WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RUBEN VEGA, ***Applicant***

vs.

HEAVILAND ENTERPRISES;
ZURICH NORTH AMERICA, ***Defendants***

Adjudication Numbers: ADJ10841321
San Diego District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the "Findings and Award" (F&A) issued on September 27, 2021, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant's permanent disability was 25% after apportionment.

Applicant argues that the WCJ erred in reducing the award for apportionment because the apportionment opinion of the qualified medical evaluator does not constitute substantial medical evidence.

We have received an answer from defendant.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record, as our Decision After Reconsideration we will rescind the WCJ's September 27, 2021 F&A and issue a new F&A, which awards applicant 57% permanent disability without reduction for apportionment.

FACTS

Applicant worked as a landscape laborer for Heaviland Enterprises when he sustained an admitted industrial injury to his neck, low back, and in the form of headaches on February 10, 2017. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August18, 2021, p. 3, lines 4-10.)

Applicant was seen for headaches by agreed medical evaluator Isaac Bakst, M.D., who took the following history of injury:

> He was sitting on the passenger side of a pickup truck, and the driver was making a left turn at a stoplight. A fast-driving vehicle struck the passenger side where he was sitting. By report, he struck his head and lost consciousness. He states that when he woke up, he was in the hospital, and remained there for the whole day.

(Defendant's Exhibit G, Report of Isaac Bakst, M.D. November 14, 2018, p. 1.)

Dr. Bakst assigned 5% whole-person impairment (WPI) for headaches based upon an analogy to the cranial nerve impairment under Table 13-11. (*Id*. at p. 14.)

For applicant's orthopedic injuries he was seen by qualified medical evaluator (QME) James Fait, M.D., who authored three reports in evidence and was deposed. (Defendant's Exhibits C, D, E, and F.) Dr. Fait initially assigned 5% WPI to both the cervical and lumbar spine using the Diagnosis Related Estimate (DRE) chart of the AMA Guides, assigning category II. (Defendant's Exhibit C, Report of James Fait, M.D., December 11, 2017, pp. 12-13.)

Dr. Fait opined upon apportionment as follows:

> In consideration of Labor Code 4663 and 4664 as well as the Escobedo Case I do find a basis for apportionment in this matter.
>
> With respect to the cervical spine, I note essentially unchanged appearance, at least by review of radiographic reports from a CT-scan in 2007 to an MRI in 2017. This would indicate longstanding underlying degenerative changes of the cervical spine without additional evidence of acute trauma on recent MRI. Such underlying degenerative changes certainly could represent ongoing neck pain, stiffness and radiating symptoms to the upper extremities. In my opinion 70% of the examinee's current impairment and disability with respect to the cervical spine is apportioned to preexisting or underlying degenerative changes and 30% to the industrially related injury of February 10, 2017.

> Similarly, MRI of the lumbar spine demonstrates only degenerative changes without evidence of acute disc pathology or acute soft tissue injury. Again, in my opinion, 70% of the examinee's current impairment and disability with respect to the lumbar spine is apportioned to preexisting underlying degenerative changes and 30% to the injury of February 10, 2017.
>
> Should additional medical evidence become available for review I certainly reserve the right to alter my opinion accordingly.

(*Id*. at p. 11.)

Upon reexamination, and following surgery, Dr. Fait assigned 25% WPI to the cervical per the DRE chart due to applicant undergoing a cervical fusion. (Defendant's Exhibit D, Report of James Fait, M.D., July 18, 2019, p. 8.) Following reexamination, Dr. Fait stated: "My opinions with regard to apportionment remain unchanged from those expressed in my prior report. I see no need to adjust apportionment status." (*Id*. at p. 7.)

Dr. Fait based his apportionment opinion, in part, upon the finding that applicant had a prior CT scan in 2007, which showed minimal change when compared with a 2017 MRI conducted following the industrial injury. (Defendant's Exhibit C, *supra* at p. 10.)

DISCUSSION

As explained in the Appeals Board's en banc decision in *Nunes I*:

> The California worker's compensation system requires that, "[e]mployers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not for that portion attributable to previous injuries or to nonindustrial factors. 'Apportionment is the process employed by the Board to segregate the residuals of an industrial injury from those attributable to other industrial injuries, or to nonindustrial factors, in order to fairly allocate the legal responsibility.'" (*Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal.4th 1313, 1321 [57 Cal. Rptr. 3d 644, 156 P.3d 1100, 72 Cal.Comp.Cases 565], quoting *Ashley v. Workers' Comp. Appeals Bd*. (1995) 37 Cal.App.4th 320, 326 [43 Cal.Rptr. 2d 589, 60 Cal.Comp.Cases 683].)
>
> Section 4663(c) provides, in relevant part:
>
> (c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall 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).)

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*), we explained:

> Section 4663(c) not only prescribes what determinations a reporting physician must make with respect to apportionment, it also prescribes what standards the WCAB must use in deciding apportionment; that is, both a reporting physician and the WCAB must make determinations of what percentage of the permanent disability was directly caused by the industrial injury and what percentage was caused by other factors.

(*Id*. at p. 607.)

> Accordingly, section 4663(c) authorizes and requires the reporting physician to make an apportionment determination, and further prescribes the standards the physician must use. (Lab. Code, § 4663(c); Escobedo, supra, at pp. 607, 611–612.) Apportionment must account for "other factors both before and subsequent to the industrial injury," and may include disability that formerly could not have been apportioned, including apportionment to pathology, asymptomatic prior conditions, and retroactive prophylactic work restrictions. (Ibid.) In addition, when a physician considers all appropriate factors of apportionment but nevertheless determines that it is not possible to approximate the percentages of each factor contributing to the employee's overall permanent disability to a reasonable medical probability, the physician has made the apportionment determination required under section 4663(c). (Benson v. Workers' Comp. Appeals Bd. (2009) 170 Cal. App. 4th 1535 [89 Cal. Rptr. 3d 166, 74 Cal.Comp.Cases 113, 133]; see also James v. Pacific Bell Tel. Co. (May 10, 2010, ADJ1357786) [2010 Cal. Wrk. Comp. P.D. LEXIS 188].)

(*Nunes v. State of California, Dept. of Motor Vehicles* (*Nunes I*), (2023) 88 Cal.Comp.Cases 741, 748-749 (Appeals Board en banc).)

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* at pp. 611, 620-621.) 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 conclusions." (*Id*. at 621.) Causation of disability is not to be confused with causation of injury. (*Id*. at 611.)

Dr. Fait's apportionment opinions do not constitute substantial evidence because he does not adequately address the causation of applicant's *disability*. Causation of disability requires an analysis based upon critical thinking. Applicant's disability to the neck is a cervical fusion warranting assignment of DRE-IV. In assigning apportionment, Dr. Fait opined, in pertinent part: "The examinee has now undergone cervical spine fusion, however, the range of motion of his cervical spine is not significantly changed following the cervical fusion from that measured prior to the cervical fusion, as documented in my two reports." (Defendant's Exhibit E, *supra* at p. 3.) This statement is not supported by Dr. Fait's range of motion measurements. In the initial evaluation, Dr. Fait noted that applicant provided submaximal effort on cervical range of motion measurements. (Defendant's Exhibit C, *supra* at p. 6.) Applicant's cervical range of motion, *with suboptimal effort*, was measured as follows:

Cervical Spine:

Flexion	20
Extension	35
Right Rotation	65
Left Rotation	70
Right Lateral Bending:	25
Left Lateral Bending :	30

(*Ibid*.)

Upon reevaluation Dr. Fait stated that applicant "put forth fair effort throughout the evaluation," but applicant's cervical range of motion mostly worsened. (Defendant's Exhibit D, *supra* at p. 4.) Dr. Fait found range of motion post-fusion, *with fair effort*, as follows:

Cervical Spine:

Flexion	40
Extension	20
Right Rotation	55
Left Rotation	55

Right Lateral Bend	25
Left Lateral Bend	25

(*Ibid*.)

Dr. Fait's explanation for apportionment is not based upon the facts of applicant's case.

Next, Dr. Fait initially assigned 70% non-industrial apportionment to both the lumbar spine and the cervical spine opining that applicant had sustained 5% WPI to both body parts based upon a DRE-II estimate. Then, applicant's impairment to the cervical spine increased to 25% based upon cervical fusion surgery. Applicant's impairment changed; however, Dr. Fait's apportionment analysis was simply to state that his opinion on apportionment remained unchanged. While it is possible for the same explanation of apportionment to apply to different impairments, the evaluating doctor must explain *how and why* the prior explanation applies to the changed impairment. Without a proper explanation, the doctor's opinion on apportionment does not constitute substantial medical evidence. Accordingly, defendant did not meet its burden of proof on apportionment.

Applicant's permanent disability rates as follows:

15.01.01.00 - 25 - [1.4]35 - 491H - 41 = 47%

15.03.01.00 - 5 - [1.4]7 - 491H - 10 = 12%

13.07.04.00 - 5 - [1.4]7 - 491F - 7 = 9%

CVC – 47 + 12 + 9 = 57% permanent disability

Applicant's disability rating does not require the assistance of a DEU rater in this case. (See *Blackledge v. Bank of America* (2010), 75 Cal. Comp. Cases 613, 624-625 (Appeals Board en banc).)

Accordingly, as our Decision After Reconsideration we rescind the WCJ's September 27, 2021 F&A and issue a new F&A, which awards 57% permanent disability without apportionment.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued on September 27, 2021 by the WCJ is **RESCINDED**, with the following **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Applicant, Ruben Vega, while employed on February 10, 2017, as a landscape laborer, occupational group number 491, at San Diego, California, by Heaviland Enterprises, sustained injury arising out of and in the course of employment to his low back, headaches, and neck. He claims to have sustained injury arising out of and in the course of employment to his psyche.

2. At the time of injury, the employer's workers' compensation carrier was Zurich North America.

3. At the time of injury, the employee's earnings were $460.30 per week warranting indemnity rates of $306.67 for temporary disability and $290.00 for permanent disability.

4. The employee has been adequately compensated for all periods of temporary disability claimed through August 29, 2019.

5. Defendant has not met their burden of proof to establish apportionment of permanent disability.

6. Applicant is found to have a permanent impairment of 57%

7. Defendant has failed to meet their burden of proof to take credit for temporary disability indemnity overpayment.

8. The reasonable value of attorney's services is 15% of the final permanent disability indemnity benefit, which equates to $14,235.38 to be commuted off the far end of the award as necessary.

AWARD

AWARD IS MADE in favor of RUBEN VEGA; against ZURICH NORTH AMERICA as follows:

a) Permanent partial disability of 57%, which equals $94,902.50 of benefits payable at the rate of $290.00 per week for 327.25 weeks beginning on August 30, 2019, and less attorney's fees of 15% ($14,235.38) payable to the Law Office of Matthew A. Verduzco.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 15, 2025

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

RUBEN VEGA
LAW OFFICE OF MATTHEW A. VERDUZCO
LEWIS, BRISBOIS, BISGAARD & SMITH

EDL/mc

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