WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

BRUCE UMECK, *Applicant*

vs.

BASF CORPORATION;
ACE AMERICAN INSURANCE COMPANY,
administered by ESIS, *Defendants*

Adjudication Numbers: ADJ10543015

Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration of the Findings, Award and Order (F&A) issued on March 11, 2021, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

The WCJ found, in pertinent part, that applicant's injury caused him to sustain a permanent partial disability of 64% after apportionment and awarded benefits accordingly.

Defendant argues that the WCJ should have applied the Combined Values Chart (CVC) because applicant failed to present substantial medical evidence establishing rebuttal of the CVC. Defendant further argues that the WCJ failed to address apportionment to the left knee. Finally, defendant argues that substantial medical evidence does not establish the existence of temporary disability beyond September 12, 2017.

We received an answer from applicant.

The WCJ filed a Report recommending that the Petition for Reconsideration be denied.

We have considered the allegations in the Petition for Reconsideration and the Answer and the contents of the Report, and we have reviewed the record. Based upon our review of the record

[1] Commissioners Sweeney and Lowe were on the panel that issued the order granting reconsideration. Commissioners Sweeney and Lowe no longer serve on the Appeals Board. New panel members have been substituted in their place.

and for the reasons discussed below, as the Decision After Reconsideration of the Appeals Board, we will rescind the March 11, 2021 F&A and return this matter to the trial level for further proceedings.

FACTS

Applicant was employed as a senior sales representative when he sustained an industrial injury to his right knee, and claimed to sustain industrial injury to the left knee. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 4, 2020, p. 2, lines 3-6.) The date of injury appears to be December 30, 2013.[2]

While multiple issues where listed for trial, defendant challenges the WCJ's findings as to permanent disability and apportionment, and periods of temporary disability. (*Id*. at p. 2, lines 15-25.)

Applicant was seen by qualified medical evaluator (QME) Clive Segil, M.D., who took the following history of injury to the right knee:

> The applicant stated that he sustained an injury on 12/30/2013 in the morning. According to him, they were setting up a small, 1-horsepower pump to pump out some material out of the tank prior to the injury. There was a pump and tank on one side and there was a little 40-inch block wall with a little containment area that he needed to get over. He pulled himself over the little wall and then he suddenly heard a pop and felt the pain in his knee. . . His immediate symptom at the time of the injury was that his right knee was sore and it was hard to walk on it.

(Defendant's Exhibit I, Report of Clive Segil, M.D., September 12, 2017, p. 2.)

Dr. Segil took a history of injury to the left knee as follows:

> Mr. Umeck reports that he underwent an MRI scan of the left knee "in February or March of 2016," due to having had complained to Dr. Karzel of discomfort and swelling in the left knee; He states that he was told that the study revealed "a meniscal tear," and surgery was advised. He relates that he then made arrangements with his attorney to add his left knee to his claim.

(*Id*. at p. 3.)

[2] The date of injury was listed on the pre-trial conference statement, but it was not listed on the minutes of hearing, nor was a date of injury included in the Findings that issued. Upon return the parties should correct this error.

Dr. Segil found applicant permanent and stationary as of September 12, 2017. (*Id*. at p. 16.) He assigned 8% whole-person impairment (WPI) to the right knee due to loss of motion. (Id. at p. 17.) He assigned 22% WPI to the left knee due to loss of motion. (*Ibid*.)

Dr. Segil commented upon apportionment as follows:

> In the right knee I would apportion 100% to the injury of 12/30/2013. In the left knee I would apportion 50% to the injury of 12/30/2013 as a compensable consequence of favoring the right knee and 50% to the non-industrial fall on 04/03/2016.

(*Ibid*.)

As to the fall of 2016, Dr. Segil reviewed a medical history from applicant's primary treater, which stated:

> He states he was laid off on 04/01/16 and then yesterday one of his dogs ran by him and he tripped and fell on his knees. He noted increased swelling and pain in the right knee. Today, when coming up the stairwell he noted increased pain. He did go back to work for two weeks and was able to perform his work activities. He is wearing a soft patella knee brace for comfort and support. With regards to his left knee, he tripped yesterday, 04/03/16 and notes pain and grinding. He does state he had pain in his left knee before this fall but the fall has increased his pain. He also feels his pain has increased due to favoring his right knee. He is now wearing a knee brace on the left.

(*Id*. at pp. 12-13.)

Dr. Segil took a history of applicant being seen for left knee pain on February 26, 2016, prior to any trip and fall. (Defendant's Exhibit H, Report of Clive Segil, M.D., December 15, 2017, p. 2.) An MRI of the left knee was obtained on March 1, 2016, which evidenced "a broad-based posterior horn tear of the medial meniscus including posterior meniscal root" prior to any trip and fall. (*Ibid*.)

Dr. Segil later changed his opinion on apportionment, which he testified in deposition, in pertinent part, as follows:

> Q So it remains your opinion as of today that 20 percent of the right knee and 20 percent of the left knee is due to degenerative changes which either preexisted the industrial injury or which are not the result of favoring the left leg because of the industrial injury. Is that correct?

A Yes.

Q And that's a fair statement of your opinion as of today. Correct?

A Yes.

Q And that's based on reasonable medical probability?

A Yes.
Q Then there was a question about -- I don't want to -- there's a doctor who said that in April of -- let me find it here. I thought it was Dr. Karzel or something like that. The doctor said that there was a trip and fall, and he had symptoms in the left knee in April of 2016. Do you recall that?

A Yes.

Q Now, I know there's a dispute about it, but hypothetically, if the judge did find that he actually had that fall, and he actually had symptoms in his left knee because of the fall, it would remain your opinion today that a portion of the disability that you find in that left knee is due to that fall. Is that correct?

A Yes.

MR. NOLAN: That's an incomplete hypothetical.

(Defendant's Exhibit L, Deposition of Clive Segil, M.D., January 28, 2020, p. 90, line 3, through p. 91, line 5.)

Next, Dr. Segil believed that applicant's impairments should be added and not combined using the CVC, opining as follows:

> I appreciate your suggestion of synergistic: effects of combining the impairment of both knees. Based on the KITE decision, instead of using the combined values chart I would add the whole person impairment with respect to both knees as well as the additional pain impairment and Mr. Umeck would therefore have a. total of 50% whole person. impairment tor the knees.

(Defendant's Exhibit D, Report of Clive Segil, M.D., May 31, 2019, p. 2.)

Dr. Segil further testified to his opinion on CVC rebuttal as follows:

> And, Doctor, why do you believe that the applicant is entitled to the Kite decision and that he would be entitled to having the impairments of both knees

added as opposed to combined where the combined has a compressive effect on the numbers?

A. Because of the Kite decision.

Q. And what is your understanding of the Kite decision, Doctor?

A. You don't use the combined tables. You just add them.

Q. Okay. But doesn't the Kite decision only allow that in certain circumstances?

A. I don't know.

Q. Oh, okay. All right. So it's your understand -- is it your understanding of the Kite decision that you can now simply add impairments as opposed to combining them?

A. I think that's the summary of the Kite decision in my understanding, yes.

(Defendant's Exhibit K, Deposition of Clive Segil, M.D., June 6, 2019, p. 62, lines 2-20.)

Although Dr. Segil found applicant permanent and stationary in 2017, in that same report he states the following under work status: "CURRENT WORK STATUS: Mr. Umeck is currently on temporary total disability." (Defendant's Exhibit I, p. 4.)

Dr. Segil testified in 2018 as follows:

Q When you last saw him, do you know if the applicant was working?

A He was not working. He was on temporary total disability.

MS. KINGSBURY: At this time, I have no further questions.

(Defendant's Exhibit J, Deposition of Clive Segil, M.D., October 11, 2018, p. 17, lines 18-23.)

In 2019, Dr. Segil reported: "His temporary total disability status continues. See below." (Defendant's Exhibit E, p. 17.)

DISCUSSION

The WCJ shall ". . . make and file findings upon all facts involved in the controversy[.]" (Lab. Code[3], § 5313; see also, *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).)

Section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton*, *supra*, 66 Cal.Comp.Cases at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) 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(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. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) 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.)

The Appeals Board has a duty to further develop the record where there is insufficient evidence on an issue. (*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.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

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

[3] All future references are to the Labor Code unless noted.

conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

Section 4663 requires any report addressing permanent disability to address apportionment of disability. Defendant carries the burden of proof on apportionment. (§ 5705.) Apportionment of permanent disability must address causation of disability and must constitute substantial evidence. (*Escobedo*, *supra*, 70 Cal.Comp.Cases at pp. 611, 620-621.)

In a recent en banc decision, the Appeals Board clarified the process for rebutting the CVC.

> One element of the PDRS is the Combined Values Chart (CVC). The purpose of the CVC is described within the PDRS, which cites to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (2001) (AMA Guides), which is adopted and incorporated for purposes of rating permanent disability under the 2005 PDRS. (Lab. Code, §§ 4660, 4660.1; Hoch, Andrea, Schedule for Rating Permanent Disabilities, (2005), p. 1-11; AMA Guides, pp. 9-10.) In sum, impairment under the AMA Guides is designed to reflect how a disability affects a person's activities of daily living ("ADLs") (self-care, communication, physical activity, sensory function, non-specialized hand activities, travel, sex, and sleep). (AMA Guides, pp. 2-9.) CVC "values are derived from the formula A + B(1-A) = combined value of A and B, where A and B are the decimal equivalents of the impairment ratings." (AMA Guides, p. 604.)
>
> Impairments to two or more body parts are usually expected to have an overlapping effect upon the activities of daily living, so that generally, under the AMA Guides and the PDRS, the two impairments are combined to eliminate this overlap.

(*Vigil v. County of Kern*, 2024 Cal. Wrk. Comp. LEXIS 23 at *7-8, (Appeals Board en banc).)

> The Combined Values Chart (CVC) in the Permanent Disability Ratings Schedule (PDRS) may be rebutted and impairments may be added where an applicant establishes the impact of each impairment on the activities of daily living (ADLs) and that either:
>
> (a) there is no overlap between the effects on ADLs as between the body parts rated; or
>
> (b) there is overlap, but the overlap increases or amplifies the impact on the overlapping ADLs.

(*Id.* at *13.)

Here the QME has conducted no significant analysis to justify rebuttal of the CVC. The opinions contained within the medical reporting are conclusory and provide no indication for why the QME reached the conclusion that he did. As explained in *Vigil*, the QME must provide a reasoned analysis to rebut the CVC, and that analysis must constitute substantial medical evidence. Accordingly, the present award of permanent disability is not supported by substantial medical evidence and must be rescinded.

Next, the QME's opinions on apportionment are also not substantial. The QME initially apportions disability to a fall that occurred but fails to explain the basis for such apportionment, particularly when faced with an MRI indicating that the left knee had tears prior to any fall. Next, the QME modifies his apportionment opinion to generically state that 20% of the disability to each knee is due to degenerative changes. However, again the QME fails to explain anywhere in the record how and why the disability was caused by non-industrial degeneration. The apportionment opinions are conclusory and not supported on the present record.

Finally, the WCJ awarded temporary disability for a period of time beyond applicant being declared permanent and stationary by the QME in 2017. No substantial evidence supports the award of temporary disability. The fact that applicant's level of permanent disability changed following the initial finding of permanent and stationary *could indicate the possibility* that applicant sustained additional periods of temporary disability. However, this fact does not establish temporary disability status. Such a conclusion must be supported by substantial medical evidence. The QME testified that applicant was on temporary total disability in 2018, which differs from the QME's 2017 opinion that applicant was permanent and stationary, but the parties asked no follow up questions. Furthermore, the 2018 testimony was conclusory as it consisted of a single line

without any explanation. Next, in 2019, Dr. Segil reported that temporary disability continues, yet Dr. Segil is also stating within the body of the same report that applicant is permanent and stationary. The parties should have clarified these disparate opinions in deposition. In sum, the current record does not sufficiently establish the periods of temporary disability.

Accordingly, as the Decision After Reconsideration of the Appeals Board, we rescind the March 11, 2021 F&A and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Order issued on March 11, 2021, by the WCJ, is **RESCINDED**.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 6, 2025

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

BRUCE UMECK
LAW OFFICES OF RONALD J. NOLAN
MCNAMARA & DRASS

EDL/mc

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