” (*Id.* at p. 1-5; emphasis added.) (*Todd, supra*, 85 Cal.Comp.Cases at p. 586 (emphasis added).)

First, Dr. Cohen did not provide any narrative discussion, i.e., reasoning, regarding impairment or apportionment. Specifically, he failed to address the restriction on rateable impairment for decreased range of motion in addition to impairment for compression neuropathies and also failed to address impairment in relation to the other diagnoses he made. Thus, his opinion is not substantial medical evidence.

Second, the WCJ’s rating instructions did not comply with our en banc decision in *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 (Appeals Board en banc). It is the WCJ’s responsibility to list all impairments in the instructions to the DEU. It is improper for the WCJ to issue rating instructions directing the DEU rater to read a medical report and fish out the physician’s impairment ratings. (*Blackledge, supra*, 75 Cal.Comp.Cases at pp. 627-628.)

Accordingly, we will amend the decision to defer the issue of permanent disability and attorney fees. We will otherwise restate the WCJ's findings regarding the admissibility of evidence and return this matter to the trial level for further proceedings. At that time, the WCJ should conduct further proceedings as he deems necessary to develop the record pursuant to *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc) and then issue a new decision consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 13, 2018 Orders Admitting Evidence, Findings of Fact, & Award is **RESCINDED** and **SUBSTITUTED** with new Findings of Fact as provided below.

FINDINGS OF FACT

1. Defendant's objection to the Formal Disability Rating of July 11, 2018 is overruled.
2. The report of Mark Montgomery, M.D., dated August 28, 2016 is received into evidence as Applicant's Exhibit 04.
3. The report of Mark Montgomery, M.D. dated May 25, 2008 is received into evidence as Applicant's Exhibit 5.
4. The report of Glenn D. Cohen, M.D. dated September 27, 2017 is received into evidence as Defendant's Exhibit E.
5. The transcript of the deposition of Glenn D. Cohen, M.D., dated May 25, 2018 is received into evidence as Defendant's Exhibit F.
6. Formal Disability Instructions and Rating dated July 11, 2016 is received into evidence as WCAB Exhibit Y.
7. Formal Disability Instructions & Rating dated July 11, 2018¹ is received into evidence as WCAB Exhibit X.

* * *

10. The issue of permanent disability is deferred.

11. Attorney fees are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER



/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 15, 2021

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

**OLIVER WINSTON
LAW OFFICE OF WARREN GREENE
STATE COMPENSATION INSURANCE FUND**

PAG/abs

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