WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

REGINALD EVANS, *Applicant*

vs.

SAN MATEO COUNTY TRANSIT DISTRICT, Permissibly Self-Insured, *Defendant*

Adjudication Number: ADJ13182924
San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact and Award and Order of October 8, 2024, wherein it was found that while employed on October 3, 2019 as a bus operator, applicant sustained industrial injury to the cervical spine and left shoulder causing permanent disability of 17%. In finding permanent disability of 17%, it was found that there was no basis for apportionment. Additionally, the WCJ did not allow defendant to credit an overpayment of temporary disability indemnity towards its permanent disability indemnity liability.

Defendant contends that the WCJ erred in finding that applicant's industrial injury caused 17% permanent disability, arguing that the WCJ should have applied Labor Code section 4663 or Labor Code section 4664 to find 15% permanent disability. Defendant also contends that its overpayment of temporary disability indemnity should have been credited towards its liability for permanent disability indemnity. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated in the portions of the Report quoted below, and for the additional reasons set forth below, we will deny the defendant's Petition.

Preliminarily, we note that former Labor Code 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, Labor Code 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.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code 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."

Here, according to Events, the case was transmitted to the Appeals Board on November 4, 2024, and 60 days from the date of transmission is January 3, 2025. This decision is issued by or on January 3, 2025, so we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 4, 2024, and the case was transmitted to the Appeals Board on November 4, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 4, 2024.

Turning to the merits, with regard to Labor Code section 4663 apportionment, as the WCJ writes in the Report:

> Labor Code section 4663 mandates that a doctor, when addressing permanent disability, address the percentage of permanent disability attributable to the industrial injury as well as the percentage attributable to other factors. With respect to permanent disability, the applicant holds the burden of proof by a preponderance of the evidence. (Labor Code section 3202.5.) The defendant has the burden of establishing the percentage of permanent disability caused by nonindustrial factors. (*Escobedo vs. Marshalls* (2005) 70 Cal. Comp. Cases 604, 614 (*en banc*).) In order to be considered substantial medical evidence on apportionment, the medical opinion "must set forth reasoning in support of its conclusions." (Id. at 621.)
>
> In the April 5, 2024 report, Dr. Roland apparently copied the text of the May 11, 2020 cervical spine x-ray report, and then stated that there was evidence of unspecified "prior injuries, impairment or underlying non-industrial pathology" which contributed to the cervical spine impairment, and apportioned 10% to the unspecified preexisting pathology. The only other report of Dr. Roland to discuss impairment for the cervical spine was the November 5, 2020 report. In that report, the apportionment discussion does not contain the verbatim transcript of the cervical spine x-ray report, but the analysis again merely attributing 10% of the impartment to unspecified preexisting pathology with no further explanation. (Joint Exhibit 103, page 23.) There is no discussion in either report about what precisely the pre-existing pathology was, let alone a discussion as to how it contributed to the applicant's current level of impairment. Without explaining what the pre-existing pathology was, and how and why it contributed to the current impairment, Dr. Roland's apportionment determination is not substantial evidence.
>
> Although Dr. Roland's discussion regarding apportionment for the left shoulder is a little more detailed, noting a prior 2018 left shoulder injury and detailing the diagnoses from that prior injury, he again provided no explanation for how and why the prior injury contributed to the current level of impairment. (Board Exhibit X, page 23.) Review of Dr. Roland's prior reports do not provide any additional explanation for his apportionment conclusions. Again, there is no explanation for how, absent the prior injury, applicant's level of impairment would not be as great. Therefore, the opinions of Dr. Roland on apportionment under Labor Code section 4663 are substantial evidence.

(Report at pp. 3-4.) As the WCJ noted in the Opinion on Decision, "It is not enough for Dr. Roland to acknowledge that there is a prior injury or diagnosis." (Opinion on Decision at p. 4.) Rather, as explained in the Report, the reporting physician must explain how and why factors other than the industrial injury are contributing to the injured worker's permanent disability.

With regard to Labor Code section 4664 apportionment, in order to find apportionment under Labor Code section 4664, the defendant must prove that there is overlap between the current disability and the disability that was subject to the prior award. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099 [71 Cal.Comp.Cases 1229].) According to the Court of Appeal in *Kopping*, "First, the employer must prove the existence of the prior permanent disability award. Then, having established by this proof that the permanent disability on which that award was based still exists, the employer must prove the extent of the overlap, if any, between the prior disability and the current disability. Under these circumstances, the employer is entitled to avoid liability for the claimant's current permanent disability only to the extent the employer carries its burden of proving that some or all of that disability overlaps with the prior disability and is therefore attributable to the prior industrial injury, for which the employer is not liable." (*Id.* at p. 1115.)

Here, the defendant did not introduce into evidence or request judicial notice of any prior award of permanent disability.[1] Additionally, any medical reporting that the stipulated award in the prior case was based on was not admitted into the evidentiary record. Since defendant presented no evidence at all on the Labor Code section 4664 issue, and in fact defendant did not specifically raise the issue until its Petition for Reconsideration, the WCJ properly found no Labor Code section 4664 apportionment. Although the applicant suggests in his Answer that defendant or its counsel should be "disciplined" for its belated and unsupported contention regarding section 4664 apportionment, we decline the suggestion to impose sanctions.

Finally, with regard to the issue of crediting the overpayment of temporary disability indemnity towards defendant's permanent disability indemnity, the WCJ wrote in the Report:

> Pursuant to Labor Code section 4909, A WCJ has the discretion on whether to award a credit for an overpayment of benefits. I found that defendants were not entitled to credit for a claimed overpayment of temporary disability in the amount of $5,720.14 for temporary disability paid for the period of November 5, 2020 through December 12, 2020 The parties did stipulate that the sole reason for the overpayment was the delay in the receipt of Dr. Roland's report. The period of overpayment is approximately five and half weeks. There is no evidence that the applicant caused or contributed to the overpayment. Although defendant was prejudiced by the delay by continuing to pay temporary disability benefits in this case, the applicant was also prejudiced as he did not know during

[1] We note that the Minutes of Hearing of the September 9, 2024 trial lists only the instant case in the caption (ADJ13182924).

> this period that a doctor opined that he was medically capable of returning to work during this delay period. In addition, the claimed credit is close to one third the value of the applicant's permanent disability award. When balancing the impact of granting the credit against applicant's permanent disability award against the impact on defendant, the burden was much greater on the applicant. I therefore found that the defendant was not entitled to credit for the overpayment.

In *Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827, 836-838 [45 Cal.Comp.Cases 1106], the Court of Appeal, citing *Verden* and *Cordes*, among other authorities, stated that equitable principles are frequently applied to workers' compensation matters, that equity favors allowance of a credit if the credit is small and does not cause a significant interruption of benefits, that the allowance of a credit of overpayment of one benefit against a second benefit can be disruptive and in some cases totally destructive of the purpose of the second benefit, and that the injured employee should not be prejudiced by defendant's actions when the employee received benefits in good faith with no wrong-doing on her part.

Here, the WCJ used her discretion in holding that defendant was not entitled to a credit given the specific facts of this case. We see no abuse of discretion.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings of Fact and Award and Order of October 8, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ PAUL KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 3, 2025

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

REGINALD EVANS
DURARD, McKENNA & BORG
LAUGHLIN, FALBO, LEVY & MORESI

DW/oo

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