WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LUIS CASTRO, *Applicant*

vs.

SKYLINE COMMERCIAL INTERIORS;
WAUSAU INSURANCE COMPANY, administered by
LIBERTY MUTUAL INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ8454650
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Award (F&A) of September 24, 2024, wherein the workers' compensation judge (WCJ) found in relevant part that applicant's industrial injury resulted in permanent disability of 64%, after adjustment for age and occupation, following apportionment based on the opinions of the internal medicine Qualified Medical Evaluator (QME), Suresh Mahawar, M.D.

Applicant contends that the apportionment was invalid; and alternatively, if the WCJ concluded that defendant met its burden on apportionment, the amount should have been based on the parties' stipulation that if the WCJ found apportionment, it should be 67%.[1]

We have not received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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[1] We note that we need not address the argument with respect to the stipulation because we have concluded that defendant did not meet its burden on apportionment.

We have considered the Petition for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration, rescind the F&A, and substitute a new F&A, which finds that applicant's injury caused 72% permanent disability without apportionment; and also awards applicant a life pension and defers the issue of attorney's fees thereon. We make no other substantive changes to the WCJ's decision.

FACTS

Applicant, while employed by defendant on March 3, 2011, sustained injury arising out of employment and during the course of employment (AOE/COE) to his left shoulder, psyche, and in the form of a sexual disorder; and claims to have sustained injury AOE/COE in the form of a sleep disorder and/or obstructive sleep apnea. Pursuant to a previous Findings of Fact and Award dated February 16, 2021, applicant was awarded 42% permanent disability and future medical treatment for the accepted body parts and the WCJ set a status conference to address developing the record regarding the claimed sleep disorder. In the Finding and Order of September 29, 2021, the WCJ ordered a new QME in internal medicine as the initial QME in internal medicine, Gerald Besses, M.D., retired.

The new QME in internal medicine Dr. Mahawar did not address applicant's sleep disorder in his first three reports of February 17, 2022, July 15, 2022, and August 8, 2022. (Ex. 108, Initial Exam Reported dated 2/17/22; Supplemental Report dated 7/15/22; Supplemental Report dated 8/8/22.) In Dr. Mahawar's Supplemental Medical-Legal Evaluation of December 5, 2022, he addressed applicant's sleep disorder as follows:

> COMMENTS AND CONCERNS:
> I do see that during the deposition of Dr. Gerald Besses on August 25, 2020 on page 54, he answered the question, "So, is the 29 percent WPI you provided, with that Epworth Sleepiness Scale 100 percent due to work injury or is it also apportioned to some other factor?" Dr. Besses answered, "I apportioned it to the industrial injury because I had no evidence that it was due to other factors."
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> I do agree with Dr. Besses that his medical record is very small prior to his injury. There are only a couple of reports in his medical record (June 20, 2008, May 27, 2009, June 4, 2009) prior to his injury. There is no documentation of sleep apnea in his medical record. However, it is true that obese people tend to have a high incidence of sleep apnea. Moreover, sleep apnea usually is associated with some structural abnormality of their upper airway passage

(hypopharynx). Corrective surgery for hypopharynx. is beneficial in sleep apnea in these cases.

He was treated by Dr. Benjamin Busfield for his left shoulder injury with Tramadol. Tramadol is a centrally acting non-narcotic medication. It is highly likely that his sleep apnea has worsened because of the use of his Tramadol for the pain.

Therefore, I respectfully disagree that all sleep apnea of Mr. Luis Castro is caused by his industrial injury on March 3, 2011, as his injury involved left shoulder injury while using the jackhammer. There is a lack of evidence for diagnosis of sleep apnea prior to his industrial injury on March 3, 2011. Therefore, it is my medical opinion that his sleep apnea is partly caused by his injury on March 3, 2011 and partly pre-existed prior to his injury. I will apportion his sleep apnea as 80 percent to his industrial injury of March 3, 2011, and 20 percent to his pre-existing medical condition.

IMPAIRMENT
I agree with Dr. Gerald Besses that he has 29 percent WPI for his sleep apnea per page 317 of the AMA Guides, as he falls in class 2 of Table 13-4 as his Epworth Sleepiness Scale is very high.

I hope I have addressed all of the concerns and questions. Please do not hesitate to contact my office with any further questions or concerns.

(Ex. 108, Supplemental Reports from QME, Dr. Mahawar dated 12/5/22, pp. 13-14.)[2]

In the Findings and Orders of October 23, 2023, the WCJ ordered that the record be further developed regarding the sleep disorder/ obstructive sleep apnea and that supplemental reporting from QME Dr. Mahawar, is necessary on the issues of industrial causation, apportionment, and future medical treatment.

In his deposition of February 23, 2024, Dr. Mahawar stated that he agreed with the WPI rating of 29 and that the sleep disorder was industrial. (Ex. 109, Deposition Transcript of Dr. Suresh Mahaway of 2/23/24, p. 10.) Dr. Mahawar further stated that applicant's industrial injury to his shoulder was a contributing cause of his sleep disorder but that applicant's sleep apnea also caused some of his sleep disturbance. (Ex. 109, pp. 11-16.) He also stated that it would be speculation to try to determine how much of the sleep disturbance was caused by the pain from his shoulder and the sleep apnea. (Ex. 109, p. 16.) Dr. Mahawar stated that the medical treatment for

[2] All four of QME Dr. Mahawar's reports are admitted as Exhibit 108 although they are four different documents in EAMS. All further references to Exhibit 108 are referring to Dr. Mahawar's December 5, 2022 Supplemental Report.

a sleep disorder due to pain was to take medications but in turn, those medications could also compound sleep apnea. (Ex. 109, p. 18.) The treatment for sleep apnea is mainly using a CPAP machine. (Ex. 109, pp. 18-19.)

Later in the deposition, Dr. Mahawar clarified by stating that sleep apnea itself is not industrially-related so the apportionment was 25% nonindustrial and 75% industrial. (Ex. 109, p. 35.) He stated that he was changing his opinion on apportionment that he had previously made in his report. (Ex. 109, pp. 42-43.)

Dr. Mahawar further stated that there is a correlation between sleep apnea and obesity, that an industrial injury that causes a person to be less active may impact their obesity level, and that there was no evidence that applicant had sleep apnea prior to his industrial injury. (Ex. 109, pp. 36-37.) Dr. Mahawar also noted that obesity is predominant in our society and not every obese person has sleep apnea. (Ex. 109, pp. 37-38.) Dr. Mahawar agreed that due to the timing of the industrial injury, the industrial injury contributed "to a degree of medical probability" to the development of sleep apnea. (Ex. 109, pp. 38-39.) He also noted that it was possible that applicant had undiagnosed sleep apnea prior to the sleep study in 2017. (Ex. 109, p. 41.)

Dr. Mahawar further stated in his deposition that, with respect to the WPI rating of 29, awakening from pain and sleep apnea were both causes of applicant's daytime sleepiness but that he could not separate those factors to a degree of medical probability. (Ex. 109, p. 44.) He also noted that the sleep study did not document how many times applicant woke up from pain. (Ex. 109, pp. 45-47.) Further, he was aware that the psychiatric records from Dr. Lopez noted that applicant told Dr. Lopez that his pain was interrupting or interfering with his sleep. (Ex. 109, pp. 47-48.) Dr. Mahawar agreed to the degree of medical probability that applicant's ongoing complaint of not being able to get restful sleep due to pain made sense to him. (Ex. 109, p. 48.) The findings on the Epworth Sleepiness Scale would be subjective. (Ex. 109, p. 49.)

At the hearing on June 27, 2024, the parties stipulated that in the event the court finds injury AOE/COE in the form of a sleep disorder and/or obstructive sleep apnea, if the QME's apportionment opinion is found to be legally invalid, the overall permanent disability rating would be 72% permanent disability. (6/27/24 Minutes of Hearing/ Statement of Evidence (MOH/SOE), p. 3.)

Following the hearing, the WCJ found applicant sustained industrial injury in the form of sleep disorder/ obstructive sleep apnea; the injury resulted in permanent disability of 64% after

adjusting for age and occupation and after the applicable and the legally valid apportionment based on the opinions of Dr. Mahawar; and that there was a need for further medical treatment with respect to both the obstructive sleep apnea and sleep disorder conditions. (9/24/24 F&A, Findings of Fact nos. 1-3.) The WCJ awarded the following: permanent disability of 64%, payable at the bumped up permanent disability rate of $264.50 after the first 60 days are paid at $230.00 per week, equivalent on the facts of this case, to $101,073.91, less the 15% attorney fee awarded below; an attorney fee of 15% of the permanent disability awarded payable to applicant's attorney, less credit for payment of the prior attorney fee of $8,485.77, awarded in the F&A dated February 16, 2021; and further medical treatment for the sleep disorder/obstructive sleep apnea. (9/24/24 F&A, pp. 1-2.)

DISCUSSION

I.

Former Labor Code[3] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

[3] All further statutory references are to the Labor Code unless otherwise noted.

Here, according to Events, the case was transmitted to the Appeals Board on November 25, 2024, and 60 days from the date of transmission is January 24, 2025. This decision is issued by or on January 24, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on November 25, 2024, and the case was transmitted to the Appeals Board on November 25, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 25, 2024.

II.

Next, we turn to the issue of apportionment. Section 4663 provides that "[a]pportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) A doctor who prepares a report addressing the issue of permanent disability due to a claimed industrial injury must address the issue of causation of the permanent disability. (Lab. Code, § 4663(b).) Section 4663 requires that the doctor "make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries." (Lab. Code, § 4663(c).) Pursuant to section 4663(c) and section 5705, applicant has the burden of establishing the approximate percentage of permanent disability directly caused by the industrial injury, while defendant has the burden of establishing the approximate percentage of permanent disability caused by factors other than the industrial injury.

(*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612-613 (Appeals Board en banc) (*Escobedo*).)

The report by the physician addressing the issue of apportionment must be supported by substantial evidence. (*Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 620, citing Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378–379 [35 Cal.Comp.Cases 525].)

> Thus, to be substantial evidence on the issue of 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, 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.
>
> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain *how and why* the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.

(*Escobedo*, *supra*, 70 Cal. Comp. Cases at p. 621, emphasis added.)

Here, Dr. Mahawar's medical reporting is not substantial medical evidence on the issue of apportionment. First, Dr. Mahawar admitted that his determination of how much the shoulder pain and the sleep apnea each contributed to the sleep disorder would be speculative. Dr. Mahawar stated in his December 5, 2022 QME report that he would apportion applicant's sleep apnea as 80% to his industrial injury of March 3, 2011, and 20% to his pre-existing medical condition

without indicating which pre-existing medical condition. (Ex. 108, p. 14.) However, in his deposition of February 23, 2024, Dr. Mahawar stated that applicant's industrial injury to his shoulder was a contributing cause of his sleep disorder but that applicant's sleep apnea also caused some of his sleep disturbance. (Ex. 109, pp. 11-16.) He also stated that it would be speculation to try to determine how much of the sleep disturbance was caused by the pain from his shoulder and the sleep apnea. (Ex. 109, p. 16.) Later in the deposition, he stated that "so because we don't have evidence for sleep apnea prior to his industrial injury, at the same time the sleep apnea occurs irrespective of industrial injury, I would say 75 percent apportionable to his industrial injury and 25 percent to his preexisting medical condition." (Ex. 109, p. 34.) Dr. Mahawar also testified that the sleep apnea and the pain were inextricably intertwined and could not separated (sic) the factors out to a degree of medical probability. (Ex. 109, p. 44.) A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen's Comp. Appeals Bd.*, *supra*, 4 Cal.3d at p. 169; *Place v. Workmen's Comp. Appeals Bd.*, *supra*, 3 Cal.3d at pp. 378–379.)

Further, Dr. Mahawar's deposition testimony supports the possibility that applicant's sleep apnea was due to his industrial injury. Dr. Mahawar agreed that applicant's awakening due to pain was completely industrial due to his shoulder injury. (Ex. 109, pp. 15-16, 47-48.) The only remaining issue was whether the other cause of the sleep disorder, the sleep apnea, was also due to his industrial injury. Dr. Mahawar admitted that future medical treatment for a sleep disorder that is due to pain would be pain medications and medications that aid sleep, and that pain medications could in turn cause sleep apnea because they depress a person's ability to breathe. (Ex. 109, pp. 17-18.) Dr. Mahawar agreed therefore that at least some of applicant's sleep apnea is also industrially caused due to the treatment of the pain. (Ex. 109, p. 18.)

Additionally, Dr. Mahawar also stated that applicant gained a significant amount of weight following his industrial injury and that obesity can also cause sleep apnea. (Ex. 109, pp. 37-39.) Since there was no evidence that applicant had sleep apnea prior to his industrial injury, Dr. Mahawar agreed that to a degree of medical probability, applicant's industrial injury did contribute to the development of sleep apnea. (Ex. 109, p. 39.)

Therefore, substantial evidence does not support the finding of apportionment and defendant has not met its burden of establishing the approximate percentage of permanent disability caused by factors other than the industrial injury. (*Escobedo, supra,* 70 Cal.Comp.Cases at pp. 612-613.)

Accordingly, we rescind the F&A, and substitute a new F&A, which finds that applicant's injury caused permanent disability of 72% without apportionment; and also, awards applicant a life pension and defers the issue of attorney's fees thereon. We make no other substantive changes to the WCJ's decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the September 24, 2024 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the September 24, 2024 Findings and Award is **RESCINDED** and a new Findings and Award is **SUBSTITUTED** as follows:

FINDINGS OF FACT

1. Luis Castro, while employed on March 3, 2011, as a carpenter/scrapper, occupational group 380, in San Francisco, California, by Skyline Commercial Interiors, whose workers' compensation insurance carrier was Wausau Insurance Company, administered by Liberty Mutual Insurance Company, sustained injury arising out of and occurring in the course of his employment to his left shoulder, psyche, and in the form of sexual dysfunction, and *in addition*, sustained injury in the form of a sleep disorder/obstructive sleep apnea.

2. This injury resulted in permanent disability of 72%, after adjustment for age and, with no apportionment.

3. There is a need for further medical treatment with respect to both the obstructive sleep apnea and sleep disorder conditions.

AWARD

AWARD IS MADE in favor of Luis Castro against Skyline Commercial Interiors, and Wausau Insurance Company administered by Liberty Mutual Insurance as follows:

a. Permanent disability of 72%, payable at the bumped up permanent disability rate of $264.50 after the first 60 days are paid at $230.00 per week, equal to $125,617.50, less the total amount of the 15% attorney fee awarded below, with credit for amounts previously paid, and thereafter a life pension of $92.77 per week subject to adjustment per Labor Code section 4659(c).

b. Commutation of attorney's fees from applicant's life pension are deferred to the parties to adjust with jurisdiction reserved at the trial level in the event of a dispute.

c. An attorney's fee of 15% of the permanent disability awarded payable to applicant's attorney, less credit for payment of the prior attorney fee of $8,485.77, awarded by Judge Friedman in his Findings and Award dated February 16, 2021.

d. Further medical treatment for the sleep disorder/obstructive sleep apnea, consistent with Findings 1 & 3.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 24, 2025

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

LUIS CASTRO
BOXER & GERSON LLP
LAW OFFICES OF SANTANA, VIERRA, STEVENSON, HARRIS AND HERMANSON

JMR/mc

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