

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

EZECHIEL BANALES, *Applicant*

vs.

**STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION,
legally uninsured, administered by STATE COMPENSATION INSURANCE FUND,
*Defendants***

**Adjudication Numbers: ADJ10941537, ADJ8480583
Salinas District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Joint Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on August 20, 2021, wherein the WCJ found in pertinent part that applicant did not sustain new and further permanent disability in case number ADJ8480583, and that the cumulative injury in case number ADJ10941537 caused 50% permanent disability.

Applicant contends that based on the opinions of chiropractic qualified medical examiner (QME) Michel R. Gagnon, D.C., he sustained new and further permanent disability for his low back in case number ADJ8480583, and that he sustained 65% permanent disability as a result of his cumulative injury in case number ADJ10941537.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&A except that we will amend the F&A to defer the issue of the level of permanent disability caused by applicant's injury in case number ADJ10941537 (Finding of Fact 3). Based thereon, we will amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his lumbar spine and ears in the form of hearing loss/tinnitus during a period ending June 14, 2012 (ADJ8480583). The injury claim was resolved by Stipulations With Request for Award which stated that the injury caused 21% permanent partial disability, after apportionment, for the lumbar spine, and 14% permanent partial disability, after apportionment, for the hearing loss/tinnitus, resulting in a combined disability rating of 32%; the Award was issued on July 28, 2014. Applicant also claimed injury to his cervical spine, lumbar spine, right wrist and hand, and to his ears in the form of hearing loss/tinnitus, during the period ending May 10, 2017 (ADJ10941537). A Petition to Reopen for New and Further Disability in case number ADJ8480583 was filed on May 21, 2017.¹

On March 14, 2013, applicant was evaluated by QME Dr. Gagnon, regarding the injury claim in case number ADJ8480583. Dr. Gagnon examined applicant, took a history and diagnosed lumbar sprain, lumbar radiculopathy, cervical sprain, and shoulder sprain. (Joint Exh. J18, Dr. Gagnon, March 14, 2013, p. 5.) He concluded that applicant had an industrial cumulative injury to his lumbar spine and right leg and that the cervical spine symptoms were due to the prior injury. (Joint Exh. J18, p. 5.) As to the issue of apportionment, Dr. Gagnon stated:

There's a previous 29% disability rating relative to the neck, back, right buttock, right hamstring with award dated 4/10/2006. Work restrictions were based on 50% loss of pre-injury capacity for lifting relying on minimal objective findings (local tenderness and hamstring tightness). There is no specific information to rely on to assess whether the disability is predominantly from the lumbar region or cervical region.
(Joint Exh. J18, p. 6.)

On July 13, 2017, Dr. Gagnon evaluated applicant regarding the injury claim in case number ADJ10941537. Dr. Gagnon examined applicant and took an interim history pertaining to the May 10, 2017 injury claim. (Joint Exh. J12, Dr. Gagnon, July 13, 2017.) He diagnosed lumbar disc involvement with radicular pain on the right, lumbar instability, and chronic low back pain, and found that applicant's condition was not permanent and stationary. Dr. Gagnon then stated:

Based on the current data available, this patient does have an aggravation of his condition. It is therefore my opinion, based on reasonable medical probability

¹ Our review of the record indicates that applicant had previously claimed injury to his neck, back, right buttocks, and right hamstring on August 15, 2003 (ADJ2623855). The parties' Stipulations With Request for Award stated that the injury caused 29% permanent disability. (Joint Exh. J15, Dr. Gagnon, January 15, 2014, p. 2.)

that there is a new cumulative trauma ending on May 10, 2017.
(Joint Exh. J12, pp. 6 – 7.)

Dr. Gagnon was provided additional medical records to review, and on December 8, 2017, he re-evaluated applicant regarding the injury claim in case number ADJ10941537. (Joint Exh. 9, Dr. Gagnon, December 8, 2017.) The doctor noted that the purpose of the re-evaluation was, "...to discuss the involvement of the right wrist and hand and possibly the neck involvement as part of the CT claim." (Joint Exh. 9, p. 6; see also p. 1.) After examining applicant and reviewing the medical record, Dr. Gagnon stated:

The symptoms have been ongoing and he has recently initiated the care with a neurologist and orthopedist. It is therefore my opinion, based on reasonable medical probability, that the long hours working at the computer at his job is the main contributor of this patient's wrist and hand pain/numbness. It is therefore industrially related.
(Joint Exh. 9, p. 6.)

On March 21, 2019, applicant was re-evaluated by Dr. Gagnon in regard to both injury claims at issue herein. Dr. Gagnon examined applicant, reviewed the interim medical records, and the diagnoses included lumbar instability/chronic low back pain, right side carpal tunnel syndrome, and cervical strain. (Joint Exh. 8, Dr. Gagnon, March 21, 2019, p. 5.)

Subsequently, Dr. Gagnon was given updated medical records and based on his review of those records he provided three supplemental reports. (See Joint Exhs. 5, 6, and 7.)

The final report in the trial record from Dr. Gagnon was submitted on August 3, 2020. (Joint Exh. 4, Dr. Gagnon, July 30, 2020.) In his report the doctor concluded that applicant had 25% lumbar spine whole person impairment (WPI), 8% right wrist/carpal tunnel WPI, and 8% cervical spine WPI. (Joint Exh. 4, pp. 1 – 2.) Regarding apportionment Dr. Gagnon stated that 30% of the lumbar spine impairment was caused by "the initial injury" [August 15, 2003, ADJ2623855], 50% of the impairment was the result of the "second injury" [ADJ8480583], and 20% of the impairment was the result of the "most recent subsequent industrial injury" [ADJ10941537]. (Joint Exh. 4, p. 3.) He then stated that for the cervical spine, "Apportionment is 50% from the pre-existing industrial injury of 8/15/2003 and 50% from the CT to 5/10/2017" [ADJ10941537]. Finally, he stated, "Regarding to the right wrist and carpal tunnel syndrome, it is 100% industrial resulting from the cumulative trauma." (Joint Exh. 4, p. 3.)

Otolaryngology QME, Joel C. Ross, M.D., evaluated applicant on November 27, 2017. After examining applicant, taking a history, and reviewing the medical record, Dr. Ross concluded that applicant's tinnitus and hearing loss resulted in 11% WPI, and that it was 100% caused by "industrial exposure." (Joint Exh. 2, Dr. Ross, November 27, 2017, p. 14.) In his supplemental report, Dr. Ross stated:

... I do agree that causation of the hearing loss was due to Mr. Banales' work from his date of hire on or about May 23, 1993 through his last day worked on May 10, 2017. ¶ Using an audiogram which was done on July 8, 2013, compare that to the last audiogram done on July 24, 2017. If I compare monaural percentage impairment, the impairment in the right ear grew by 1.9% and in the left ear grew by 15%. ¶ There was a substantial hearing loss from the 2012/2013 evaluation which got slightly worse in the right ear over the next four years and a little more worse in the left ear by 15%, as to the question of the degree of worsening of his hearing loss over that four year period of time. (Joint Exh. 1, Dr. Ross, July 8, 2020, p. 1.)

The parties proceeded to trial on April 1, 2021. (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 1, 2021). The issues submitted for decision included whether applicant sustained injury to his ears in the form of hearing loss/tinnitus in case number ADJ10941537, and permanent disability/apportionment as to both cases. (MOH/SOE, p. 3.) The WCJ issued a Joint Findings and Award on May 27, 2021, the Joint Findings and Award was rescinded, the Disability Evaluation Unit issued ratings based on the WCJ's Formal Rating Instructions, and the F&A at issue herein was issued on August 20, 2021.

DISCUSSION

It is well established that any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 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]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].)

Applicant argues that based on the opinions of Dr. Gagnon, he sustained new and further permanent disability for his low back in case number ADJ8480583. However, in his Report, the WCJ stated, "In none of his fifteen reports did Dr. Gagnon state that the 2012 injury has caused new and further disability." (Report p. 2.) The WCJ later explained:

The higher PD number of 26.5% for the 2012 claim is derived from a purely mathematical application of Dr. Gagnon's 50% apportionment to the current overall 53% and is not evidence of new and further disability. What is missing is an analysis by Dr. Gagnon of this issue, including his reasoning, and a finding by him that the injury has, in fact, produced new and further disability. (Report, p. 4.)

As noted above, Dr. Gagnon stated that the increase in applicant's symptoms was "a new cumulative trauma ending on May 10, 2017." (Joint Exh. J12, p. 7.)

Regarding the issue of applicant's hearing loss, as noted above, the Stipulations With Request for Award in case number ADJ8480583 stated that applicant had 14% permanent partial disability, after apportionment, for the hearing loss/tinnitus.

Pursuant to Labor Code section 4664(b):

If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof. (Lab. Code, § 4664.)

Based on the section 4664(b) presumption, the permanent disability resulting from a previous industrial injury still existed at the time of the subsequent injury, but the defendant must prove that there is overlap between the prior disability and the current disability. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1107 [71 Cal.Comp.Cases 1229].) Here, the current permanent disability caused by hearing loss/tinnitus clearly overlaps with the prior award of permanent disability caused by hearing loss/tinnitus. In his November 27, 2017 report QME Dr. Ross stated that applicant had 11% impairment due to his hearing loss/tinnitus. (Joint Exh. 2, p. 14.) In the July 8, 2020 report, Dr. Ross agreed that, "[C]ausation of the hearing loss was due to Mr. Banales' work from his date of hire on or about May 23, 1993 through his last day worked on May 10, 2017." (Joint Exh. A1, p. 1.) Since applicant had previously been awarded 14% permanent disability for his hearing loss/tinnitus, the 11% impairment assigned by Dr. Ross does not constitute "new and further" disability.

Therefore, we agree with the WCJ that the trial record does not contain substantial evidence that would support an award of new and further disability in case number ADJ8480583.

As to the issue of apportionment of applicant's disability in case number ADJ10941537, we first note that a physician must explain how and why the disability is causally related to the

industrial injury and how and why the injury is responsible for the percentage of the disability, as assigned. Further, if a physician concludes that a portion of an employee'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 portion of the disability as assigned by the physician. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Again, having reviewed all of Dr. Gagnon's reports, we see that he stated his opinions as to what percentage of applicant's disability was caused by the various injuries, but in none of the reports does he explain the basis for his opinions. Thus, the reports do not comply with the requirements stated in *Escobedo, supra*, and they do not constitute substantial evidence as to the issue of apportionment.

Finally, applicant argues that apportionment should be applied to the separate factors of disability, not to the combined factors of disability per the Combined Values Chart (CVC). As explained above, Dr. Gagnon's reports are not substantial evidence regarding apportionment. However, to address applicant's argument, we note that doctors use the CVC to combine factors of impairment for the same body part and then apportionment is applied when rating that body part's level of disability. Further, apportionment is applied to each body part rating string as appropriate, it is not applied to an overall rating of disability. If permanent disability was apportioned after the CVC was applied, then the apportionment as to one body part's pre-existing disability would be applied to all of the body parts being rated. That would not result in an accurate rating of an injured worker's disability. Again, apportionment is applied to the separate body part's rating string, and then the disabilities are combined using the CVC. Apportionment is not applied after the body parts' disability are combined per the CVC.

As we explained above, the reports from QME Dr. Gagnon do not comply with the requirements stated in *Escobedo, supra*, and they do not constitute substantial evidence as to the issue of apportionment. The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County*

Metropolitan Transit Authority (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Upon return of this matter, we recommend that the parties request a supplemental report from Dr. Gagnon that clarifies and explains his opinions regarding apportionment.

Accordingly, we affirm the F&A except that we amend the F&A to defer the issue of the level of permanent disability caused by applicant's injury in case number ADJ10941537 (Finding of Fact 3). Based thereon, we amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings and Award issued by the WCJ on August 20, 2021, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. The issue of the permanent disability caused by the injury in case number ADJ10941537 is deferred.

* * *

AWARD

* * *

(A) The award of permanent disability indemnity and attorney fees, in case number ADJ10941537, is deferred pending development of the record.

* * *

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 13, 2022

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

**EZECHIEL BANALES
SPRENKLE, GEORGARIOU & DILLES
STATE COMPENSATION INSURANCE FUND**

TLH/pc

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