WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SALLY LOSURDO, *Applicant*

vs.

UNITED PARCEL SERVICE;
LIBERTY MUTUAL INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ9422746 (MF), ADJ9422740, ADJ9422741, ADJ9422742
Marina del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration[1] in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Joint Findings of Fact & Order (Joint F&O) issued by the workers' compensation administrative law judge (WCJ) on February 11, 2020. By the Joint F&O, the WCJ found in relevant part that applicant sustained injury arising out of and in the course of employment (AOE/COE) in the form of fibromyalgia. She further found that the medical report of Dr. David Yu is admissible as an exhibit and is substantial evidence on the issue of causation for the fibromyalgia. Further development of the record was ordered with a regular physician per Labor Code[2] section 5701. (Lab. Code, § 5701.)

Defendant contends that Dr. Yu's report is inadmissible because it was not obtained pursuant to the Labor Code and he is not a secondary treating physician or consulting physician. Defendant also contends that Dr. Yu's report was not issued in compliance with the Labor Code and California Code of Regulations, and is not substantial evidence on the issue of causation for applicant's claimed fibromyalgia. Lastly, defendant contends that the WCJ erred in finding the reporting of the qualified medical evaluator (QME) to be not substantial evidence.

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[1] Following the grant of reconsideration, Commissioner Dodd became unavailable to participate. Another commissioner was assigned in her place.

[2] All further statutory references are to the Labor Code unless otherwise stated.

We received an answer from applicant. The WCJ was unavailable to issue a report regarding defendant's Petition and therefore, the presiding WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration. (Cal. Code Regs., tit. 8, § 10962(c) (eff. Jan. 1, 2020).)

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report and opinion, which are both adopted and incorporated herein, as our decision after reconsideration, we will rescind the F&Os and substitute new F&Os for the purposes of clarity. We make no substantive changes to the F&Os.

FACTUAL BACKGROUND

Applicant claims four workers' compensation injuries while employed as a center clerk by the United Parcel Service (UPS): 1) to the right knee on October 17, 2000 (ADJ9422746); 2) to the left knee and in the form of fibromyalgia on November 7, 2012 (ADJ9422740); 3) to the cervical spine and lumbar spine on October 5, 2005 (ADJ9422742); and 4) to the cervical spine, lumbar spine, right knee, sacroiliac joint fracture and in the form of fibromyalgia through December 24, 2012 (ADJ9422741). As relevant herein, defendant has accepted compensability for the left knee in ADJ9422740 and the cervical spine, lumbar spine, right knee and sacroiliac joint fracture in ADJ9422741, but disputes compensability for the fibromyalgia with respect to both claims. (Minutes of Hearing and Order of Consolidation, February 13, 2018, pp. 3-5.)

In a report dated February 5, 2013, Wonil Lee, M.D. diagnosed applicant with fibromyalgia. His report does not discuss whether this condition is industrially related. (Applicant's Exhibit No. 2, Medical report of Wonil Lee, M.D., February 5, 2013.)

Steven Weiner, M.D. began providing treatment to applicant in March 2013 for applicant's fibromyalgia. (Applicant's Exhibit No. 4, Medical report of Steven Weiner, M.D., March 28, 2013.) He noted Dr. Lee's diagnosis of fibromyalgia and included it amongst his listed diagnoses, but he did not discuss industrial causation for this condition in his reports that are in evidence.

Michael Klassen, M.D. evaluated applicant as the orthopedic QME. He deferred to a rheumatologist to comment on applicant's fibromyalgia. (Joint Exhibit Z, Deposition transcript of the cross-examination of Michael Klassen, M.D., May 10, 2016, p. 48:17-25.) A Finding and Order Re Additional QME Panel for a panel in rheumatology was issued by a WCJ on November 7, 2016.

Mihaela Taylor, M.D. of UCLA saw applicant in 2017 at the referral of "Dr. Ahmadi for evaluation and treatment of fibromyalgia and chronic aches." (Applicant's Exhibit No. 5, Medical report of Mihaela Taylor, M.D., June 13, 2017, p. 1.) She found applicant's symptoms to be "highly suggestive of central pain syndrome such as fibromyalgia and chronic headaches," although she deferred a final diagnosis until evaluation by Dr. David Yu regarding the fibromyalgia. (*Id.*) Dr. Taylor's report does not discuss whether this condition would be industrially related.

Rodney Bluestone, M.D. initially evaluated applicant as the panel QME in rheumatology in 2017. In his February 7, 2017 report, Dr. Bluestone commented as follows in relevant part:

> In this patient's situation, the myofascial pain all derives from cervical spine disease. The mention of fibromyalgia in the November, 2014, U.C.L.A. follow-up notes is unconfirmed by virtue of my current evaluation. This patient does not have a state of "Chronic, Widespread Pain" (i.e., centrally mediated). This patient has a series of organic pain sites, well defined by your past orthopaedic surgeons and by my evaluation currently. There are inflammatory and/or degenerative pain sites well defined by your past examiners and in this office.
> …
> I see no evidence that this patient has any form of fibromyalgia. Fibromyalgia means the patient has generalized pains with no underlying organic causation, usually with generalized musculoskeletal tenderness. This patient has some widespread pains, but all due to well-defined pathologies (cervical spine plus myofascial pain with or without myelopathy; sacroiliitis; osteoarthritis of the knees and hands; and posterior tibialis tenosynovitis causing pain at the ankles). This patient certainly has no evidence of generalized tenderness. Of note, I obtained no history of Raynaud's phenomenon.
> …
> Once a diagnosis of fibromyalgia is made (in this case, I do *not* support this diagnosis), that diagnosis tends to be repeated by other examiners without careful scrutiny of the diagnostic criteria for that condition-hence, the appearance in the U.C.L.A. notes of a past and ongoing history of fibromyalgia.
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> (Joint Exhibit T, Panel QME Report of Rodney Bluestone, M.B., February 7, 2017, pp. 6 and 8.)

In his July 5, 2017 report, Dr. Yu noted that applicant was referred "for fibromyalgia and possible spondylitis." (Applicant's Exhibit No. 1, Medical report of David Yu, M.D., July 5, 2017,

p. 1.) His report does not contain a summary of records reviewed so it is unclear if he was provided with Dr. Bluestone's reporting to date at the time of his evaluation. Dr. Yu opined that:

> She has fibromyalgia with widespread pain, fatigue, foggy brain, waking up un-refreshed, and headache. The fibromyalgia is severe in intensity and disabling.[…]The central pain is developed partly from over long periods of stress at work, during which patient had several disputes requiring interference by the teamsters, and was submitted to what she describes as very harsh working environment.
>
> (*Id.* at pp. 2-3.)

Dr. Yu recommended exercises for applicant and noted that she would be "followed and managed by Dr. Mihaela Taylor, who is an expert in fibromyalgia." (*Id.* at p. 3.)

Additional records were provided to Dr. Bluestone, including Dr. Yu's July 5, 2017 report. Dr. Bluestone issued a supplemental report dated August 16, 2017 and stated:

> The patient did not present to my office with a state of "Chronic, Widespread Pain." Please carefully look at my description of her pain diagram that she completed for me on January 10, 2017. Please note that she had some regional areas of pain but never had any state of "Chronic, Widespread Pain" as is necessary to recognize a state of fibromyalgia. Dr. Yu felt, however, that the patient's repeated states of fibromyalgia were due to continuous work stress—in other words, he was assuming the patient had incurred *an industrial psychiatric injury.* There is no evidence that that is the case based on her current record review. To diagnose occupational stress causing emotional or physical symptoms, one requires an undisputed diagnosis of an industrial psychiatric injury. In the presence of any such injury, of course, one might expect a diagnosis to occur of depression. Many patients with depression may develop psychophysiologic symptoms, including the psychophysiologically derived state of "Chronic, Widespread Pain," which may mimic fibromyalgia to the undiscerning examiner. In my office, this patient did not screen out for the presence of any significant depression or anxiety.
>
> Based on this latest review, there are no changes to be made in my prior reports on this patient nor in my concerns addressed in my supplemental report.
>
> (Joint Exhibit S, Panel QME report of Robert Bluestone, M.B., August 16, 2017, p. 3.)

Dr. Bluestone was cross-examined on November 14, 2017. (Joint Exhibit V, Deposition transcript of the cross-examination of Rodney Bluestone, M.D., November 14, 2017.) Dr. Bluestone acknowledged that he is familiar with and respects Drs. Taylor and Lu, but reiterated his opinion that applicant does not have fibromyalgia. (*Id.* at pp. 31-34.)

The matter proceeded to trial on February 13, 2018, at which time applicant's four claims were consolidated. (Minutes of Hearing and Order of Consolidation, February 13, 2018, p. 2.) Parts of the body injured in the form of fibromyalgia was among the issues in dispute for ADJ9422740 and ADJ9422741. (*Id.* at pp. 3 and 5.) Defendant also objected to "self-procured medical reports as sole basis for an award pursuant to Labor Code section 4605." (*Id.* at p. 5.) Applicant filed a trial brief dated February 12, 2018, wherein she argued that the medical reporting from both QMEs was not substantial evidence and requested that the WCJ order development of the record with two regular physicians per Labor Code section 5701. Defendant objected to applicant's request in its February 21, 2018 response. The matter was not submitted, but was continued until April 4, 2018. (*Id.* at p. 1.)

The Minutes of Hearing from April 4, 2018 reflect the following comments:

> After review of the existing medical evidence submitted on the record of the aforementioned matters, the Court determines that the opinions from Rodney Bluestone, M.D. and David Yu, M.D. cannot be considered substantial medical evidence upon which the disputed issues raised at Trial can be made. Specifically, Dr. Bluestone's opinions regarding causation are ambiguous. On the other hand, Dr. Yu did not review any and all medical records herein and did not address Dr. Bluestone's opinions regarding causation.
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> (Minutes of Hearing, April 4, 2018, p. 2.)

The following order was also issued:

> GOOD CAUSE APPEARING and after discussion with the parties and with no objection from the parties, the parties are to return to their respective physicians, namely Dr. Bluestone and Dr. Yu, to procure one supplemental opinion from each physician to cure the above defects and serve the Court and parties with said opinions. In the event that further discovery is necessary beyond the scope of this Order, either party may petition the Court for leave to conduct further discovery. Besides the above limited further development of the record, discovery shall remain close from the time of the MSC.

> If the parties are unable to resolve the matters once supplement opinions have been received, either party may file a DOR in order to the place the cases back on calendar for determination of the disputed issues, including whether the matters will be resubmitted for decision, or whether further development of the record is required, including but not limited to a regular physician per LC 5701.
>
> (*Id.*)

The matter was taken off calendar.

Dr. Bluestone issued a supplemental report dated July 3, 2018, which was apparently in response to letters from both parties. In the report, he reiterated his conclusion that applicant does not have fibromyalgia and made no changes to his prior reports or deposition testimony. (Defendant's Exhibit G, Supplemental Report from Dr. Rodney Bluestone, July 3, 2018.)

The trial proceeded on January 21, 2020. Additional exhibits were offered into evidence. Applicant offered an undated report from Dr. Yu as exhibit number 7 and defendant offered Dr. Bluestone's July 3, 2018 supplemental report. (Minutes of Hearing (Further) and Summary of Evidence, January 21, 2020, p. 2.) Dr. Yu's report was marked for identification only. It was noted in the Minutes of Hearing that Dr. Bluestone has retired. (*Id.*) Applicant testified at trial and stated in relevant part that she used her private medical insurance to see Dr. Yu. (*Id.* at p. 4.) The matter was submitted. (*Id.* at p. 1.)

The WCJ issued the resulting Joint F&O as discussed above. The Opinion on Decision states in relevant part:

> At the time of Trial on January 21, 2020, defendants object to the admissibility of Exhibit 7 raising Labor Code §§4628, 4061(i), 8 CCR §§10606, 35.5(b), as well as Batten v. WCAB, (2015) 241 Cal.App.4th 1009. In particular, defendants argued that David Yu, M.D. is an independent doctor, not secondary treating physician in workers' compensation. It is improper to rebut a Panel QME report with a consultative report pursuant to Batten. Applicant argued that Dr. Yu is a treating physician and that all treating reports are admissible. Applicant further argued that the code sections raised by defendants are not applicable as this is a treatment report. Also, under Valdez v. WCAB, (2013), 57 Cal.4th 1231, the report is admissible.
>
> The crux of the dispute is whether Exhibit 7 is a medical-legal report or treatment report. Without actually reviewing this report given defendants' objection, this WCJ has to consider how applicant was referred to Dr. Yu. In the report from Dr. Taylor, dated June 13, 2017

(Exhibit 5), as applicant's treating physician, she referred applicant to Dr. Yu for evaluation regarding diagnosis of fibromyalgia v. possible ankylosing spondylitis suggested by the Panel QME in rheumatology herein, Rodney Bluestone, M.D., in order to provide applicant with proper treatment. In Dr. Yu's July 5, 2017 report (Exhibit 1), Dr. Yu confirmed diagnosis of fibromyalgia and found no evidence of spondyloarthritis. He recommended applicant to perform several exercises and referred her back to Dr. Taylor for further treatment. Hence, it is found that Dr. Yu is a secondary treating physician, his reports are treatment reports admissible under Labor Code §4060(b), and that applicant was not referred to Dr. Yu for the sole purpose of rebutting Dr. Bluestone's opinions. Based on the foregoing, it is found that Exhibit 7 is admitted into evidence.

The failure to comply with the format of a treating physician's report does not deem a report inadmissible as these are curable defects.
…
Applicant relies on the medical opinions of Dr. Yu, Wonil Lee, M.D., Steven Weiner, M.D., and Dr. Taylor (Exhibits 1, 2, 3, 4, 5 and 7) to sustain the burden of proving fibromyalgia. Defendants rely on the opinions of Dr. Bluestone (Joint Exhibits S, T, U, V and Exhibit G) who did not find fibromyalgia to rebut same.

Dr. Yu, Dr. Lee, Dr. Weiner and Dr. Taylor are all specialists in the field of rheumatology and they all diagnosed applicant with fibromyalgia. It is very difficult to believe that all of them, two of whom deemed highly respectable in the field of rheumatology by Dr. Bluestone at his deposition on November 14, 2017 (Joint Exhibit V), would misdiagnose applicant. However, all of their reports are very cursory, most likely because they were not written as medical-legal reports but for the purpose of treatment. This WCJ is only able to find Dr. Yu's July 5, 2017 report and his last undated report (Exhibits 1 and 7) substantial medical evidence on the issue of injury AOE/COE in the form of fibromyalgia as Dr. Yu temporally linked applicant's fall in 2012 and work stress to the development of fibromyalgia. However, his reports are not substantial medical evidence to address all other disputed issues herein, including apportionment between the November 7, 2012 date of injury and the CT herein.

On the other hand, Dr. Bluestone insisted that because applicant did not complain or show chronic, widespread pain during his examination and/or in the pain diagram drawn at his office, applicant does not have fibromyalgia. He referenced laboratory profile revealing no evidence of any form of systemic metabolic or inflammatory rheumatic disease to account for any aspect of applicant's musculoskeletal pain presentation in his January 25, 2017 report (Joint Exhibit U) and yet,

said laboratory profile was not attached to the report. Unlike Dr. Yu in his last undated report (Exhibit 7), Dr. Bluestone never addressed pain regions pursuant to diagnostic criteria for fibromyalgia. In fact, on several occasions, he went beyond his area of expertise to test and/or discuss applicant's psychiatric/psychological state to address if there are any psychophysiologic causes of applicant's pain. What this WCJ found most troubling is his deposition testimony on November 14, 2017 (Joint Exhibit V), Page 38, Lines 5 to 7, which begged the question if he, a Board certified rheumatologist, believes that fibromyalgia is a transient condition:

> A: I did not say she did not have fibromyalgia when other doctors examined her. What I'm saying is she didn't have fibromyalgia when I examined her. ...

According to Dr. Yu (Exhibit 7), fibromyalgia is a disease which lasts many years. Based on the foregoing, it is found that Dr. Bluestone's opinions are not substantial medical evidence to rebut injury AOE/COE in the form of fibromyalgia.

(Joint Opinion on Decision, February 11, 2020, pp. 3-4.)

DISCUSSION

I.

Section 4060 provides as follows in pertinent part:

(a) This section shall apply to disputes over the compensability of any injury. **This section shall not apply where injury to any part or parts of the body is accepted as compensable by the employer.**

(b) Neither the employer nor the employee shall be liable for any comprehensive medical-legal evaluation performed by other than the treating physician, except as provided in this section. **However, reports of treating physicians shall be admissible.**

(c) **If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2.**

(Lab. Code, § 4060(a)-(c), emphasis added.)

Section 4062.2 outlines the process to obtain a QME panel in represented cases. (Lab. Code, § 4062.2.) Section 4062.2(a) specifically provides that:

> Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.
>
> (Lab. Code, § 4062.2(a).)

Section 4064(d) separately provides as follows:

> The employer shall not be liable for the cost of any comprehensive medical evaluations obtained by the employee other than those authorized pursuant to Sections 4060, 4061, and 4062. However, **no party is prohibited from obtaining any medical evaluation or consultation at the party's own expense.** In no event shall an employer or employee be liable for an evaluation obtained in violation of subdivision (b) of Section 4060. **All comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board except as provided in Section 4060, 4061, 4062, 4062.1, or 4062.2.**
>
> (Lab. Code, § 4064(d), emphasis added.)

Section 4605 states as follows:

> **Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation.** A qualified medical evaluator or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion.
>
> (Lab. Code, § 4605, emphasis added.)

The California Supreme Court has analyzed the admissibility of medical reports in workers' compensation proceedings and opined in pertinent part:

> [T]he comprehensive medical evaluation process set out in section 4060 et seq. for the purpose of resolving disputes over compensability does not limit the admissibility of medical reports…Under section 4064, subdivision (d), "no party is prohibited from obtaining any medical evaluation or consultation at

> the party's own expense," and "[a]ll comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board . . ." except as provided in specified statutes. The Board is, in general, broadly authorized to consider "[r]eports of attending or examining physicians." (§ 5703, subd. (a).) These provisions do not suggest an overarching legislative intent to limit the Board's consideration of medical evidence.
>
> (*Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, 1239 [78 Cal.Comp.Cases 1209].)

As acknowledged by the Court in *Valdez*, sections 4060, 4064(d) and 5703 suggest an expansive rather than limiting approach by the Legislature regarding the admissibility of medical evidence. With respect to reports privately obtained from doctors by the employee pursuant to section 4605, the *Valdez* Court added:

> …when we consider the reforms enacted by Senate Bill 863…[t]he Legislature did not…narrow employees' right to seek treatment from doctors of their choice at their own expense, or bar those doctors' report admissibility in disability hearings. Rather, it provided that privately retained doctors' reports "shall not be the sole basis of an award of compensation." (§ 4605.) **The clear import of this language is that such reports may provide some basis for an award, but not standing alone.**
>
> (*Id.* at p. 1239, emphasis added.)

Thus, the limiting language in section 4605 concerns the use of such reports as evidentiary support of an award, but does not necessarily limit the admissibility of those reports as evidence. The Court further recognized that "[s]ection 4605 has long permitted employees to consult privately retained doctors at their own expense, and the amendments enacted by Senate Bill 863 maintain that right." (*Id.* at p. 1240.)

After *Valdez*, the Court of Appeal issued its decision in *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009 [80 Cal.Comp.Cases 1256]. In *Batten*, the Court opined in relevant part:

> The Board noted that section 4605 is contained in article 2 of chapter 2 of part 2 of division 4 of the Labor Code, which is titled "Medical and Hospital Treatment." Considering this context, **the Board concluded that the term "consulting physician" in section 4605 means "a doctor who is consulted for the purposes of discussing**

> **proper medical treatment, not one who is consulted for determining medical-legal issues in rebuttal to a panel QME."** We agree with the Board. Section 4605 provides that an employee may "provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires." **When an employee consults with a doctor at his or her own expense, in the course of seeking medical treatment, the resulting report is admissible.**
>
> (*Id.* at p. 1016, emphasis added.)

The *Batten* Court further held that:

> Section 4605 permits the admission of a report by a consulting or attending physician, and section 4061, subdivision (i) permits the admission of an evaluation prepared by a treating physician. Neither section permits the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the panel qualified medical expert's opinion.
>
> (*Id.*)

In this matter, the WCJ concluded that Dr. Yu's report was admissible as a report from a secondary treating physician per section 4060(b). Both applicant's claims in which she is alleging fibromyalgia are partially accepted for other body parts. Therefore, section 4060 is not applicable to these claims pursuant to section 4060(a).

Applicant testified at trial that she saw Dr. Yu through her private insurance. She was permitted to obtain a report from a consulting or attending physician at her own expense per section 4605. Pursuant to *Batten*, when an employee consults with a physician at his or her own expense, in the course of seeking medical treatment, the resulting reports are admissible unless they were obtained *solely* to rebut the panel QME. The record here indicates that applicant was referred to Dr. Yu by Dr. Taylor to confirm the diagnosis of fibromyalgia, for which Dr. Taylor was providing treatment. The record therefore shows that applicant consulted with Dr. Yu in the course of seeking medical treatment, not solely to rebut the panel QME, Dr. Bluestone. Even taking into account Dr. Yu's undated report (Applicant's Exhibit No. 7), there is insufficient evidence that Dr. Yu has actually been provided with Dr. Bluestone's reports. Dr. Yu's opinions cannot be considered obtained solely as a rebuttal of QME opinions he has not seen.

Based on this analysis, we agree with the WCJ's conclusion that Dr. Yu's reports, including Exhibit Nos. 6 and 7, are admissible.

II.

Administrative Director (AD) Rule 9785(a) contains the following definitions as relevant herein:

> (1) The "primary treating physician" is the physician who is primarily responsible for managing the care of an employee, and who has examined the employee at least once for the purpose of rendering or prescribing treatment and has monitored the effect of the treatment thereafter. The primary treating physician is the physician selected by the employer, the employee pursuant to Article 2 (commencing with section 4600) of Chapter 2 of Part 2 of Division 4 of the Labor Code, or under the contract or procedures applicable to a Health Care Organization certified under section 4600.5 of the Labor Code, or in accordance with the physician selection procedures contained in the medical provider network pursuant to Labor Code section 4616…
>
> (2) **A "secondary physician" is any physician other than the primary treating physician who examines or provides treatment to the employee, but is not primarily responsible for continuing management of the care of the employee**…
> …
> (6) "Continuing medical treatment" is occurring or presently planned treatment that is reasonably required to cure or relieve the employee from the effects of the injury.
>
> (Cal. Code Regs., tit. 8, § 9785(a)(1), (2) and (6).)

AD Rule 9785(e) states in pertinent part:

> (3) Secondary physicians, physical therapists, and other health care providers to whom the employee is referred shall report to the primary treating physician in the manner required by the primary treating physician.
>
> (4) The primary treating physician shall be responsible for obtaining all of the reports of secondary physicians and shall, unless good cause is shown, within 20 days of receipt of each report incorporate, or comment upon, the findings and opinions of the other physicians in the primary treating physician's report and submit all of the reports to the claims administrator.
>
> (Cal. Code Regs., tit. 8, § 9785(e)(3) and (4).)

The record here is unclear regarding who, if anyone, was applicant's primary treating physician (PTP) at the time that she was referred to Dr. Yu for evaluation of the fibromyalgia. However, AD Rule 9785(a)(2) does not require referral from a PTP for a doctor to be considered

a secondary physician. Furthermore, defendant does not claim it has authorized any doctor as the PTP nor attempted to gain medical control. Therefore, we will consider Dr. Yu to be a secondary physician.

III.

Applicant bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.) It is sufficient to show that work was a contributing cause of the injury. (See *Clark*, *supra*, 61 Cal.4th at p. 298; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) Applicant need only show that industrial causation was "not zero" to show sufficient contribution from work exposure for the claim to be compensable. (*Clark*, *supra*, 61 Cal.4th at p. 303.) The burden of proof "manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].) It has also long been established that "all reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee." (*Guerra v. Workers' Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, 1310 [81 Cal.Comp.Cases 324], citing *Clemmons v. Workmen's Comp. Appeals Bd.* (1968) 261 Cal.App.2d 1, 8; see also *Garza*, *supra*, 3 Cal.3d at p. 317; Lab. Code, § 3202.) Since Dr. Yu's reports were obtained pursuant to section 4605, his reporting cannot be the sole basis for an award of compensation. We therefore must consider whether there remains substantial evidence in the record in support of the finding that applicant's fibromyalgia is industrially caused.

It is also well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza*, *supra*; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) To constitute substantial evidence ". . . 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 (Appeals Board en banc).)

Here, the WCJ found that Dr. Bluestone's opinions did not constitute substantial medical evidence. In fact, the WCJ was troubled by the basis for his opinions:

> Unlike Dr. Yu in his last undated report (Exhibit 7), Dr. Bluestone never addressed pain regions pursuant to diagnostic criteria for fibromyalgia. In fact, on several occasions, he went beyond his area of expertise to test and/or discuss applicant's psychiatric/psychological state to address if there are any psychophysiologic causes of applicant's pain. What this WCJ found most troubling is his deposition testimony on November 14, 2017 (Joint Exhibit V), Page 38, Lines 5 to 7, which begged the question if he, a Board certified rheumatologist, believes that fibromyalgia is a transient condition:
>
> > A: I did not say she did not have fibromyalgia when other doctors examined her. What I'm saying is she didn't have fibromyalgia when I examined her. ...
>
> According to Dr. Yu (Exhibit 7), fibromyalgia is a disease which lasts many years. Based on the foregoing, it is found that Dr. Bluestone's opinions are not substantial medical evidence to rebut injury AOE/COE in the form of fibromyalgia.
>
> (Joint Opinion on Decision, February 11, 2020, pp. 3-4.)

Based on the reasons stated by the WCJ in the Joint F&O, we are persuaded that applicant met her burden of proving AOE/COE by a preponderance of the evidence. The WCJ supported her conclusion that Dr. Bluestone's opinions are not substantial medical evidence to rebut injury AOE/COE in the form of fibromyalgia. Therefore, we will not disturb the WCJ's finding regarding AOE/COE of fibromyalgia in both ADJ9422740 and ADJ9422741.

We admonish defendant to schedule the future QME and regular physician appointments and to ensure the physicians are furnished with all proper documents. We remind the parties that they should make a good faith effort to informally resolve any dispute regarding documents sent to the QME pursuant to the 20-day period mandated by section 4062.3(b). Informal resolution of these disputes helps to progress matters in an expeditious fashion and avoid involving the Appeals Board in disputes the parties are capable of resolving without judicial intervention. A moving party is obligated to swear under penalty of perjury that it made "a genuine, good faith effort to

resolve [a] dispute" before seeking intervention from the Appeals Board through a declaration of readiness to proceed. (Cal. Code Reg., tit. 8, § 10414(d).)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings of Fact & Order issued by the WCJ on February 11, 2020 is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. In ADJ9422746, applicant, while employed by the defendant as a center clerk, occupational group number 360, on October 17, 2000, sustained injury arising out of and in the course of employment to her right knee. At the time of injury, applicant's earnings were $1,288.78 per week, warranting indemnity rates of $859.19 for temporary disability (TD) and $230 for permanent disability (PD).

2. In ADJ9422740, applicant, while employed by the defendant as a center clerk, occupational group number 360, on November 7, 2012, sustained injury arising out of and in the course of employment to her left knee and in the form of fibromyalgia. At the time of injury, applicant's earnings were $1,288.78 per week, warranting indemnity rates of $859.19 for temporary disability (TD) and $230 for permanent disability (PD).

3. In ADJ9422741, applicant, while employed by the defendant as a center clerk, occupational group number 360, from January 22, 1976 to December 24, 2012, sustained injury arising out of and in the course of employment to her cervical spine, lumbar spine, right knee, sacroiliac joint fracture and in the form of fibromyalgia. At the time of injury, applicant's earnings were $1,288.78 per week, warranting indemnity rates of $859.19 for temporary disability (TD) and $230 for permanent disability (PD).

4. In ADJ9422742, applicant, while employed by the defendant as a center clerk, occupational group number 360, on October 5, 2005, sustained injury arising out of and in the course of employment to her cervical spine and lumbar spine. At the time of injury, applicant's earnings were $1,288.78 per week, warranting indemnity rates of $859.19 for temporary disability (TD) and $230 for permanent disability (PD).

5. All other issues are deferred.

6. Exhibit 6 and Exhibit 7 are admitted into evidence.

IT IS FURTHER ORDERED that the parties utilize Seymore Levine, M.D., as the regular physician in the field of rheumatology to examine the applicant, which includes addressing rheumatologic issues herein pursuant to Labor Code section 5701. Jurisdiction is reserved to the WCJ in the event of a dispute.

IT IS FURTHER ORDERED that the parties return applicant to Michael Klassen, M.D. for an orthopedic re-evaluation to procure an opinion, including addressing the disputed issues. Jurisdiction is reserved to the WCJ in the event of a dispute.

Accordingly, as our decision after reconsideration, we rescind the F&Os and substitute new F&Os for the purposes of clarity. We make no substantive changes to the F&Os.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 23, 2021

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

SALLY LOSURDO
LAW OFFICES OF GOLDSCHMID, SILVER & SPINDEL
DIETZ, GILMOR & CHAZEN

HAV/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Judge Mi was the trial Judge in this matter. Judge Mi is unavailable to respond to the Petition for Reconsideration. The sole contention by defendant is that Judge Mi utilized 4060(b) for admissibility of Dr. Yu's reporting. Judge Mi utilized the fact that Dr. Yu was a secondary treating physician to find the report is admissible.

The parties were Ordered to use Dr. Seymour Levine as a regular physician. Defendant is not objecting to this. The petitioner has not shown irreparable harm.

It is recommended that the petition for reconsideration be denied.

DATE: April 29, 2020

Gregory Palmberg
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

JOINT OPINION ON DECISION

Applicant, Sally Losurdo, born June 7, 1955, while employed on October 17, 2000 (ADJ9422746), as a Center Clerk in Los Angeles, California, by United Parcel Service, insured by Liberty Mutual Insurance Company, sustained injury arising out of and in the course of employment (AOE/COE) to her right knee. At the time of injury, applicant's earnings were $1,288.78 per week, warranting indemnity rates of $859.19 for temporary disability (TD) and $230 for permanent disability (PD). Defendants have furnished some medical treatment and the parties stipulate that the permanent and stationary (P&S) date for applicant's right knee pursuant to the Panel QME, Michael Klassen, M.D., was February 19, 2015.

Applicant, Sally Losurdo, born June 7, 1955, while employed on November 7, 2012 (ADJ9422740), as a Center Clerk in Los Angeles, California, by United Parcel Service, insured by Liberty Mutual Insurance Company, sustained injury AOE/COE to left knee, and claims to have sustained injury AOE/COE in the form of fibromyalgia. At the time of injury, applicant's earnings were $1,288.78 per week, warranting indemnity rates of $859.19 for TD and $230 for PD. Defendants have furnished some medical treatment and the parties stipulate that the P&S date for applicant's left knee pursuant to Dr. Klassen was February 19, 2015.

Applicant, Sally Losurdo, born June 7, 1955, while employed from January 22, 1976 to December 24, 2012 (ADJ9422741), as a Center Clerk in Los Angeles, California, by United Parcel Service, insured by Liberty Mutual Insurance Company, sustained injury AOE/COE to cervical spine, lumbar spine, right knee, and sacroiliac joint fracture, and claims to have sustained injury AOE/COE in the form of fibromyalgia. At the time of injury, applicant's earnings were $1,288.78 per week, warranting indemnity rates of $859.19 for TD and $230 for PD. Defendants did not pay any benefits herein. Defendants have furnished some medical treatment and the parties stipulate that the P&S date for applicant's cervical spine, lumbar spine, and right knee pursuant to Dr. Klassen was February 19, 2015, and the P&S date for applicant's sacroiliac joint fracture pursuant to Dr. Klassen was September 24, 2015.

Applicant, Sally Losurdo, born June 7, 1955, while employed on October 5, 2005 (ADJ9422742), as a Center Clerk in Los Angeles, California, by United Parcel Service, insured by Liberty Mutual Insurance Company, sustained injury AOE/COE to cervical spine and lumbar spine. At the time of injury, applicant's earnings were $1,288.78 per week, warranting indemnity rates of $859.19 for TD and $230 for PD. Defendants did not pay any benefits herein. Defendants have furnished some medical treatment and the parties stipulate that the P&S date for applicant's cervical and lumbar spine pursuant to Dr. Klassen was February 19, 2015.

No attorney fees have been paid and no attorney fee arrangements have been made with respect to the above matters.

ADMISSIBILITY OF TRIAL EXHIBITS:

At the time of Trial on February 13, 2018, defendants object to the admissibility of Exhibit 6 on the basis that said Exhibit was not served on defendants prior to Trial and was not listed in the Pre-

trial Conference Statement while discovery closed at the Mandatory Settlement Conference (MSC). Applicant argued that there was no surprise or prejudice to defendants as they were aware that Mihaela Taylor, M.D. was applicant's treater all along.

Labor Code §5502(d)(3), in part, states as follows:

> Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference.

A careful review of the Pre-trial Conference Statements, dated August 30, 2017, confirmed that applicant did not list Dr. Taylor's August 17, 2017 report as exhibit. The only report from Dr. Taylor listed on the Pre-trial Conference Statements is a report, dated June 13, 2017 (Exhibit 5). According to applicant's attorney, at the February 13, 2018 Trial, applicant only produced one page of the August 17, 2017 report, and after the MSC, applicant produced additional pages. Nevertheless, applicant's attorney did not list any document from Dr. Taylor, dated August 17, 2017, at the MSC. Applicant's attorney also failed to demonstrate that said report was not available, or, with the exercise of due diligence, could not have been procured before the MSC. Based on the foregoing, it is found that Exhibit 6 is not admitted into evidence.

At the time of Trial on January 21, 2020, defendants object to the admissibility of Exhibit 7 raising Labor Code §§4628, 4061(i), 8 CCR §§10606, 35.5(b), as well as Batten v. WCAB, (2015) 241 Cal. App. 4th 1009. In particular, defendants argued that David Yu, M.D. is an independent doctor, not secondary treating physician in workers' compensation. It is improper to rebut a Panel QME report with a consultative report pursuant to Batten. Applicant argued that Dr. Yu is a treating physician and that all treating reports are admissible. Applicant further argued that the code sections raised by defendants are not applicable as this is a treatment report. Also, under Valdez v. WCAB, (2013), 57 Cal. 4th 1231, the report is admissible.

The crux of the dispute is whether Exhibit 7 is a medical-legal report or treatment report. Without actually reviewing this report given defendants' objection, this WCJ has to consider how applicant was referred to Dr. Yu. In the report from Dr. Taylor, dated June 13, 2017 (Exhibit 5), as applicant's treating physician, she referred applicant to Dr. Yu for evaluation regarding diagnosis of fibromyalgia v. possible ankylosing spondylitis suggested by the Panel QME in rheumatology herein, Rodney Bluestone, M.D., in order to provide applicant with proper treatment. In Dr. Yu's July 5, 2017 report (Exhibit 1), Dr. Yu confirmed diagnosis of fibromyalgia and found no evidence of spondyloarthritis. He recommended applicant to perform several exercises and referred her back to Dr. Taylor for further treatment. Hence, it is found that Dr. Yu is a secondary treating physician, his reports are treatment reports admissible under Labor Code §4060(b), and that applicant was not referred to Dr. Yu for the sole purpose of rebutting Dr. Bluestone's opinions. Based on the foregoing, it is found that Exhibit 7 is admitted into evidence.

The failure to comply with the format of a treating physician's report does not deem a report inadmissible as these are curable defects.

INJURED PARTS OF THE BODY:

For the date of injury of November 7, 2012 (ADJ9422740) and the CT from January 22, 1976 to December 24, 2012 (ADJ9422741), the parties have a dispute as to whether or not applicant sustained injury AOE/COE in the form of fibromyalgia.

Applicant relies on the medical opinions of Dr. Yu, Wonil Lee, M.D., Steven Weiner, M.D., and Dr. Taylor (Exhibits 1, 2, 3, 4, 5 and 7) to sustain the burden of proving fibromyalgia. Defendants rely on the opinions of Dr. Bluestone (Joint Exhibits S, T, U, V and Exhibit G) who did not find fibromyalgia to rebut same.

Dr. Yu, Dr. Lee, Dr. Weiner and Dr. Taylor are all specialists in the field of rheumatology and they all diagnosed applicant with fibromyalgia. It is very difficult to believe that all of them, two of whom deemed highly respectable in the field by rheumatology by Dr. Bluestone at his deposition on November 14, 2017 (Joint Exhibit V), would misdiagnose applicant. However, all of their reports are very cursory, most likely because they were not written as medical-legal reports but for the purpose of treatment. This WCJ is only able to find Dr. Yu's July 5, 2017 report and his last undated report (Exhibits 1 and 7) substantial medical evidence on the issue of injury AOE/COE in the form of fibromyalgia as Dr. Yu temporally linked applicant's fall in 2012 and work stress to the development of fibromyalgia. However, his reports are not substantial medical evidence to address all other disputed issues herein, including apportionment between the November 7, 2012 date of injury and the CT herein.

On the other hand, Dr. Bluestone insisted that because applicant did not complain or show chronic, widespread pain during his examination and/or in the pain diagram drawn at his office, applicant does not have fibromyalgia. He referenced laboratory profile revealing no evidence of any form of systemic metabolic or inflammatory rheumatic disease to account for any aspect of applicant's musculoskeletal pain presentation in his January 25, 2017 report (Joint Exhibit U) and yet, said laboratory profile was not attached to the report. Unlike Dr. Yu in his last undated report (Exhibit 7), Dr. Bluestone never addressed pain regions pursuant to diagnostic criteria for fibromyalgia. In fact, on several occasions, he went beyond his area of expertise to test and/or discuss applicant's psychiatric/psychological state to address if there are any psychophysiologic causes of applicant's pain. What this WCJ found most troubling is his deposition testimony on November 14, 2017 (Joint Exhibit V), Page 38, Lines 5 to 7, which begged the question if he, a Board certified rheumatologist, believes that fibromyalgia is a transient condition:

> A: I did not say she did not have fibromyalgia when other doctors examined her. What I'm saying is she didn't have fibromyalgia when I examined her....

According to Dr. Yu (Exhibit 7), fibromyalgia is a disease which lasts many years. Based on the foregoing, it is found that Dr. Bluestone's opinions are not substantial medical evidence to rebut injury AOE/COE in the form of fibromyalgia.

OCCUPATION:

The parties stipulate that applicant's job title was Center Clerk. Based upon defendants' unrebutted detailed job descriptions of a Customer Counter Clerk and an Operations Clerk (Exhibit F) with significant lifting and carrying, as well as lower extremities requirements, among other things, which fit the characteristics under Group 360 as follows:

> Porters, Packers
>
> Significant lifting and carrying required; significant walking required; may occasionally climb at low levels....
>
> Typical occupations: Clerk, Shipping; Conveyor Tender; Warehouse Worker.

Thus, it is found that applicant was employed as a Center Clerk, Occupational Group No. 360.

TEMPORARY DISABILITY:

The parties did not stipulate to any TD paid by defendants under any of the four matters herein. Defendants did not submit any evidence that they paid any TD indemnity herein either. EDD paid benefits at the weekly rate of $872 from January 24, 2013 to January 22, 2014 for a total sum of $45,344. Applicant claims periods of TD from December 24, 2012 to December 21, 2014 under ADJ9422740, ADJ9422741 and ADJ9422742.

Dr. Klassen addressed periods of TD after each date of injury in his June 12, 2015 report (Exhibit A) and at his deposition on May 10, 2016 (Joint Exhibit Z). This WCJ found his opinions speculative and not substantial medical evidence. Instead of following the medical records he had reviewed and/or applicant's work and treatment history, he opined based on reasonable period of TD in general or on average after an injury or a certain procedure applicant underwent. For example, at his May 10, 2016 deposition (Joint Exhibit Z), Page 41, Lines 18 to 25:

> A: So she didn't work after her lumbar spine surgery. So what I think I said was that she would be TTD from that surgery which would be 6/25/2014.
>
> Q: To when?
>
> A: It would be reasonable to have her for six months.
>
> Q: So that would be December?
>
> A: So it would be 12/25/14.

There are other examples. In his June 12, 2015 report (Exhibit A), he found the right knee injury to arise from the October 17, 2000 date of injury and that it would be reasonable for applicant to be TTD for six months. Then, he found no period of TD from the CT claim in the same report. At his deposition on May 10, 2016 (Joint Exhibit Z), he apportioned the right knee disability 80% to

the October 17, 2000 date of injury and 20% to the CT. He did not address whether the "reasonable" period of six months of TD should fall under the specific date of injury or CT. Similarly, he apportioned the applicant's cervical spine disability 80% to the CT and 20% to the 2005 date of injury, and he opined that applicant would be TTD for her cervical spine surgery from July 24, 2013 to January 24, 2014 for six months based on "an average." Dr. Klassen did not address whether this "average" period of TD should fall under the CT or the 2005 date of injury.

Of course, it is important to note that Dr. Klassen actually evaluated applicant only once on February 19, 2015. Based on the foregoing, it is found that Dr. Klassen's opinions are stale and certainly not substantial medical evidence.

Issue removed from submission. See Order Developing Record.

PERMANENT DISABILITY:

Issue removed from submission. See Order Developing Record.

APPORTIONMENT:

Defendants have the burden of proof on apportionment to non-industrial PD. The only non-industrial apportionment pertains to applicant's lumbar spine disability. Dr. Klassen opined in his February 19, 2015 report (Joint Exhibit Y) on Page 16 as follows

> LUMBAR SPINE
>
> There **is** apportionment to the injury that she had when she was out of work for two years. I would opine that 25% of her lumbar spine injury is apportionable to non-industrial causes that predated her industrial condition.

Clearly, this opinion is internally flawed. On one hand, he opined that there should be non-industrial apportionment because applicant had been out of work for two years with her last date of work on December 24, 2012 after working for the employer for 37 years. Then, he said the non-industrial causes predated her industrial condition. Most importantly, it is evident based on the above opinion that Dr. Klassen apportioned causation of injury and not causation of disability. Thus, defendants failed to sustain their burden of proving apportionment of disability of applicant's lumbar spine to non-industrial causes.

Of course, as explained above, Dr. Klassen's opinions are stale and speculative and thus, not substantial medical evidence on all issues, including the apportionment among the matters herein. Furthermore, the record still has to be developed regarding the apportionment of fibromyalgia between the November 7, 2012 and the CT claim, if applicable.

Issue removed from submission. See Order Developing Record.

NEED FOR FURTHER MEDICAL TREATMENT:

Issue removed from submission. See Order Developing Record.

LIEN OF EMPLOYMENT DEVELOPMENT DEPARTMENT:

Issue removed from submission. See Order Developing Record.

ATTORNEY'S FEE:

Issue removed from submission. See Order Developing Record.

DATE: FEB 11, 2020

Ivy W. Mi
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE