WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GERMAN ANGUIANO, *Applicant*

vs.

POLARIS PROPERTY MANAGEMENT; EMPLOYERS ASSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ10737010
Marina del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to further study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Award (F&A) issued on December 28, 2021, wherein the workers' compensation administrative law judge (WCJ) found that (1) applicant, while employed by defendant on April 16, 2016,[2] sustained injury arising out of and in the course of employment (AOE/COE) to the lumbar spine, right hip, right leg, and in the form of abdominal hernia; (2) applicant did not sustain injury AOE/COE to the psyche and left leg and in the form of dental, high blood pressure, headaches, dizziness, GERD, and shortness of breath; (3) applicant's average weekly earnings at the time of injury were $847.29; (4) applicant's permanent and stationary date is November 10, 2017; (5) applicant's injury caused permanent disability of 50%, equivalent to 271.25 weeks of permanent disability indemnity, at the rate of $290 per week, in the total sum of $78,662.50, less credit to defendant for permanent disability advances; (6) applicant is entitled to an apportioned award; (7) future medical care is necessary; (8) the

[1]Commissioner Sweeney is no longer a member of the Workers' Compensation Appeals Board. Commissioner Capurro has been substituted in her place.

[2] We note that the application for adjudication and the parties' stipulation at trial states that the date of injury was April 17, 2016. We will therefore correct this clerical error in the substituted findings. (*Toccalino v. Worker's Comp. Appeals Bd*. (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145]; see also 2 Cal. Workers' Comp. Practice (Cont. Ed. Bar, March 2018 Update) Supplemental Proceedings, § 23.74, p. 23-76.)

reasonable value of the services rendered by applicant's attorney is $11,799.37; and (9) there is not a reason to develop the record relative to the disputed body parts.[3]

The WCJ awarded applicant permanent disability benefits, further medical care, and attorney's fees in accordance with these findings.

Applicant contends that the WCJ erred by finding that (1) applicant has permanent disability of 50% percent; (2) applicant's award of disability should be apportioned; and (3) applicant did not sustain injury to the psyche and left leg and in the form of dental, high blood pressure, headaches, dizziness, GERD, and shortness of breath and there is no reason to develop the record thereon.

We received an Answer.

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

We have reviewed the contents of the Petition, the Answer and the Report. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the F&A and substitute findings that (1) the issues of the date applicant became permanent and stationary, permanent disability, apportionment, and attorney fees relating to the injury to the lumbar spine, right hip, right leg, and in the form of abdominal hernia are deferred; (2) the issue of whether applicant sustained injury to the psyche and left leg and in the form of dental, high blood pressure, headaches, dizziness, GERD, and shortness of breath is deferred; and (3) applicant is entitled to develop the record relative to the disputed body parts; and otherwise affirm the F&A; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On January 31, 2017, applicant filed an application for adjudication, alleging that on April 17, 2016, he sustained injury to the back, hips, leg, foot, and head (unspecified). (Application for Adjudication, January 31, 2017, p. 9.)

[3] We note that finding number 9 states that there "is/is not" a reason to develop the record relative to the disputed body parts. (F&A, No. 9.) However, the Report states that there is not a reason to develop the record on the disputed body parts and it is that finding which the Petition challenges. (Report, pp. 5-7.) We therefore view the discrepancy as a clerical error and read finding number 9 to state that there is not a reason to develop the record.

On April 4, 2019, applicant filed an amended application for adjudication, alleging that on April 17, 2016, he sustained injury to multiple body parts, including to the head and psyche. (Application for Adjudication, April 4, 2019, p. 9.)

On January 11, 2021, applicant filed another amended application for adjudication, alleging that on April 17, 2016, he sustained injury to the head, back, hips, leg, foot, psyche, internal, and dental. (Application for Adjudication, January 11, 2021, p. 4.)

On January 28, 2021, the WCJ held a Mandatory Settlement Conference (MSC) and scheduled trial for March 8, 2021. (Minutes of Hearing, January 28, 2021.)

On May 3, 2021, the parties filed an amended pre-trial conference statement (PTCS), identifying applicant's claim of injury to "dental, psyche/stress, shortness of breath, left leg, headaches and dizziness; stomach/GERD" as an issue for trial and the WCJ continued trial until July 1, 2021. (Fully Signed PTCS, May 3, 2021, p. 2; Minutes of Hearing, May 3, 2021.)

On July 1, 2021, the matter proceeded to trial on the following issues:

1. Parts of body injured, with the employee claiming injury to dental, high blood pressure, psyche, left leg, headaches, dizziness, GERD and shortness of breath.
2. Earnings, with the employee claiming $1,039.07 per week based upon the wage statement and Labor Code Section 4453 (c) (1) and the employer claiming $847.29 per week based upon the wage statement.
3. Permanent and stationary date, with the employee claiming 2/8/2021 based on the reporting of Dr. Brian Grossman as to the orthopedic body parts. The employer claims 11/10/2017 based upon the reporting of Dr. Yuri Faulkenstein.
4. Non-industrial apportionment.
5. Attorney fees.
6. Development of the record relative to the disputed body parts.

(Minutes of Hearing (Reporter), July 1, 2021, pp. 2:24-3:8.)

The parties stipulated that while employed as a maintenance worker by defendant on April 17, 2016, applicant sustained injury to the lumbar spine, right hip, right leg, and abdominal hernia. (*Id*., p. 2:4-7)

The WCJ admitted into evidence medical reporting and deposition testimony by panel qualified medical evaluator (PQME) Yuri Falkinstein, M.D., including reports dated November 10, 2017, and October 18, 2019. (Jt. Ex. AA, PQME Report of Yuri Falkinstein, M.D., November 10, 2017; Jt. Ex. BB, PQME Report of Yuri Falkinstein, M.D., October 18, 2019.)

Dr. Falkinstein's November 10, 2017 report states:

DIAGNOSES

1. MRI OF THE LUMBAR SPINE DATED 06/28/16 REVEALED AT L5-SI, 3MM GRADE 1 ANTEROLISTHESIS. CHRONIC UNILATERAL LEFT-SIDED PARS INTERARTICULARIS DEFECT NOTED WITHOUT EDEMA IN POSTERIOR ELEMENTS. THE RIGHT PARS WAS THIN IN CALIBER BUT APPEARED INTACT. MILD BULGING OF UNCOVERED DISC WITH MODERATE FACET HYPERTROPHY. VERY MILD FORAMINAL NARROWING.
2. MRI OF THE PELVIS DATED 08/01/16 REVEALED SEVERE JOINT SPACE LOSS AND COMPLETE CARTILAGE DENUDATION WITH ASSOCIATED SUBCHONDRAL MARROW EDEMA/CYST FORMATION AND MILD MARGINAL OSTEOPHYTOSIS PARTIALLY VISUALIZED IN RIGHT HIP. MILD LEFT LATERAL PELVIC TILT AND MILD GENERALIZED MUSCLE ATROPHY IN RIGHT HEMIPELVIS AND HIP WERE VISUALIZED, WHICH COULD BE RELATED TO RIGHT HIP OSTEOARTHRITIS. CHRONIC LOW-GRADE PARTIAL-THICKNESS TEAR OF DISTAL RIGHT GLUTEUS MINIMUS TENDON. MILDOSTEOARTHRITIS CHANGES WERE NOTED IN PUBIC SYMPHYSIS WITH MINIMAL SUBCHONDRAL MARROW EDEMA VISUALIZED IN LEFT PARASYMPHYSEAL REGION.
3. LUMBAR STRAIN
4. HISTORY OF POSSIBLE CONGENITAL PARS DEFECT WITH MRI SHOWING NO ACUTE EDEMA IN THE PARS
5. RIGHT HIP SEVERE DEGENERATIVE JOINT DISEASE
6. X-RAY OF THE LUMBAR SPINE DATED 11/10/17 REVEALED 3 MM ANTEROLISTHESIS WITH NO TRANSLATION WITH FLEXION/EXTENSION AND REMAINS FIXED AT 3 MM.
7. X-RAY OF THE RIGHT HIP DATED 11/10/17 REVEALED 1 MM JOINT SPACE.

…

PERMANENT AND STATIONARY STATUS:

MAXIMUM MEDICAL IMPROVEMENT

Body Part	MMI Date
Lumbar Spine	November 10, 2017
Right hip	November 10, 2017

. . .

It is my opinion that the patient's lumbar spine and right hip are well stabilized and not likely to change substantially within the next year without medical treatment. Therefore, for all intents and purposes, he can be considered as having reached maximal medical improvement (MMI) and is permanent and stationary as of today's evaluation of November 10, 2017, I realize over time there may be some changes to his overall state; however, further significant recovery or deterioration is not anticipated.

. . .

WHOLE PERSON IMPAIRMENT RATING:

BODY PART	WPI	METHOD	TABLE/FIGURE	PAGE
Lumbar Spine	8%	DRE II	15-3	384
Right hip	2%	ROM	17-9	537
	10%	Arthritis	17-31	544

…
LUMBAR SPINE:

Based on available and significant information provided, the patient's lumbar spine condition would fall under the criteria of DRE Lumbar Category II (5% - 8%) Impairment of the Whole Person, on Table 15-3, page 384 of the AMA Guides, 5th Edition. . . .

His MRI does not reveal any significant nerve compression or stenosis. The pars defect does not show any acute edema to indicate an acute fracture. In addition, flexion/extension x-rays today show no obvious translation. There is 3 mm of anterolisthesis with no translation with flexion/extension and remains fixed at 3mm. Therefore, he qualifies for 8% **whole person impairment** under DRE category

RIGHT HIP:

The above rating was based on 90° of flexion. Range of motion measurements utilizing Table 17-9 on page 537 of the AMA Guides, 5th Edition, assigns **a 2% WPI.**

However, he would also qualify for impairment under table 17-31 page 544 of the AMA guidelines. For his 1 mm joint space in the right hip, he would qualify for **10% whole person impairment.**

With the **impairment from arthritis providing a higher rating,** and being more representative of the patient's actual of the degree of impairment, this will be referenced.

ALMARAZ- GUZMAN II ANALYSIS

There is **no indication for Almaraz-Guzman II application** at this time as the conventional use of the AMA Guides, 5th Edition has adequately reflected the patient's actual level of impairment.

PAIN ASSESSMENT
In this particular case, it would appear that the pain-related impairment has increased the burden of the patient's condition *based on how the **right hip residual impairment** impacted his ability to perform Activities of Daily Living,* thereby **increasing the computed percentage by 2%.**

APPORTIONMENT:

APPORTIONMENT OF PERMANENT DISABILITY

Body Part	Specific: April 17, 2016	Non-Industrial
Lumbar Spine	75%	25%
Right Hip	25%	75%

LUMBAR SPINE; RIGHT HIP:

Following the **Escobedo** decision, there is substantial medical evidence with reasonable medical probability to support apportionment of the **lumbar spine and right hip impairment** to underlying pathology. The previously discussed structural studies of the lumbar spine revealed findings of nonindustrial degenerative changes and pre-existing pars defect. Meanwhile, the right hip MRI and radiographic studies both revealed evidence of age associated degenerative changes. These factors must be reasonably apportioned being secondary to nonindustrial causes.
…

With reasonable degree of medical probability and based on the above evidence based medical literature, I would apportion **75%** of the **lumbar spine** permanent impairment to the specific industrial injury of **April 17, 2016; and 25%** to the combined influence of **degenerative changes and pre-existing pars defect.** With regard to the **right hip, 25%** of the permanent impairment would be attributed to the injury of **April 17, 2016;** and **75%** to his findings of severe **osteoarthritis.**

(Jt. Ex. AA, PQME Report of Yuri Falkinstein, M.D., November 10, 2017, pp. 26-27, 34-37, 39.)

On October 18, 2019, applicant was reevaluated by Dr. Falkinstein, who noted that applicant had continued to receive medical treatment following his last examination, including physical therapy, an MRI and CT scan of the low back, as well as a right total hip replacement surgery on February 14, 2019, after which he received additional treatment.[4]

Dr. Falkinstein's October 18, 2019 report states as follows:

DIAGNOSES

1. MRI OF THE LUMBAR SPINE DATED 04/03/18 REVEALED LOSS OF INTERVERTEBRAL DISC HEIGHT AND DISC DESICCATION CHANGES SEEN AT L5-S 1 LEVEL WITH STRAIGHTENING OF

[4] Dr. Falkinstein also summarized a number of medical reports and records, in which it is noted that the date of the right total hip arthroplasty was actually February 12, 2019.

NORMAL LUMBAR SPINE LORDOSIS. L5-S1 LEVEL: 2.6 MM BROAD-BASED DISC PROTRUSION SEEN IMPRESSING UPON ANTERIOR PORTION OF THE THECAL SAC WITH MILD BILATERAL NEURAL FORAMINAL STENOSIS. NO EXTRUSION OR SEQUESTRATION OF THE DISC MATERIAL SEEN.

2. CT OF THE LUMBAR SPINE DATED 05/17/l 8 REVEALED AT L5-S1 THERE WAS 6 MM ANTEROLISTHESIS OF LS WITH RESPECT S1. THERE WAS CHRONIC LEFT-SIDED SPONDYLOLYSIS WHICH WAS PRESENT ON PREVIOUS EXAM ALTHOUGH INCOMPLETELY. THERE WAS A LEFT-SIDED SPINA BIFIDA OCCULTA, WHICH PRESENT. THERE WAS NO CANAL OR LATERAL RECESS STENOSIS. SLIGHT DISC BULGE, ANTEROLISTHESIS, AND FACET HYPERTROPHY RESULTS IN MILD, TO MILD TO MODERATE RIGHT FORAMINAL STENOSIS.
3. RIGHT HIP OPERATIVE REPORT DATED 02/12/19. PROCEDURE: RIGHT TOTAL HIP ARTHROPLASTY.
4. HISTORY OF RIGHT HIP ARTHRITIS AND INJURY
5. LUMBAR STRAIN
6. LUMBAR SPONDYLOLISTHESIS AND INSTABILITY

. . .

At this time additional medical records were submitted for review covering the period of June 22, 2000 through April 19, 2019, as well as the transcript of my own deposition dated June 25, 2018.

…

DISABILITY:

Mr. Anguiano was deemed MMI on **November 10, 2017,** and he would have remained MMI as of said date until the right total hip replacement surgery on February 12, 2019, when he would have reasonably been TTD.

…

WHOLE PERSON IMPAIRMENT RATING:

…

LUMBAR SPINE:

Mr. Anguiano's CT scan showed 6 mm of translation, which is equivalent to DRE IV Category for dynamic instability. His impairment rating will be modified to reflect 22 % WPI secondary to instability and 6 mm of spondylolisthesis.

. . .

RIGHT HIP:

Mr. Anguiano underwent right total hip replacement. Using **Table 17-34** Rating Hip Replacement Results on page 548 of the AMA Guides 5th Edition, his impairment was measured based on the following factors:

Pain - 40 points (slight); **Function: Limp - 11** points (none); **Supportive device** - 11 points (none); **Distance walked** - 5 points (3-5 blocks).

Activities: Stairs climbing- 4 points (normal); **Putting on shoes and socks** - 4 points (with ease);
Sitting - 4 points (any chair); **Public transportation** - 1 point (able to use).

Deformity - 5 points

Range of Motion: 5 points

Total of **90 points.**

Using **Table 17-33** Impairment Estimates for Certain Lower Extremity Impairments on page 546-547 of the AMA Guides 5th Edition, Mr. McCown's right total hip replacement's **90 points** would be interpreted as **good result** (85-100 points) with an equivalent **Whole Person Impairment** of **15%.**
…
APPORTIONMENT:
. . .
LUMBAR SPINE:

Opinion on the issue of apportionment in terms of the lumbar spine will remain unchanged. **75%** of the **lumbar spine** permanent impairment was attributed to the specific industrial injury of **April 17, 2016**; and **25%** to the combined influence of **degenerative changes and pre-existing pars defect.**

RIGHT HIP:

Upon further questioning of the patient, he described having no significant pain or discomfort prior to the specific injury. He was asymptomatic prior to the work incident of April 17, 2016. However, with the ·presence of the significant existing arthritis the previously assigned apportionment will be modified to reflect the same apportionment as lumbar spine with **75% industrial** and **25% to non-industrial degenerative changes.**

(Jt. Ex. BB, PQME Report of Yuri Falkinstein, M.D., October 18, 2019, pp. 44- 47, 49.)

The WCJ also admitted the primary treating physician (PTP) Report of Brian Grossman, M.D., dated December 21, 2020, into evidence. (Ex. 23, Report of Brian Grossman, M.D., December 21, 2020.)

Dr. Grossman's December 21, 2020 report states:

TEST RESULTS

10/15/20, Advanced Imaging, MRI Lumbar Spine: There is desiccation of the L5-S1 disc. There is 4 mm of anterolisthesis. There is mild to moderate bilateral

foraminal stenosis. There is a 1 to 2 mm disc bulge at L4-5 with mild bilateral facet enlargement. .

3/17/18, Santa Clarita Imaging, CT Lumbar Spine: There is a left L5 pars fracture. There is moderate bilateral facet arthrosis. There is moderate right facet arthrosis at L4-5 where there is also facet tropism. There is spinal bifida occulta of LS.

3/23/2020, SCOI, Radiographs Lumbar Spine: There are 5 lumbar vertebrae. There is normal lumbar lordosis. Coronal alignment is within normal limits. Vertebral body heights are within normal limits. There is mild loss of disc height at L5-S1. Anterior osteophytes are noted at L5-S1.There is grade I spondylolisthesis at L5-S1 of 1 cm.

Radiographic impression: Grade I spondylolisthesis L5-S1

(Ex. 23, Report of Brian Grossman, M.D., December 21, 2020, p. 6.)

In the Opinion on Decision, the WCJ states:

PERMANENT DISABILITY & APPORTIONMENT

The 11/10/2017 (Exhibit AA) and 10/18/2019 (Exhibit BB) medical reports of PQME Yuri Falkenstein M.D. are found to be persuasive and substantial medical evidence as to Permanent Disability and Apportionment of Permanent Disability.

Based on the opinions of Dr. Yuri Falkenstein, as well as the stipulated permanent disability rating strings the and the combined values provided by the Disability Evaluation Unit the Applicant is entitled to Permanent Disability as follows:

Lumbar Spine: 75 (15.03.01.00-22-[1.4]-31-380H-37) 29%
Right Hip: 75 (17.03.01.00-20-[1.4]-28-380I-36) 29%

COMBINE: 29 C 29 = 50 FINAL PD

50% percent permanent disability is equivalent to 271.25 weeks of permanent disability indemnity, at the rate of $290 per week, in the total sum of $78,662.50 less credit to defendant for permanent disability advances.

(Opinion on Decision, p. 2.)

In the Report, the WCJ states:

The claim of injury his lumbar spine, right hip, right leg and abdominal hernia was accepted by the carrier. The applicant began treatment on 04/27/2016 at US Healthworks (Exhibit 5). Further medical care was provided by numerous physicians.
. . .
An Orthopedic Panel Qualified Medical Examiner (PQME) Dr. Yuri Falkinstein was obtained and this PQME issued his first report dated 11/07/2017 (Exhibit AA).

. . .

Dr. Falkinstein issued additional reports dated 10/18/2019 (Exhibit BB), 09/24/2020 (Exhibit CC) and was also deposed by the parties on 06/25/18 (Exhibit DD) and 07/27/2020 (Exhibit EE).

. . .

The trial went forward and on 12/26/2021 and the Pre-Trial Conference Statement (PTCS) and the scope of the disputed body parts was updated to injury to dental, high blood pressure, psyche, left leg, headache, dizziness, GERD and shortness of breath.

. . .

The Applicant testified that he had been treating for five years with his family physician Dr. Mungcal for high blood pressure, anxiety and depression and sexual dysfunction. The Applicant also testified that his dental problems began shortly after he last worked for Polaris Property Management (in 2016) and he had been treated by two dentists.

. . .

Moreover, the applicant testified that he had advised all of his doctors about all of the alleged body parts, including claims of psychiatric and dental injury. He specifically stated that he told Dr. Brian Grossman, Dr. Falkinstein, Dr. Masserman, Dr. Hernandez as well as Dr. Barcohana.

. . .

So, while the applicant filed the 01/07/2021 Amended Application for Adjudication within 5 years of the date of injury, the conditions listed on the amended Application had been in existence for years and the applicant had allegedly been treating for these conditions. Applicant failed to offer evidence of this treatment at the time of trial and failed to demonstrate any diligent efforts to perform discovery regarding these allegedly injured body parts.

. . .

Petitioner has shown no legitimate reason why discovery was not done regarding the disputed body parts despite longstanding knowledge of these issues and ample opportunity to perform discovery that would give rise to an order to develop the record . . .

. . .

Future medical was awarded on all accepted body parts.

. . .

The Applicant did not meet the burden of proof of industrial injury to the disputed body parts and failed to show any diligence in asserting his rights and claims. When the burden of proof rests with a party, it is inappropriate to order development of the record when that party fails to meet that burden of proof.

(Report, pp. 2-7.)

DISCUSSION

Applicant first contends that the WCJ erred by finding that applicant has permanent disability of 50%. Specifically, applicant argues that PQME Dr. Falkinstein calculated permanent

disability without reviewing diagnostic studies of the lumbar spine made after April 2019, and, therefore, his reporting does not constitute substantial medical evidence.

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d);[5] *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].) 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." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

Here, PQME Dr. Falkinstein's initial diagnosis of the lumbar spine included findings of 3 mm grade 1 anterolisthesis chronic with the right pars appearing intact. (Jt. Ex. AA, PQME Report of Yuri Falkinstein, M.D., November 10, 2017, pp. 26-27.) With this diagnosis, Dr. Falkinstein reported that he did not anticipate any further deterioration of the lumbar spine and rated permanent disability of that body part at 8%. (*Id*., pp. 34-35.)

Approximately one year later, Dr. Falkinstein reviewed a new MRI and a new CT scan and altered his lumbar spine diagnosis to include findings of loss of intervertebral disc height and disc desiccation at L5-S1 level, 6 mm anterolisthesis of L5 with respect to S1, and spondylolisthesis and instability. (Jt. Ex. BB, PQME Report of Yuri Falkinstein, M.D., October 18, 2019, pp. 44-45, 47.) With this altered diagnosis, he rated permanent disability at 22%. (*Id*., pp. 47, 49.)

Dr. Falkinstein's reporting on the lumbar spine from November 2017 through October 2019 reveals that his opinions were subject to change based upon newly acquired diagnostic information. Since Dr. Falkinstein did not review diagnostic studies of the lumbar spine made on March 3, 2020 and October 15, 2020, however, it is unclear whether his reporting remains based upon germane facts and adequate medical history.

[5] Unless otherwise stated, all further statutory references are to the Labor Code.

Furthermore, while Dr. Falkinstein opined in his subsequent medical reporting that the lumbar disability has increased, he found that the lumbar apportionment was unchanged, and attributed 75% to the April 17, 2016 injury and 25% to the "combined" influence of degenerative changes and pre-existing pars defect. As for the right hip, the permanent disability and apportionment determination were both amended in the supplemental medical reporting, and Dr. Falkinstein amended the apportionment assigned to the right hip to "reflect the same apportionment" as the lumbar spine, with 75% industrial and 25% to non-industrial degenerative changes. (*Id.,* p. 49.)

The Appeals Board has the discretionary authority to order development of the record when the medical record is not substantial evidence or to fully adjudicate the issues consistent with due process. (§§ 5701, 5906; see *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the [Appeals] Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the [Appeals] Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie*, *supra*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Id*.)

Because Dr. Falkinstein's reporting to date is not informed by the latest diagnostic studies of the lumbar spine, we are persuaded that the record requires further development regarding permanent disability of that body part.

We further note that supplementation of the record on permanent disability of the lumbar spine should be from Dr. Falkinstein per *McDuffie,* and that this supplementation should be informed by review of all pertinent medical records, including but not limited to the diagnostic studies of March 3, 2020 and October 15, 2020.

We also recognize that the WCJ found that applicant has permanent disability of 50% based upon Dr. Falkinstein's ratings not only for the lumbar spine but the right hip, with apportionment

as found in Dr. Falkinstein's latest reporting as to disability. (Opinion on Decision, p. 2.) Since we will explain below that supplementation of the record is also required on apportionment of the right hip, we conclude that the record requires development as to the issues of permanent disability as well as apportionment of the lumbar spine and right hip.

Accordingly, we will substitute a finding that defers the issues of permanent disability of the lumbar spine and right hip, apportionment, and, as appropriate, attorney's fees.

We now address applicant's contention that the WCJ erred by finding that his award is apportioned. Specifically, applicant argues that his preexisting osteoarthritis of the right hip cannot support apportionment because there is no evidence that he would have required hip replacement surgery in the absence of industrial injury.

In *Escobedo* the Appeals Board held that (1) section 4663 requires the reporting physician to make an apportionment determination; (2) apportionment to other factors allows apportionment to causation, including pathology, prior conditions, and retroactive work restrictions; (3) applicant holds the initial burden to prove industrial injury and also has the added burden of establishing the approximate percentage of permanent disability directly related to the industrial injury; (4) defendant has the burden of establishing the approximate permanent disability caused by other factors; and (5) a medical report addressing apportionment may not be relied upon unless it constitutes substantial evidence. (*Escobedo*, *supra*.)

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. Furthermore, if a physician opines that a percentage of disability is caused by a degenerative disease, the physician must explain the nature of the disease and how and why it is causing disability at the time of the evaluation. (*Id*.)

Here, PQME Dr. Falkinstein apportioned 25% of applicant's permanent disability of the right hip to preexisting osteoarthritis but did not explain its nature and how and why it caused the permanent disability he attributed to it, other than to state it should reflect the same apportionment of the lumbar spine as 75% industrial and 25% to non-industrial degenerative changes. (Jt. Ex. BB, PQME Report of Yuri Falkinstein, M.D., October 18, 2019, p. 49.)

It follows that the record requires development on the issue of apportionment of the right hip. Further, insofar as we find that the record requires further development as to the issue of permanent disability as to the lumbar spine and right hip, we will accordingly, substitute a finding that defers that issue, as well as the issue of apportionment of the lumbar spine with respect to parsing out each factor of non-industrial causation found, insofar as Dr. Falkinstein "combined" the 25% non-industrial disability of the lumbar spine to both degenerative changes and pre-existing pars defect without further explanation.

Finally, given the determination that the record should be further developed by way of supplemental reporting from Dr. Falkinstein as to the issues of permanent disability and apportionment, we also defer the determination of the permanent and stationary date, given Dr. Falkinstein's finding that applicant was again TTD post right total hip replacement.

We now turn to applicant's contention that the WCJ erred by finding that applicant did not sustain injury to the psyche and left leg and in the form of dental, high blood pressure, headaches, dizziness, GERD, and shortness of breath and there is no reason to develop the record thereon. Specifically, applicant argues that the WCJ failed to find that the record requires development as to the disputed body parts in violation of the right to due process.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd*. (2000) 82 Cal. App. 4th 151, 157–158 [65 Cal.Comp.Cases 805].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd*. (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312].) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal. App. 4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker*, *supra*, at pp. 157–158 citing *Kaiser Co. v. Industrial Acci. Com.* (*Baskin*) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd*. (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

It is the policy of the law to favor, whenever possible, a hearing on the merits. (*Fox v. Workers' Comp. Appeals Bd*. (1992) 4 Cal.App. 4th 1196, 1205 [57 Cal.Comp.Cases 149]; see also *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478 ("when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default").)

This is particularly true in workers' compensation cases, where there is a constitutional mandate "to accomplish substantial justice in all cases." (Cal. Const., art. XIV, § 4.)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) The WCJ and the Appeals Board have 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.) Furthermore, decisions of the Appeals Board must be supported by substantial evidence. (§§ 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].) And any determination as to the issue of injury AOE/COE must be based upon medical evidence. (See *Insurance Company of North America v. Workers' Comp. Appeals Bd*. (*Kemp*) (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913]; *Peter Kiewit Sons v. Industrial Acc. Com*. (1965) 234 Cal.App.2d 831, 838–839 [30 Cal.Comp.Cases 188]; see also H*egglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Here, applicant filed an amended application for adjudication alleging injury to the head, back, hips, leg, foot, psyche, internal, and dental on January 11, 2021. (Application for Adjudication, January 11, 2021, p. 4.) Shortly thereafter, on January 28, 2021, the WCJ held a Mandatory Settlement Conference (MSC) and scheduled trial for March 8, 2021. (Minutes of Hearing, January 28, 2021.) On May 3, 2021, the parties framed the issue of injury to "dental, psyche/stress, shortness of breath, left leg, headaches and dizziness; stomach/GERD" for trial, and the matter subsequently proceeded to trial on that issue and the issue of whether the record should be further developed as to those body parts. (Fully Signed PTCS, May 3, 2021, p. 2; Minutes of Hearing (Reporter), July 1, 2021, pp. 2:24-3:8.)

In this regard, the WCJ found that applicant did not sustain injury to the head, back, hips, leg, foot, psyche, internal, and dental because applicant had not timely obtained and presented evidence for trial. (See Report, pp. 4-5.) This finding was in essence a finding that the medical

record was incomplete; and, as we have explained, the WCJ could have ordered development of the record on that basis to enable full adjudication of the issue on the merits in a manner consistent with due process. (*McDuffie*, *supra*, at p. 241.) Instead, the WCJ found that development of the record would be "inappropriate" based upon applicant's lay testimony that he had received treatment for the injury to the disputed body parts for years preceding trial. (Report, pp. 5, 7.) Based upon the foregoing authorities, we conclude that this was error.

Accordingly, we will substitute findings that (1) the issue of whether applicant sustained injury to the head, back, hips, leg, foot, psyche, internal, and dental is deferred; and (2) applicant is entitled to develop the record as to these disputed body parts. In doing so, we recommend that the parties obtain medical reporting from the treating physicians or an agreed or qualified medical evaluator so that the issue of injury to these body parts may be properly framed for trial. (See, e.g. § 4062.3(l) prohibiting parties from filing a DOR on a disputed medical issue "unless there has first been an evaluation by the treating physician or an agreed or qualified medical evaluator".)

Accordingly, as our Decision After Reconsideration, we will rescind the F&A and substitute findings that (1) the issues of the date applicant became permanent and stationary, permanent disability, apportionment, and attorney fees relating to the injury to the lumbar spine, right hip, right leg, and in the form of abdominal hernia are deferred; (2) the issue of whether applicant sustained injury to his psyche and left leg and in the form of dental, high blood pressure, headaches, dizziness, GERD, and shortness of breath is deferred; and (3) applicant is entitled to develop the record relative to the disputed body parts; and otherwise affirm the F&A; and we will return the matter to the trial level for further proceedings consistent with this decision.

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 December 28, 2021 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. German Anguiano, born [], while employed at Sherman Oaks, California by Polaris Property Management, sustained injury to the lumbar spine, right hip, right leg, and in the form of abdominal hernia arising out of and in the course of employment on April 17, 2016.

2. The issue of whether applicant sustained injury arising out of and in the course of employment to his psyche and left leg and in the form of dental, high blood pressure, headaches, dizziness, GERD, and shortness of breath is deferred.

3. Average weekly earnings at the time of injury were $847.29.

4. The issue of the date applicant's condition became permanent and stationary with respect to finding number 1 is deferred.

5. The issue of permanent disability with respect to finding number 1 is deferred.

6 The issue of apportionment with respect to finding number 1 is deferred.

7. Applicant is entitled to future medical care with respect to finding number 1.

8. The issue of attorney fees with respect to finding number 1 is deferred.

9. Applicant is entitled to is develop the record relative to his claim of injury arising out of and in the course of employment to his psyche and left leg and in the form of dental, high blood pressure, headaches, dizziness, GERD, and shortness of breath.

AWARD

AWARD IS MADE IN FAVOR OF **GERMAN ANGUIANO** against **EMPLOYERS ASSURANCE COMPANY** of:

a. Further medical care as set out in finding number 7.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 14, 2026

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

GERMAN ANGUIANO
LAW OFFICES OF SOLOV & TEITELL
TOBIN LUCKS

SRO/kl

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