

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

RUSSELL BLAIR, *Applicant*

vs.

**TRUGREEN LANDSCAPE / TERMINIX / SERVICEMASTER BRANDS, and ZURICH
NORTH AMERICA, *Defendants***

Adjudication Number: ADJ3108970

Santa Ana 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 December 1, 2022, wherein the WCJ found in pertinent part that applicant sustained an injury arising out of and in the course of employment (AOE/COE) to his lumbar spine, right hip, and psyche; that 66% of applicant's psychiatric permanent disability was a result of his industrial injury, and that applicant did not sustain injury AOE/COE to his left hip, bilateral knees, dental system, internal system, or in the form of sleep disorder.

Applicant contends that failing to develop the record regarding his dental injury claim is a denial of due process; and that applicant was last evaluated by defendant's psychiatry qualified medical examiner (QME) Myron L. Nathan, M.D., in 2010, so Dr. Nathan's reports are "stale" and cannot be the basis for making a finding regarding his psychiatric injury and the disability caused thereby. (Petition, pp. 3 – 4.)

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be granted for the limited purpose of amending the F&A to defer the issue of the industrial causation of applicant's dental injury claim and to remand the matter to the trial court for the development of the record on the issue of causation of applicant's dental condition. We did not receive an Answer from defendant.

We have considered the allegations in the Petition and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in section III of the Report regarding further development of the record, and for the reasons discussed below, we will grant reconsideration and affirm the F&A except that we will amend the F&A to defer the issues of whether applicant sustained injury to his dental system (Finding of Fact 2); the percentage of applicant's permanent psychological disability caused by his injury (Finding of Fact 3); the issue of the level of permanent disability caused by applicant's industrial injury (Finding of Fact 7) and the amount of the fee owed to applicant's attorney (Finding of Fact 9). Based thereon, the Award will be amended, and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

The portion of the trial record that is relevant to the issues raised in the Petition is summarized as follows:

Applicant claimed injury to his lumbar spine, right hip, left hip, bilateral knees, and psyche, to his dental system, internal system, and in the form of sleep disorder, while employed by defendant as a landscaper, during the period from September 8, 2003, through September 8, 2004.

The matter was tried on May 1, 2006, and the issue submitted for decision was injury AOE/COE. On July 14, 2006, a WCJ issued a Findings & Award, finding industrial injury to applicant's low back and right hip and finding that the left hip injury/condition was non-industrial. (See Minutes of Hearing and Summary of Evidence (MOH/SOE), September 15, 2022, p. 2, stipulation #7.)

On December 15, 2008, applicant was evaluated by defendant's psychiatry QME Dr. Nathan. (Def. Exh. A, Dr. Nathan, December 15, 2008.) Dr. Nathan re-evaluated applicant on December 9, 2009. (Def. Exh. B, Dr. Nathan, December 9, 2009.)¹

On December 27, 2010, Dr. Nathan re-evaluated applicant. The doctor took an interim history, reviewed the medical record, and performed psychological tests. The diagnoses included a history of alcohol abuse/alcohol dependence, nonindustrial, in remission; history of alcohol-induced mood disorder due to nonindustrial causation, resolved; and depressive disorder not

¹ We note that defendant's exhibit A consists of five pages of the December 15, 2008 report from Dr. Nathan and then includes pages 17 through 42 (plus attachments) of the November 22, 2010 report from defendant's orthopedic QME Richard I. Woods, M.D; defendant's exhibit B contains two pages of the December 9, 2009 report from Dr. Nathan and pages 6 through 32 (plus the addendum) of his December 15, 2008 report.

otherwise specified, mild. (Def. Exh. C, Dr. Nathan, December 27, 2010, p. 17.) Dr. Nathan later explained:

You will note at the time of this examination, the applicant was administered several psychological tests. The applicant's MMPI-2 and MCMI-III were not valid. These are the only two tests with checks or balances, and the applicant exaggerated his symptoms. As a result, all of the totally subjective tests without checks or balances would have to be looked upon with a great deal of skepticism. Furthermore, from a clinical standpoint, the applicant did not appear to be anxious or depressed, and his mood and affect appeared to be euthymic [the state of living without mood disturbances]. While the applicant claims to be depressed and watches television in bed, he does not appear to be socially withdrawn. ¶ Therefore, I continue to be of the impression the applicant's GAF score falls between 61 and 70 in which there is some mild symptoms but generally functioning pretty well and there is some meaningful interpersonal relationships. I would conclude the applicant's GAF is 61 reflecting a Whole Person Impairment of 14. In regard to the issue of causation and apportionment 66-2/3% of the applicant's permanent disability has been caused secondary to industrial causation due to his orthopedic symptomatology, and 33-1/3% of his permanent disability is due to his psychopathology due to his personality functioning, his prior history of Alcohol Abuse and Dependence. (Def. Exh. C, pp. 23 – 24.)

Dr. Nathan was asked to review a report from applicant's psychiatry QME, Ara L. Nogales, Ph.D., and in his supplemental report he stated:

Based upon my review of Dr. Nogales' report, I see no reason to alter or change my prior impressions. I would suggest that the applicant return to California in order that he can be reexamined. (Def. Exh. D, Dr. Nathan, July 17, 2014, p. 4.)

Applicant was evaluated by internal medicine QME Jens W. Dimmick, M.D., on January 28, 2016. Dr. Dimmick noted that applicant had “a very dry mouth” of “unclear etiology.” (App. Exh. 2, Dr. Dimmick, February 23, 2016, p. 23.)

The parties proceeded to trial on September 15, 2022. The WCJ's summary of applicant's testimony included:

Applicant submitted a bill for dental work, because the medication he has been taking has affected his teeth. He has a lot of broken teeth and teeth that have fallen out. This causes him problems, because he now has to plan out his meals due to his inability to chew some foods. (MOH/SOE, p. 8.)

The issues submitted for decision included applicant's psychiatric and dental system injury claims. (MOH/SOE, p. 3.)

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].) In order to constitute substantial evidence as to the issue of apportionment, the medical opinion must disclose the reporting physician's familiarity with the concepts of apportionment and must delineate the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors. (*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).) Also, the physician must explain the nature of the other factors, how and why those factors are causing permanent disability at the time of the evaluation, and how and why those factors are responsible for the percentage of disability assigned by the physician. (*Escobedo v. Marshalls, supra*, at 621) Further, it is important to note that "the percentage to which an applicant's injury is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's permanent disability is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions might be different." (*Ibid.* at 611.)

Here, in his December 27, 2010, report, as quoted above, Dr. Nathan concluded that 66-2/3% of applicant's psychiatric permanent disability was a result of his industrial orthopedic injury and 33-1/3% of his psychiatric disability was a result of his psychopathology "due to his personality functioning, his prior history of Alcohol Abuse and Dependence." (Def. Exh. C, p. 24.) Dr. Nathan did not explain how and why applicant's employment with defendant and his pre-existing alcohol abuse were causing his permanent disability at the time of the evaluation, nor did he explain how and why those factors were responsible for the percentage of disability he assigned. Thus, his reports are not substantial evidence regarding the issue of permanent disability/apportionment and cannot be the basis for determining applicant's psychiatric disability caused by his industrial injury.

As to the issue of applicant's dental injury claim, it has long been recognized that evidence from a lay witness on an issue requiring expert opinion is not substantial evidence, and medical proof is required when issues of diagnosis, prognosis, and treatment are beyond the bounds of ordinary knowledge. (*City & County of San Francisco v. Industrial Acc. Com. (Murdock)* (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103]; *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].) Therefore, applicant's testimony that the medication he has been taking has affected his teeth, is not substantial evidence. As the WCJ stated in his Report, "Dr. Dimmick does not provide an affirmative opinion about the diagnosis's causation but suggests that further evaluations would be appropriate." (Report p. 4.) We agree with the WCJ that "the evidence points toward a possible industrial injury but that no medical reporting provides a direct correlation between the Applicant's dental claim and his use of opiates." (Report, p. 4.) 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].)

Under the circumstances of this matter, it is appropriate that the matter be returned to the WCJ for further development of the record and for further proceedings.

Accordingly, we grant reconsideration and affirm the F&A except that we amend the F&A to defer the issues of whether applicant sustained injury to his dental system; the percentage of applicant's permanent psychological disability caused by his injury; the issue of the level of permanent disability caused by applicant's industrial injury and the amount of the fee owed to applicant's attorney. Based thereon, the Award is amended, and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award issued by the WCJ on December 1, 2022, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 1, 2022, Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. Applicant did not sustain an injury arising out of and in the course of employment to his left hip, bilateral knees, internal system, nor in the form of a sleep disorder; the issue of whether applicant sustained injury to his dental system is deferred.

3. The percentage of applicant's permanent psychological disability caused by his injury is deferred.

* * *

7. The issue of the level of permanent disability caused by applicant's industrial injury is deferred.

* * *

9. The applicant's attorney is entitled to a fee of 15% of the awarded permanent disability; the amount of the attorney fee is deferred.

AWARD

* * *

a. The Award of permanent disability indemnity is deferred pending development of the record.

* * *

c. The Award of attorney fees 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/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 14, 2023

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

**RUSSELL BLAIR
LAW OFFICES OF JESSE MARINO, APC
FLOYD, SKEREN, MANUKIAN & LANGEVIN**

TLH/mc

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

**DEVELOPMENT OF THE MEDICAL RECORD CONCERNING
THE CAUSATION OF THE APPLICANT'S DENTAL COMPLAINTS.**

The Applicant asserts that the undersigned Judge erred in not ordering the development of the record to determine if the Applicant's dental complaints are industrial. Although an employee bears the burden of proving that their injury was sustained in the course of his employment, the established legislative policy is that the Workmen's Compensation Act must be liberally construed in the employee's favor (Lab. Code, § 3202), and all reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of the employee. The Applicant testified that the medication he had been taking had affected his teeth and that he has a lot of broken teeth and teeth that have fallen out.⁷

The Applicant was evaluated by Dr. Jens Dimmick²³. Dr. Dimmick diagnosed the Applicant with constipation secondary to chronic use of opiates, tremulousness, tachycardia secondary to medications, dry mouth, and nasal stuffiness.⁸ Dr. Dimmick does not provide an affirmative opinion about the diagnosis's causation but suggests that further evaluations would be appropriate.

In some cases, the issues, while of a medical nature, are sufficiently within the grasp of lay experience and understanding to permit a finding without expert medical evidence.

However, the medical cause of an ailment is usually a scientific question, requiring a judgment based on scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters.

⁷ MOH/SOE, September 15, 2022; Page 8 lines 19 to 20

⁸ APPLICANT'S EXHIBIT 2: Medical report of Dr. Jens Dimmick, dated 2/23/2016 (exam date 1/28/2016),

Upon further review, the Undersigned Judge finds that the evidence points toward a possible industrial injury but that no medical reporting provides a direct correlation between the Applicant's dental claim and his use of opiates.

With the evidence pointing towards a possible industrial injury, the Undersigned Judge finds that in keeping with opinions and procedures in Tyler⁹ and McDuffie,¹⁰ the Applicant's Petition For Reconsideration should be granted in part and that the matter be remanded back to the trial court for further development of the record on the issue of industrial causation of Applicant's dental claim.

⁹ Tyler v. Workers' Comp. Appeals Bd., 56 Cal. App. 4th 389

¹⁰ McDuffie v. Los Angeles County Metro. Transit Auth., 67 Cal. Comp. Cases 138.