WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JUAN CARAVEZ, *Applicant*

vs.

RED BLUFF MEADOWS and NATIONAL UNION FIRE INSURANCE COMPANY, administered by AMERICAN INTERNATIONAL GROUP, INC., *Defendants*

Adjudication Numbers: ADJ9626208 ADJ11089339

Redding District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Defendant seeks reconsideration of the Findings, Award, and Order (F&A) issued by the workers' compensation administrative law judge (WCJ) on November 8, 2021, wherein the WCJ found in pertinent part that the opinions of agreed medical examiner (AME) Michael A Sommer M.D., regarding apportionment are not substantial evidence, and therefore "under Benson a combined award of permanent disability is justified;"[2] and that applicant's two injuries caused 64% "combined disabilities." (F&A, p. 2.)

Defendant contends that the opinions of AME Dr. Sommer regarding apportionment of applicant's low back disability constitute substantial evidence.

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

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[1] Commissioner Lowe, who was previously a panelist in this matter, no longer serves on the Appeals Board and commissioner Dodd who was also on the panel is not presently available to participate in the matter. Other panel members have been assigned in their place.

[2] *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113]

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

BACKGROUND

Applicant claimed injury to his cervical spine, right shoulder, and low back, while employed by defendant as a maintenance manager on October 23, 2013 (ADJ9626208). He also claimed injury to his low back while employed by defendant during the period from April 13, 2013, through April 13, 2014 (ADJ11089339).

AME Dr. Sommer initially evaluated applicant on November 3, 2015. After examining applicant, taking a history, and reviewing the medical record, Dr. Sommer diagnosed applicant as having “”Chronic painful lumbar degenerative disc disease. … Tendinitis, right shoulder. … [and] Chronic painful cervical degenerative disc disease.” (Joint Exh. A, Michael A Sommer M.D., November 25,2015, p. 6.) As to the issue of apportionment, Dr. Sommer stated:

> …[T]he patient's age is such that one would expect, and imaging suggests as well, that there was a pre-existent but apparently clinically silent condition. Given the work that he had done all along, which had certain physical demands involved, I conclude there is a reason for non-industrial apportionment of approximately 10%. Approximately 90% of the disability in the cervical spine and right shoulder is a consequence of the instant 10/23/13 injury. ¶ With respect to the low back, items to consider for apportionment are the earlier injury in about 2000 resulting in surgery and an award of disability. About this we know that the patient had ongoing symptoms, required Vicodin three times a day, was receiving shots from Dr Sabet and has described a limitation of lifting at about 40 pounds. … Thus, I find no basis to invoke a cumulative injury mechanism. Rather, the whole apportionment goes between the instant 10/23/13 injury and the prior industrial injury at Grass Manufacturing. Based on the presently available facts, I conclude apportionment is approximately 60% to the instant 10/13 injury and approximately 40% to the pre-existent injury in about 2000. (Joint Exh. A, pp. 9 – 10.)

In subsequent supplemental reports, Dr. Sommer discussed apportionment as follows:

> Following review of the records, impairment/disability has not increased from the prior award of disability. In addition, my opinion regarding apportionment of disability has changed. Clearly there was an injury when struck in the back by a dental chair. However. there is no evidence of this injury resulting in any traumatic changes in the low back. Diagnostic studies showed longstanding degenerative changes. The records show the patient suffered chronic back pain dating back to 2000. He was awarded 31% disability and was recommended to undergo spinal fusion at L4-5, where recent x-ray show severe degenerative changes. ¶ Given all the above, it is now my opinion there is no additional disability/impairment following the 2013 event. Current treatment is palliative and provides some relief. The prior award of disability (and treatment recommendations including fusion) carries forward pursuant to Labor Code 4664. Given the severity, nature and treatment of the prior injury, 100% of present disability under labor Code 4663, apportionment of disability to all causative factors, is to the prior injury and natural progression.
> (Joint Exh. C, A, Michael A Sommer M.D., May 2, 2016, p. 3.)

> Having looked again at all of the inputs I conclude Mr. Caravez present disability/impairment is-caused approximately 30% by the recent Red Bluff injury. And, considering again the nature of the work he did for that employer and that he had progressive increasing symptoms (according to medical records over the course of that employment (and that his back was vulnerable from prior injury and surgery), subsequent CT injury did occur and is responsible for approximately 10% of his disability. The remaining approximately 60% is from natural progression of the earlier injury at Grass Manufacturing.
> (Joint Exh. D, A, Michael A Sommer M.D., June 28, 2017, p. 3.)

The parties proceeded to trial on August 16, 2021. The issues submitted for decision included permanent disability and apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 16, 2021, p. 2.)

DISCUSSION

An award, order or decision by the Appeals Board must be supported by substantial evidence considering the entire record. (Lab. Code, §§ 5903, 5952; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Apportionment is the process utilized to separate permanent disability caused by an industrial injury from the disability attributable to other industrial injuries or to nonindustrial factors. Employers must compensate injured workers only for the portion of permanent disability attributable to the current industrial injury, not for the portion attributable to previous injuries or nonindustrial factors. (Lab. Code, §§ 4663, 4664; *Brodie*

v. Workers' Comp. Appeals Bd. (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565].) 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 identify 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. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board *en banc*).) The physician must also explain the nature of the other factors, how and why those factors were 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. (*Id.* at 621.)

Here, as the WCJ stated in the Opinion on Decision, Dr. Sommer "…does not address the requirements set out in Escobedo, in that his opinions generally leave out, … the necessary explanation of why and how the pathology and prior injury result in the current disability, and why and how these conditions lead him to choose the percentages that he does." (F&A, pp. 7 – 8, Opinion on Decision.) In his Report, the WCJ explained, "Considering that the missing analysis here is required by Escobedo to find that the opinion is substantial evidence, these faults are fatal to the substantiality of his opinion on apportionment of disability in the back." (Report, p. 3.)

As the AME, Dr. Sommer, was presumably chosen by the parties because of his expertise and neutrality. Therefore, his opinion should ordinarily be followed unless there is a good reason to find that opinion unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114, 117].) Having reviewed the trial record, we agree with the WCJ that Dr. Sommer's opinions regarding apportionment are not substantial evidence and would not be an appropriate basis for determining applicant's disability caused by the injuries at issue herein.

Further, it has been determined that an injured worker may be entitled to an award of the combined permanent disability caused by multiple injuries only when the evaluating physician cannot parcel out the approximate percentages of the injured worker's overall permanent disability caused by each of the successive injuries. (*Benson v. Workers' Comp. Appeals Bd*., (2009) 170 Cal.App.4th 1535, 1541 footnote 3, [74 Cal.Comp.Cases 113]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) As noted above, a decision by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952; *Garza v. Workmen's Comp. App. Bd., supra*; *LeVesque v. Workmen's Comp. Appeals Bd., supra*.) The fact that a physician's opinions regarding apportionment are not substantial evidence,

is not evidence that the physician "cannot parcel out" the disability caused by the applicant's injuries. When made aware of the problems with his or her opinions, the reporting physician may submit a report resolving those problems and in turn may be able to parcel out the approximate percentages of the injured worker's overall permanent disability caused by each of the successive injuries. (*Benson v. Workers' Comp. Appeals Bd*., *supra.*)

The Appeals Board has a duty to further develop the record when it is clear that additional evidence is needed in order to determine an issue submitted for decision. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].)

Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Under the circumstances of this matter, it is appropriate that Dr. Sommer be asked to submit a report to clarify his opinions as to apportionment, and to address the issue of whether he is able to parcel out the disability caused by applicant's prior low back injury and the two injuries currently at issue.

Finally, it must be noted that the 31% permanent disability award applicant received for his 2000 low back injury was based on a disability rating made pursuant to the 1997 permanent disability rating schedule (PDRS). That permanent disability was based on work restrictions, not factors of whole person impairment identified in the *American Medical Association Guides to the Evaluation of Permanent Impairment*, (AMA Guides), which were incorporated by the 2005 PDRS. Applicant's disability caused by the 2013 injuries is rated utilizing the 2005 PDRS factors of whole person impairment. Clearly, the 1995 PDRS work restrictions are not applicable in determining applicant's disability caused by the 2013 injuries. Thus, in order to properly apportion applicant's disability, Dr. Sommer must provide his best estimate of the AMA Guides WPI caused by the 2000 low back injury, and then address apportionment based thereon.

Accordingly, we rescind the F&A 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.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 8, 2021 Findings, Award, and Order 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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 23, 2023

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

JUAN CARAVEZ
HARLEY E. MERRITT, ESQ.
TESTAN LAW

TLH/mc

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