

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

KRISTINA FIELD, *Applicant*

**L. BRAND, INC./VICTORIA SECRET, Permissibly Self-Insured; SANTA ROSA GOLF
AND COUNTRY CLUB/CLUBCORP USA, INC.; SAFETY NATIONAL CASUALTY
CORPORATION, *Defendants***

**Adjudication Number: ADJ10175606
Santa Rosa District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Defendant L. Brand, Inc./Victoria Secret (Defendant) seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings, Award and Orders of February 4, 2022, wherein it was found that, while employed as a retail manager during a cumulative period ending July 15, 2013, applicant sustained industrial injury to feet, right ankle, low back, right hip and right knee causing permanent total (100%) disability and the need for further medical treatment.

Defendant contends that the WCJ erred in finding permanent total disability and in finding industrial injury to the right knee and right hip. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report). We will deny the defendant's Petition for the reasons stated in the passages of the Report we quote below, and for the additional reasons stated herein. We do not adopt the WCJ's discussion of apportionment (Report at pp. 5-7.) However, as explained below, we do not adopt the apportionment analysis of qualified medical evaluator orthopedist Ronald B. Wolfson, M.D.

We affirm the finding of overall permanent total disability based on the vocational report of Scott Simon, M.S., C.R.C, for the reasons stated by the WCJ in the Report. Although defendant argues in the Petition that "The only relevant WPI opinion is by orthopedic PQME Dr. Ronald Wolfson at 43% WPI" (Petition at p. 6), as the WCJ notes in the Report, the WCJ here found that the AMA Guides rating was rebutted by vocational evidence. Although defendant argues that the WCJ should have accepted the opinions of its vocational expert, James C. Westman, M.R.C., it does not argue that vocational rebuttal was not available to applicant.

Preliminarily, we note that the Appeals Board has 60 days from the filing of a petition for reconsideration to act on that petition. (Lab. Code, § 5909.) Defendant's Petition was timely filed on February 24, 2022. However, the Petition did not come to the attention of the Appeals Board until after the expiration of the statutory time period. Consistent with fundamental principles of due process, therefore, and in keeping with common sensibilities, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a petition for reconsideration begins no earlier than the Appeals Board's actual notice of the petition for reconsideration. (See *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd. (Felts)* (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622].) In this case, the Appeals Board received actual notice of the Petition for Reconsideration on June 17, 2022, making this decision timely.

Turning to the merits, with regard to the issue of apportionment of permanent disability, Dr. Wolfson wrote in his initial report:

Apportionment may be an issue. I would apportion 5% to some minor degenerative changes in her lumbar spine and 95% to the recent injury to the compensable consequence that was written for the claim that was filed in 2017 for her low back that resulted in the chronic pain syndrome.

(June 4, 2019 report at p. 42.)

In a supplemental report of October 16, 2019, Dr. Wolfson wrote:

[A]fter reviewing all of the additional records, I believe that more apportionment should be applied to the multilevel degenerative disease in her back and I would apportion 10% to that based on the MRI of 01/31/2018 and the MRI of 07/15/2018 describing disc protrusion and annular tears and mild foraminal narrowing.

There was also an MRI dated 0 1/13/2018 that I reviewed that confirmed the degenerative changes.

So, with respect to apportionment, I believe that there should be more apportionment for the back that I provided and would apply 15% to the degenerative changes of the spine based on the MRIs and 85% to the injury and that applies to the back only.

(October 16, 2019 report at pp. 2-3.)

While it is now well established that one may properly apportion to pathology and asymptomatic prior conditions (see, e.g. *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617 [Appeals Bd. en banc]), an apportionment opinion must still constitute substantial medical evidence. As we explained in *Escobedo*:

[A] medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citations.]

Moreover, in the context of apportionment determinations, the 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 that the Board can determine whether the physician is properly apportioning under correct legal principles. [Citations.]

For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.

(*Escobedo*, 70 Cal.Comp.Cases at p. 621.)

Here, Dr. Wolfson did explain in detail the exact nature of the apportionable disability. While Dr. Wolfson explained that MRIs revealed pre-existing back pathology, he did not explain how that pathology contributed to applicant's permanent impairment. Although Dr. Wolfson did explain at his deposition that "the findings that were exhibited on the MRIs that basically showed foraminal narrowing, annular tears, disc protrusion, that *conceivably* accounted for some of the pain she had." (June 17, 2021 deposition at p. 28 [emphasis added].) However, in order to constitute substantial medical evidence on which a finding of apportionment can be based, "a medical opinion must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687].) Since Dr. Wolfson's apportionment determination did not constitute substantial medical evidence, applicant is entitled to an unapportioned award.

With regard to defendant's apparent argument that apportionment was indicated to applicant's concurrent liability at Santa Rosa Golf and Country Club, no medical evidence was presented that this constituted a separate work injury. It appears that applicant's concurrent employment contributed to a single injury and thus Labor Code section 4663 which concerns apportionment only to factors other than the "direct result of injury arising out of and occurring in the course of employment." (Lab. Code, § 4663, subd. (c).) Any division of liability regarding applicant's concurrent employment is governed by Labor Code section 5500.5, but is not a basis for Labor Code section 4663 apportionment. (*Bresson v. Vons Grocery Company* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 141 [Appeals Bd. panel].)

With regard to the finding of industrial injury to the right knee and right hip, Dr. Wolfson opined that applicant suffered "severe pain" in the right hip and right knee as a result of altered gait from her accepted right foot and ankle injury. (October 16, 2019 report at p. 2.) In his June 4, 2019 report, Dr. Wolfson wrote that applicant is in "[c]onstant severe pain requiring long-term opiates." Thus applicant sustained injury to her right knee and right hip in that she requires medical treatment to those body parts as a result of her industrial condition. (Lab. Code, § 3208.1, subd. (b).)

We will otherwise deny reconsideration for the following reasons stated in the WCJ's Report:

**I
INTRODUCTION**

1. Applicant's occupation: Retail Manager.
2. Age at time of injury: 40
3. Body parts injured: Bilateral feet, right ankle, right knee, right hip, lumbar spine.
4. Manner of injury: cumulative trauma.
5. Identity of Petitioner: defendant. The Petition for Reconsideration was timely and properly verified.

Note: The Findings Award and Order was issued on February 4, 2022. The defendant timely filed a Petition for Reconsideration on February 24, 2022.

Thereafter, a task was created in EAMS and assigned to the undersigned, and was closed immediately. I have no recollection of either seeing or closing the

task. No task was generated by the applicant's answer to the Petition filed on March 8, 2022. The file was not transferred to the Recon Unit.

The undersigned first became aware of the Petition for Reconsideration when applicant's attorney contacted the Santa Rosa board inquiring what the status of the case was. At that point, I requested that the Petition for Reconsideration be treated as if it had been filed on that date - May 31, 2022. As I understand it, that is the first date that the Recon Unit was made aware of the filing. In the meantime, applicant's attorney had already filed a Declaration of Readiness to proceed regarding the status of the case and a hearing was held on June 9, 2022 at which the forgoing was explained to the parties. Both parties and the undersigned were in agreement that the Petition for Reconsideration should be treated as filed timely on May 31, 2022. The parties agreed to defer resolution of the UR and penalty issues until after resolution of the permanent disability issues.

II FACTS

Applicant was employed as a retail manager by Victoria's Secret, and over the course of her employment developed pain in her right foot and ankle. (Joint Exhibit J7, 11/29/2017 report of PQME Dr. Guzman DPM at pg. 2). She was initially treated by podiatrist Thomas Chang, DPM, and had her first surgery (of five total) on 8/19/2013 performed by Dr. Karaoglan. (Id.) Thereafter, she had several more surgeries, including a fusion with hardware, and a fusion revision surgery, with removal of hardware and the addition of new hardware. (See generally, Joint Exhibit J12, deposition of Dr. Guzman at Pg. 10).

As a result of her altered gait, she developed pain in her hnnbar spine. (See Joint Exhibit J3, 10/16/2019 report of Dr. Wolfson at pg. 2). She also has pain consistent with CRPS. (Minutes of Hearing and Summary of Evidence ("MOH") at pg. 8:18-19, Joint Exhibit J4, 6/4/2019 report of Dr. Wolfson at pg. 39) She uses a cane, a walker, and crutches to ambulate. (MOH. at pg. 8). She uses a wheelchair while eating and often when outside the house. (Id. at pg. 9) She has assistance for most activities of daily living. (Id.)

She attempted to study Excel and Word at the Santa Rosa Junior College but was only able to obtain a grade of "D." (Id. at pg. 9:10). She attempted to return to the workforce and worked, with significant accommodations, at Sonoma County Bathworks. She was not able to work a six-hour shift or keep with the work load and was let go. (Id. at pg. 10: 12 - 17). She worked at Shiloh Nails and Spa part time but even 16 hours a week in a largely sedentary job proved too much. (Id. at pg. 10:18 - 21). Later she attempted to work at a children's clothing store in Colorado, but even a largely sedentary job scheduled for 12 hours a week was not workable. (Id. at pg. 10:22 - 11 :3).

III DISCUSSION

The undersigned found the following in regards defendant's arguments raised in its Petition:

1. The impairment rating of orthopedic OME Dr. Wolfson is not dispositive.

Defendant argues that the court should have found the reporting of PQME Dr. Wolfson the most compelling and found for applicant based on that reporting. As discussed below, the court found the reporting of Vocational Rehabilitation expert Scott Simon more persuasive regarding the applicant's overall disability. Notwithstanding, the court agrees in general with the defendant's interpretation of the medical-legal reporting. The court agrees that the reporting of Dr. Guzman, finding disability to the bilateral feet based on gait derangement by analogy, would be subsumed in the reporting of Dr. Wolfson, finding impairment for the lumbar spine, also based on gait derangement by analogy. The court also agrees that Dr. Wolfson's reporting indicates that the applicant has apportionment to non-industrial factors for the back in the amount of 15%.

The court finds, however, that although Dr. Wolfson is not a vocational expert, he does offer his non-expert opinion of the applicant's ability to reenter the workforce. On several occasions Dr. Wolfson states that in his non-expert opinion the applicant is essentially totally permanently disabled. In his June 4, 2019 report he states "Basically, Ms. Field is not able to do anything." (Joint Exhibit J4, 6/4/2019 report of Dr. Wolfson at pg. 7). In his deposition he states:

Q: (By Mr. Bloom)

As I understand what you just said is that what you wrote at the time of your June 2019 report at page 42 is still your opinion. And let me read to you what I'm specifically asking about:

"She will probably not work and considering the magnitude of what has happened to her, she should be considered 100 percent disabled."

Now, is that still your opinion, or did you change that opinion?

A. Well, I don't think she's going to be able to work in the near future. Maybe if she received the proper treatment and was able to get off some of the dangerous drugs, she might be able to do something. But basically, I feel that she is disabled; she needs to be on Social Security disability. I believe she can't work, but I think the impairment rating should be around 40 percent:

Joint Exhibit J1 1, deposition of Dr. Wolfson dated 6/17/2021 at pg. 29 – 30.

The court did not accept Dr. Wolfson's opinion as to this matter, but does find his opinion of some value, and certainly consistent with the opinion of Mr. Simon in this case.

[Discussion of Apportionment Omitted]

3. The opinion of VRE Scott Simon is more comprehensive and thorough than that of VRE James Westman.

With respect to the competing VR experts' opinions, the undersigned found the reporting of Scott Simon more persuasive. There were three reasons for this. First, Mr. Westman does not appear to have undertaken any vocational testing in his assessment, whereas Mr. Simon did undertake vocational testing. Second, the reporting of Mr. Simon was more consistent with the applicant's credible and un rebutted testimony.

Finally, and most importantly, Scott Simon's opinions are consistent with the fact that the applicant did, in the undersigned assessment, make earnest and sincere attempts to return to the labor force which were ultimately unsuccessful. It is to the applicant's credit that she sought retraining on her own through enrollment at the Santa Rosa Junior College, although this proved to be beyond her capacity. (MOH at pg. 10:8 - 12) She attempted to return to work in 2016, 2017 and 2018 with employers who did a great deal to accommodate her, and yet in each case she was unable to continue working. She had accepted her fate by the time the case came before the undersigned, and this judge felt that she had been unable to rehabilitate despite quite admirable attempts to do so. The undersigned is convinced, based on the vocational evidence interpreted in conjunction with the applicant's credible testimony, that the applicant is not amenable to rehabilitation. Award was made on that basis.

4. Injury was found to the right hip and right knee based on the totality of the medical and the un rebutted testimony of the applicant.

It should be noted the court's holding that the applicant suffered injury to her right knee and right hip has [no] bearing on the applicant's disability. The court ... based its finding on the totality of the medical record. The evidence indicates that the applicant suffered injury to these body parts. Her injuries caused her to have a bilateral, or "waddle", limp. In his June 4, 2019 report, Dr. Wolfson notes that she was complaining of pain in her right hip in January 2018 that was so severe that a spinal cord simulator was requested. (Joint Exhibit J4, 6/4/2019 report of Dr. Wolfson) The applicant testified that she has pain in her low back, right hip and both knees due to using assistive devices. (MOH at pg. 8:21 - 23). The court found this evidence sufficient to find injury to the right knee and right hip.

**IV
RECOMMENDATION**

The court recommends that the defendant's Petition for Reconsideration be denied.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings, Award and Orders of February 4, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER

CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 16, 2022

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

**KRISTINA FIELD
JOHN A. BLOOM
CHOU LAW GROUP
STANDER REUBENS**

DW/oo

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