

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

**GINA DAVIS, *Applicant***

**vs.**

**ORACLE AMERICA, INC. and  
SAFETY NATIONAL CASUALTY CORPORATION,  
administered by TRISTAR RISK MANAGEMENT, *Defendants***

**Adjudication Number: ADJ11167605**

**San Francisco District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.<sup>1</sup>

Applicant seeks reconsideration of the Findings of Fact and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on August 9, 2023, wherein the WCJ found in pertinent part that applicant did not rebut the Combined Values Chart (CVC) in the 2005 Permanent Disability Rating Schedule (PDRS), and that her bi-lateral hands and wrists injury caused 89% permanent partial disability.

Applicant contends that the opinions of physical medicine and rehabilitation qualified medical examiner (QME) Steven D. Feinberg, M.D., are substantial evidence that her factors of disability should be added, not combined, resulting in an award of 100% permanent disability.

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

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.

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<sup>1</sup> Commissioner Palugyai, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

## BACKGROUND

Applicant's employment with defendant began on September 10, 2007. (See Joint Exh. 102, Steven D. Feinberg, M.D., June 29, 2021, p. 2.) She claimed a cumulative injury to her bilateral wrists and hands while employed by defendant as a global trade compliance specialist, during the period from April 4, 2015, through April 4, 2016.

QME Dr. Feinberg initially evaluated applicant on June 15, 2016. After examining applicant, taking a history, and reviewing the medical record, he concluded that applicant had not reached permanent and stationary status. (Joint Exh. 108, Steven D. Feinberg, M.D., June 15, 2016, p. 14.) The doctor re-evaluated applicant on November 8, 2017, and he issued various supplemental reports. (See Joint Exhs. 107 – 103). Applicant underwent a course of treatment and on June 29, 2021, Dr. Feinberg again re-evaluated her. After his re-examination of applicant and review of the interim medical record, Dr. Feinberg concluded that applicant had again reached permanent and stationary status and that her permanent disability was, "... 100% related to her medical treatment and her resultant CRPS (complex regional pain syndrome) and apportionment to any pre-existing or other condition is not appropriate." (Joint Exh. 102 Steven D. Feinberg, M.D., June 29, 2021, p. 22.)

In his reports, when addressing the issues of applicant's work restrictions and permanent disability, Dr. Feinberg stated:

I frankly think I erred [in a prior report] and should have described her as being limited to Light Work with her upper extremities. Regarding the term "Repetitive" use, this term has to do with doing things repeatedly with the upper extremities. Providing a percentage loss though is not meaningful as I do not believe she could engage in repetitive activities such as typing, sorting objects regardless of the size on a regular basis or other similar tasks. ¶ Regarding the term "Forceful" use, she basically is unable to apply force when using her upper extremities and this would be limited to light type work activities. (Joint Exh. 103, Steven D. Feinberg, M.D., February 26, 2018, pp. 4 – 5.)

In terms of her work status, she could not return to her previous job. It is not medically probable that she could reengage in the open labor market. ¶ She has a disability to her upper extremities precluding right upper extremity use and for the left upper extremity no heavy or forceful or repetitive use. (Joint Exh. 102 pp. 21 – 22.)

Adding versus Combining: There are 2 methods to rebut the CVC Table and add rather than combine. If the impairments have no overlap on ADLs, [sic] adding is appropriate. If there are overlapping ADLs with synergistic/amplifying effect, then adding is also appropriate. In this particular case, while there is evidence of overlap, the synergy between her upper extremities supports adding rather than combining.  
(Joint Exh. 102, p. 22.)

I received an 8/3/21 letter from Mr. Richard [defense counsel]. ¶ He is correct that I stated that it is not medically probable that she could reengage in the open labor market. ¶ He is correct that I was providing a medical opinion and that the issue needs to be opined upon by a vocational expert following appropriate analysis.  
(Joint Exh.101, Steven D. Feinberg, M.D., August 4, 2021, p. 1.)

The parties proceeded to trial on February 21, 2023, and the matter was continued for additional testimony by applicant. At the May 11, 2023 trial the matter was submitted for decision; the issues submitted included permanent disability and apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 21, 2023, p. 2.)

## **DISCUSSION**

Our review of the trial record raises various issues, and it has long been the law that once reconsideration has been granted, the Appeals Board has the authority to address issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration. (Lab. Code, §§ 5906, 5908; (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]); (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].)

First, regarding applicant's argument that her factors of disability should be added, not combined, as noted above, Dr. Feinberg stated his opinion that applicant's factors of disability should be added rather than combined. We have previously held that the disability values of multiple impairments may be added instead of combined using the CVC if adding the factors of disability provides a more accurate rating of the injured worker's permanent disability. (*Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595]; *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 (writ den.); *De La Cerda v. Martin Selko & Co.* (2017) 83 Cal.Comp.Cases 567 (writ den.).)

However, for his opinion to constitute substantial evidence, Dr. Feinberg must set forth a more complete analysis and explanation for his opinion, not just his conclusion. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

As to applicant's ability to engage in certain work activities, Dr. Feinberg stated, "... I do not believe she could engage in repetitive activities such as typing, sorting objects regardless of the size on a regular basis or other similar tasks. ¶ Regarding the term "Forceful" use, she basically is unable to apply force when using her upper extremities ..." (Joint Exh. 102, pp. 21 – 22.) "... [I]t is not medically probable that she could reengage in the open labor market." (Joint Exh.101, p. 1.)

Again, based on our review of the entire record, it appears that applicant may have loss of use "of both hands" which would result in 100% permanent total disability. (Lab. Code, § 4662(a)(2).) However, whether applicant has lost the use of both hands is a medical determination, not a legal determination, and therefore it must be addressed by the reporting physicians. Although applicant's loss of use of both hands may be inferred from Dr. Feinberg's statements, as noted, to be substantial evidence on that issue, the doctor must provide a more detailed explanation as to his actual opinions regarding applicant's ability to use her hands, and he must explain the basis for his opinions. (*Escobedo v. Marshalls, supra.*)

Finally, surveillance videos of applicant were taken on October 18, 2019, November 2, 2019, June 12, 2021, and August 3, 2021. (Def. Exh. B, MOH/SOE, February 21, 2023, p. 5.) It appears that Dr. Feinberg was not provided the surveillance videos to review. To constitute substantial evidence a doctor's opinion must be based on an adequate examination and history. (*Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls, supra.*) Thus, Dr. Feinberg must be provided the surveillance videos for his review in order to accurately assess applicant's level of disability.

The Appeals Board, including the WCJ, have discretionary authority to further develop the record where there is insufficient evidence on an issue submitted for decision. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65

Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

As discussed herein, the reports from Dr. Feinberg are not substantial evidence regarding applicant's permanent disability caused by her injury, and therefore, it is appropriate that the record be further developed.

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 August 9, 2023 Findings of Fact and Award 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/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**April 9, 2024**

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

**GINA DAVIS  
GALINE, FRYE, FITTING & FRANGOS  
RTGR LAW LLP**

**TLH/mc**



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