

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

RUBEN ORTIZ, *Applicant*

vs.

SOUTH COUNTY PACKING, INC., permissibly self-insured, *Defendants*

**Adjudication Number: ADJ11233035
Salinas 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.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will amend the WCJ's decision as recommended in the report, and otherwise affirm the February 24, 2021 Findings and Award.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 24, 2021 Findings and Award is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

4. The injury caused permanent disability of 12%.

* * *

6. Applicant's attorney has performed reasonable services of \$1,663.88.

* * *

AWARD

AWARD IS MADE in favor of **RUBEN ORTIZ** and against **SOUTH COUNTY PACKING** permissibly self-insured, as follows:

* * *

(B) Permanent disability indemnity in the total amount of \$11,092.50, payable forthwith, less the sum of \$1,663.88 which is awarded as reasonable attorney fees and ordered payable to Sprenkle, Georgariou & Dilles, less credit for advances previously made.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 6, 2021

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

**RUBEN ORTIZ
SPRENKLE GEORGARIOU & DILLES
STANDER REUBENS THOMAS KINSEY**

PAG/oo

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

**REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

I

INTRODUCTION

Applicant, has filed a timely, verified petition for reconsideration which contends that (1) Dr. Feinberg's opinion regarding overlap of permanent disability is not substantial medical evidence and, therefore, applicants permanent disability should be based on Dr. Feinberg's opinion as to permanent impairment for the 2016 date of injury and apportionment pursuant to Labor Code Section 4663, and (2) the correct method for apportionment pursuant to Labor Code Section 4614 is to separately rate permanent disability for each date of injury using the same disability rating scheduled (if possible) and then to subtract the disability from the prior injury from the disability from the subsequent injury. Defendant has filed an Answer to the Petition for Reconsideration.

II

BACKGROUND

Applicant, Ruben Ortiz, sustained an industrial injury to his back while employed as an irrigator, occupational group 491, for South County Packing, Inc., on 11/23/16. The parties originally utilized Barry Tuch, MD, as the panel QME. After the WCJ determined that Dr. Tuch's opinions were not substantial evidence, the WCJ appointed Steven Feinberg, MD, to act as a regular physician. Dr. Feinberg authored three medical reports dated 9/27/20 (Exh. J-1), 11/26/19 (Exh. J-2) and 1/7/20 (Exh. J-3). Dr. Feinberg was deposed on 6/18/20 (Exh. J-4.)

In his report dated 11/26/19, Dr. Feinberg concludes that applicant's impairment from an AMA Guides is Lumbar DRE-II with 8% whole person impairment and an additional 3% WPI for chronic pain syndrome. However, under Alamaraz Guzman, the 11% WPI does not adequately capture the extent of applicants ADL deficits. By analogy Dr. Feinberg concludes that 16% WPI is the most accurate description of applicant's impairment. (Report, 11/26/19, p. 21; Exh. J-2.)

Dr. Feinberg also concludes that 75% should be apportioned to the 11/23/16 injury and 25% to prior injuries and underlying degenerative arthritis. (Report, supra, p. 20; Exh J-2.) In a supplemental report dated 1/7/20, Dr. Feinberg was asked to address the issue of overlap between

the current whole person impairment and the impairment for the 2002 injury. Dr. Feinberg responded as follows:

“The answer is yes there is overlap so legally there may be permissibly subtraction but that doesn’t change my opinion about apportionment to the cause of the disability.” (Report, 1/7/20, p. 4; Exh. J-3.)

Dr. Feinberg also added:

“What I provided was medical apportionment as to what is the cause of his current disability, legally, per LC 4664, the subtraction method may be used.” (Report, supra, p. 4; Exh. J-3.)

Dr. Feinberg was deposed on 6/18/20 and he testified that the *Almaraz Guzman* analysis (with the 16% WPI) was the most accurate assessment of applicant’s impairment because applicant’s ADL deficits were in excess of that which one would expect from the typical patient with a lumbar DRE-II, and that applicant’s level was similar to someone with a DRE-III. (Deposition, 6/18/20, p. 15: 8-21; Exh. J-4.)

During his deposition Dr. Feinberg was asked whether he would have to engage in speculation if he were to assign a whole person impairment under the AMA Guides for the 2002 injury. Dr. Feinberg testified that there is quite a bit of documentation regarding applicant’s objective findings from the 2002 injury and Dr. Feinberg states that: *“... so I think I could go back and do that.”* (Deposition, supra, p. 22: 24-25, p. 23: 1-10; Exh. J-4.)

Although Dr. Feinberg concluded that the information about the effects of the 2002 and 2016 dates of injury is different, nevertheless Dr. Feinberg concludes that he could provide a *“pretty good idea of what his impairment rating was at that time. I wouldn’t give an opinion if I thought it was speculative.”* (Deposition, supra, p. 23: 19-26; p. 24: 1-13; Exh. J-4.)

Dr. Feinberg explains why, in this case, he is able to provide an AMA Guides rating for the 2002 injury:

“... if you’re asking me can I go back and give my best estimate of what was probably a rating at that time, given that he had radicular symptoms in the reporting, and not just Dr. Nervino but others, I feel pretty comfortable doing that, but it’s not perfect, but it’s also not speculating.” (Deposition, supra, p. 25: 17-23; Exh. J-4.)

The parties basically agreed to have Dr. Feinberg review the old records and to prepare a report with his opinion on whether it was possible to assign an AMA Guides rating for the 2002 injury.

Dr. Feinberg issued his supplemental report dated 9/27/20 in which he reviews and summarizes extensive medical records concerning applicant's 2002 injury. Dr. Feinberg concludes that as a result of the 2002 injury, and using the standard approach to the AMA Guides retrospectively, "*Mr. Ortiz has non-verifiable radicular pain and would have been provided a Lumbar DRE-II at 8% WPI. He would have been allocated a 3% WPI for his chronic pain syndrome.*" (Report, Dr. Feinberg, 9/27/20, p. 9; Exh. J-1.)

Dr. Feinberg reiterates his earlier conclusion that, as a result of the 2016 injury, applicant's impairment is most accurately described as a Lumbar DRE-III at 13% WPI with an additional 3% allowance for his chronic pain syndrome. (Report, supra, p. 9, Exh. J-4.)

The WCJ issued DEU instructions to rate a 5% WPI for the effects of the 2016 injury and the DEU rating is 11%. The DEU rating was served on 2/11/21. There was no objection to the DEU rating and thereafter the WCJ issued an award for 11% permanent disability (\$9,932.50). It is from this award that applicant has filed his petition for reconsideration.

III

DISCUSSION

1. Dr. Feinberg's assessment of impairment and apportionment constitutes substantial evidence in support of the award.

Dr. Feinberg reviewed extensive medical records regarding applicant's objective findings as a result of his 2002 injury and he concludes that Mr. Ortiz had non-verifiable radicular pain and he would have been provided a Lumbar DRE-II at 8% WPI for the 2002 injury. In addition he would have been allocated a 3% WPI for his chronic pain syndrome for a total of 11% WPI as a result of the 2002 injury.

Dr. Feinberg did not engage in surmise, speculation in reaching this conclusion. Instead his opinions are based on his review of comprehensive medical records and his assessment of applicant's whole person impairment as a result of the 2002 injury. As he emphasized in his

deposition testimony, Dr. Feinberg concludes that he is able to reach such a conclusion without engaging in speculation. (Deposition, supra, p. 25; Exh. J-4.) Applicant has introduced no evidence to support its argument that Dr. Feinberg's opinion providing an AMA Guides rating for the 2002 injury is based on surmise, speculation or conjecture.

In fact Dr. Feinberg addressed that issue during his deposition. Dr. Feinberg testified that he was able to provide an accurate estimate of applicant's AMA Guides rating based on his review of applicant's medical records from the 2002 injury without engaging in speculation. (Deposition, supra, pp. 23-28; Exh. J-4.) Dr. Feinberg explains the reasons for his conclusions which are based on diagnostic studies and his review of extensive medical records for the 2002 injury. The medical records which document radicular findings after the 2002 injury also support Dr. Feinberg's assessment of the DRE II rating for the 2002 injury. Dr. Feinberg's opinions constitute substantial evidence in support of the award. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal. 3d 312, 90 Cal. Rptr. 355, 35 Cal. Comp. Cases 500.)

2. Calculation of permanent disability utilizing the subtraction method based on Dr. Feinberg's opinions.

Applicant contends that the WCJ erred by using a 5% WPI, and then adjusting it for age and occupation under the current schedule. Instead applicant contends that pursuant to Labor Code Section 4664, the correct method for determining apportionment is to separately rate each injury using the same disability rating schedule (if possible), then subtract the disability resulting from the prior injury from the disability resulting from the subsequent injury. Applicant's contention is well taken.

In this case, Dr. Feinberg indicates that applicant sustained 11% WPI due to the 2/22/02 injury compared to the current overall 16% WPI after the 11/23/16 injury. If the same rating schedule is utilized the two ratings would be as follows:

D/I: 2/22/02

15.03.01.00 – 16 [1.4] 15 – 491H– 19 – 18:0

D/I: 11/23/19

15.03.01.00 – 16 [1.4] 22 – 491H – 27 - 30

Utilizing the subtraction method for apportionment produces the following rating: 30 minus 18 = 12% permanent disability which amounts to \$11,092.50. Applicant's attorney would be entitled to attorney fees of \$1,663.88.

IV

RECOMMENDATION

It is recommended that the petition for reconsideration be granted and that an Amended Findings of Fact issue as follows:

4. The injury caused permanent disability of 12%.

It is recommended that the Award be amended as follows:

(B) Permanent disability indemnity in the total amount of \$11,092.50, payable forthwith, less the sum of \$1,663.88 which is awarded as reasonable attorney fees and ordered payable to Sprenkle, Georgariou & Dilles, less credit for advances previously made.

In all other respects the Findings and Award which issued on 2/24/21 shall remain in effect.

Respectfully submitted,

STUART R. CRYMES
Presiding
Workers' Compensation
Administrative Law Judge