

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

JESSE SANCHEZ, *Applicant*

vs.

**CVS PHARMACY; NEW HAMPSHIRE INSURANCE COMPANY,
ADMINISTERED BY SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,
*Defendants***

**Adjudication Number: ADJ9601706
Marina Del Rey District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant CVS Pharmacy (defendant) seeks reconsideration of the Findings of Fact issued on June 14, 2023, wherein the workers' compensation administrative law judge (WCJ) found that the disability issues presented at trial were to be found in accordance with the Agreed Medical Evaluator (AME).

Defendant contends the WCJ's decision is vague and ambiguous as to what issues were decided, and that the WCJ's opinion fails to articulate a basis in law for the conclusions reached.

Defendant has also filed a Petition for Leave to File Supplement to Defendant's Petition for Reconsideration, and a corresponding Supplement to Defendant's Petition. (Cal. Code Regs., tit. 8, § 10964(b).) We have granted the request pursuant to Workers' Compensation Appeals Board (WCAB) Rule 10964, and have reviewed the Supplemental Petition herein. (Cal. Code Regs., tit. 8, § 10964(a).)

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant

reconsideration, rescind the Findings of Fact, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

FACTS

Applicant claimed injury to the lumbar spine, right knee, right shoulder, right hip, left knee, and right wrist while employed as a working manager by defendant on August 1, 2014. Defendant admits injury to the lumbar spine, right knee, right shoulder, right hip, and left knee, and denies injury to the right wrist. The parties have selected Jeffrey Berman, M.D., to act as AME in the specialty of orthopedic medicine.

On May 8, 2023, the parties proceeded to trial and framed issues of parts of body injured (right wrist), permanent disability, apportionment, occupation and group number, the need for further medical treatment, and liability for self-procured medical treatment. (Minutes of Hearing and Summary of Evidence (Minutes), May 8, 2023, p. 2:21.) Applicant testified, and both parties filed trial briefs prior to case submission on May 23, 2023. (Minutes, at 1:24.)

On June 14, 2023, the WCJ issued a single Finding of Fact:

It is found that the disability issues presented herein by the Applicant, Jesse Sanchez, will be found in accordance with the agreed Medical Examiner, Dr. Jeffrey Berman. Joint Exhibit BB dated 05-17-2021 and Joint Exhibit BBB dated 10-21-2022.

(Findings of Fact, June 14, 2023, p. 2.)

The accompanying Opinion on Decision reviews the case history, and observes that applicant presented credible testimony regarding his employment and injuries. (Opinion on Decision, June 14, 2023, at p. 2.) The Opinion concludes, “[t]he Court finds that the industrial injuries sustained by the Applicant should be found in accordance to the agreed Medical Reporting of Dr. Berman. Further issues shall be deferred.” (*Ibid.*)

On July 10, 2023, defendant filed its Petition for Reconsideration (Petition), observing that among the issues submitted for decision was the issue of permanent disability. Defendant avers, “[i]n this case, the issue of permanent disability includes the request of the parties for a legal determination by the Trial Judge as to whether there was a misapplication by AME Jeffrey Berman, M.D. of the AMA Guides and case law regarding the calculation of permanent disability. The

Finding of Facts and Opinion on Decision are seemingly silent on this issue.” (Petition, p. 2:23.) Defendant observes that there is no apparent discussion of the issues raised in the parties’ trial briefing, and that the WCJ’s decision does not reflect a request for consultative rating, or a corresponding Award or Order. (*Id.* at p. 3:14.)

Applicant’s Answer contends that the reporting of AME Dr. Berman is substantial evidence. Applicant submits that the WCJ should “clarify her finding regarding the occupational group applicable in this case,” and that we should thereafter “uphold” a prior consultative rating of the reporting of Dr. Berman and award 77% permanent disability. (Answer, at p. 6:124.)

The WCJ’s Report recommends denial of defendant’s Petition, without substantive analysis of the issues presented.

DISCUSSION

Defendant’s Petition asserts the WCJ’s decision is vague and ambiguous as to what issues are being decided and which are deferred, and that the WCJ’s Opinion fails to articulate the basis for the decision. (Petition, at p. 4:2.) We agree.

Labor Code¹ Section 5313 provides:

The appeals board or the workers’ compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.

As required by section 5313 and explained in *Hamilton*, “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton, supra*, at p. 475.)

A decision “must be based on admitted evidence in the record” (*Hamilton, supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers’ Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

¹ All further statutory references are to the Labor Code unless otherwise stated.

Section 5815 also provides:

Every order, decision or award, other than an order merely appointing a trustee or guardian, shall contain a determination of all issues presented for determination by the appeals board prior thereto and not theretofore determined. Any issue not so determined will be deemed decided adversely as to the party in whose interest such issue was raised.

Sections 5313 and 5815 thus require the WCJ to “file finding upon *all* facts involved in the controversy” and to issue a corresponding award, order or decision that states the “reasons or grounds upon which the [court’s] determination was made.” (Italics added; see also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-622 [2010 Cal. Wrk. Comp. LEXIS 74] (Appeals Board en banc).)

The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision....” (*Hamilton, supra*, at p. 476.) The Court of Appeal has further observed that pursuant to Labor Code section 5908.5, decisions of the WCAB must state the evidence relied upon and specify in detail the reasons for the decision. (*Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351] (*Evans*)). The purpose of the requirement is “to assist the reviewing court to ascertain the principles relied upon by the lower tribunal, to help that tribunal avoid careless or arbitrary action, and to make the right of appeal or of seeking review more meaningful.” (*Evans, supra*, at p. 755.)

Here, the parties framed multiple issues, including whether applicant sustained injury to the right hand. (Minutes, at 2:21.) The Findings of Fact fails to substantively address this issue.

The parties also placed in issue permanent disability. (Minutes, at 2:22.) The Finding of Fact indicates that “the disability issues ... will be found in accordance with the Agreed Medical Examiner.” (Finding of Fact No. 1.) We agree with defendant, however, that the ambit of this decision is fundamentally vague. The parties filed trial briefs with the court prior to submission for decision that provided detailed arguments on issues pertaining to the calculation of impairment and permanent disability. These issues included whether the AME appropriately instructed that various impairments be added rather than combined as described in *Athens Administrators v. Workers’ Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34] (writ den.). The parties further briefed the issue of whether the AME appropriately assessed impairment under the principles set forth in *Almaraz/Guzman. Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74

Cal.Comp.Cases 1084 (Appeals Board en banc), as affirmed by *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].) Again, the single Finding of Fact does not substantively address the issue, nor is the WCJ's reasoning with regard to either issue explicated in the accompanying Opinion on Decision.

Moreover, an injured employee's permanent disability rating and each component element of that rating are questions of fact to be resolved by the WCAB. (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 618 [20 I.A.C. 390, 391-392]; *Subsequent Injuries Fund v. Industrial Acc. Com. (Rogers)* (1964) 226 Cal.App.2d 136, 152 [29 Cal.Comp.Cases 59, 69].) Accordingly, after reviewing the evidence, it is the WCJ's function to formulate rating instructions, which "are, in effect, tentative findings of fact." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Stapp)* (1978) 81 Cal.App.3d 586, 587 [43 Cal.Comp.Cases 658, 658]; *Fidelity & Casualty Co. v. Workmen's Comp. Appeals Bd. (Ratzel)* (1967) 252 Cal.App.2d 327, 331 [32 Cal.Comp.Cases 271, 273].) Here, the WCJ did not address the underlying issues with respect to the whole person impairment, did not address whether applicant sustained injury to the right hand, and issued no rating or corresponding award.²

In addition to failing to address the issues raised by the parties, failing to issue a rating or rating instructions, and failing to issue an award, the Opinion on Decision purports to defer "further issues," without describing what those issues are, and why they are being deferred. (Opinion on Decision, p. 2.)

We further observe that the Labor Code provides for the enforcement of an Award issued by the WCAB through the entry of a judgment in Superior Court. Pursuant to section 5806, any party affected by a judgement of the WCAB "may file a certified copy of the findings and order, decision, or award of the appeals board with the clerk of the superior court of any county ... [j]udgment shall be entered immediately by the clerk in conformity therewith." (Lab. Code, § 5806.) The execution of a judgment entered on a finding made by the WCAB is available to those parties seeking to enforce their right to the benefits specified in an Award. (*Vickich v. Superior Court of Los Angeles County* (1930) 105 Cal.App. 587, 592 [288 P. 127] ["The execution on a judgment entered upon an award of the Industrial Accident Commission, although in the form

² To the extent that applicant urges that we uphold a prior consultative rating of the reporting of Dr. Berman by the Disability Evaluation Unit (Answer, at p. 6:124), we note that pursuant to DWC Rule 10166, "consultative rating determinations will not be admissible in judicial proceedings." (Cal. Code Regs., tit. 8, § 10166(b).)

of an execution upon a judgment of the superior court, is in reality an execution upon the award of the commission.”.) Section 5807 further provides that, “[t]he certified copy of the findings and order, decision, or award of the appeals board and a copy of the judgment constitute the judgment-roll.” (Lab. Code, § 5807.)

However, in order for a party to avail themselves of this statutorily authorized mechanism for enforcement of an Award issued by the WCAB, the Award itself must be sufficiently clear and specific as to allow for its reduction to a judgment. Accordingly, section 5313, and *Hamilton, supra*, require that the WCJ issue an award of sufficient clarity that it can be enforced as a judgment, should the need arise. (Lab. Code, §§ 5313; 5806; 5807.) Here, the WCJ’s decision is so fundamentally vague as to render it unenforceable under the auspices of sections 5806 and 5807.

Based on the foregoing, the WCJ’s decision fails to make the requisite “findings upon all facts involved in the controversy,” and does not meet the minimum standards set forth in sections 5313 and 5815, or in our en banc decision in *Hamilton, supra*. Accordingly, we will rescind the June 14, 2023 Finding of Fact, and return the matter to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

Upon return of this matter to the trial level, the WCJ must substantively address the contentions placed in issue by the parties, including parts of body injured, and must further substantively address whether the opinions expressed by the AME with respect to the calculation of impairment are supported by substantial evidence and are congruent with statutory and case law authority. (*Hamilton, supra*, at p. 478; Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers’ Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) The WCJ should then issue rating instructions as explained in *Blackledge, supra*.³ Thereafter, if appropriate, the WCJ may issue an Award based on the evidence, with an accompanying Opinion on Decision explaining in detail the basis for the decision. A decision that complies with section 5313 and 5815 will serve to “assist the reviewing

³ As we explained in *Blackledge*, “[t]he rating instructions ‘may refer to an accompanying medical report or chart for the sole purpose of describing measurable physical elements of the conditions that are clearly and exactly identifiable;’ in every other respect, however, the rating instructions ‘shall describe the factors of disability in full.’ (Cal. Code Regs., tit. 8, § [10675]; see also *Heggin*, 4 Cal.3d at p. 174 [36 Cal.Comp.Cases at p. 101] (“We hold that . . . the Board must, in any instructions it may direct to the rating bureau, fully describe each separate factor of disability”).) (*Blackledge v. Bank of America, supra*, 75 Cal.Comp.Cases 613, 622.)

court in ascertaining the principles relied upon by the lower tribunal, and to help avoid careless or arbitrary action, and to make the right of appeal more meaningful.” (*Evans, supra*, at p. 755.)

For the foregoing reasons,

IT IS ORDERED that defendant’s Petition for Reconsideration of the Findings of Fact issued by the WCJ on June 14, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that the Findings of Fact issued by the WCJ on June 14, 2023 is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS’ COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ NATALIE PALUGYAI, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 8, 2023

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

**JESSE SANCHEZ
GORDON, EDELSTEIN, KREPACK, GRANT, FELTON & GODLSTEIN
PEARLMAN BROWN & WAX**

SAR/abs

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