WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GUADALUPE CASTILLO, *Applicant*

vs.

ALAMEDA COUNTY FAIR, PSI, adjusted by CALIFORNIA FAIR SERVICES AUTHORITY, *Defendants*

Adjudication Numbers: ADJ10925935; ADJ10925933
Sacramento District Office

OPINION AND DECISION AFTER RECONSIDERATION

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

Applicant and defendant both seek reconsideration of the Findings and Award (F&A) issued on September 12, 2022, wherein the workers' compensation administrative law judge (WCJ) found in ADJ10925935 that (1) applicant sustained an industrial injury to her right shoulder on May 8, 2015; (2) applicant's occupational group number is 340; (3) applicant did not sustain any permanent disability; and (4) applicant is entitled to future medical care. In ADJ10925933, the WCJ found that (1) applicant sustained industrial injury to her lumbar spine on September 3, 2008; (2) applicant's occupational group number is 340; (3) applicant sustained 25% permanent disability; (4) there is no legal apportionment; (5) applicant is entitled to future medical care; and (6) applicant's attorney is entitled to a fee of 15% of the awarded permanent disability.

The WCJ awarded applicant future medical care and permanent disability benefits in accordance with these findings.

Applicant contends in ADJ10925935 that the WCJ erroneously found that she did not sustain permanent disability.

Defendant contends in ADJ10925933 that the WCJ erroneously found that applicant sustained permanent disability of 25%.

We received an Answer from defendant.

We received a Report and Recommendation on Petitions for Reconsideration (Report) from the WCJ recommending that applicant's Petition for Reconsideration be denied and that defendant's Petition for Reconsideration be granted and applicant awarded permanent disability of 20%.

We have reviewed the contents of the Petitions, 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 affirm the F&A, except that we will amend the findings in ADJ10925935 to defer the issue of permanent disability and the findings and award in ADJ10925933 to find that applicant sustained 20% permanent disability; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On September 8, 2021, both cases filed by applicant proceeded to trial on the following issues:

1. Permanent disability;
2. Apportionment;
3. Need for further medical treatment;
4. Attorney fees;
5. Whether or not Dr. Garland's report is substantial medical evidence.

(Minutes of Hearing (Reporter), September 8, 2021, p. 3:4-12.)

The parties stipulated that while employed by defendant as an events operator on September 3, 2008 (ADJ10925933) and May 8, 2015 (ADJ10925935), applicant sustained injury arising out of and in the course of employment to the lumbar spine (ADJ10925933) and right shoulder (ADJ10925935). (*Id.*, p. 2:15-20.)

The WCJ admitted into evidence the medical reporting of applicant's treating physician, Richard Shinaman, M.D., as well as several medical reports and the deposition testimony from the Agreed Medical Evaluator (AME), Glynn Garland, M.D. Applicant testified, and the matter stood submitted for decision.

On October 25, 2021, the WCJ found that applicant sustained injury to her lumbar spine on September 3, 2008 (ADJ10925933) and her right shoulder on May 8, 2015 (ADJ10925935); and that Dr. Garland's reporting is not substantial medical evidence. (Findings and Order, October 25, 2021.) The WCJ ordered that the parties obtain supplemental reporting from Dr. Garland. (*Id*.)

On August 29, 2022, the matter returned to the trial calendar. (Minutes of Hearing, August 29, 2022, pp. 1-2.)

The WCJ admitted into evidence two supplemental reports from Dr. Garland, dated November 19, 2021 and January 21, 2022, as well as a report by David Bell, M.D. The report from Dr. Garland dated January 21, 2022 states:

> [Y]ou asked me to confirm a statement made in my supplemental report that the applicant did not have impairment in her right shoulder.
>
> The reevaluation on March 20, 2019 was reconsidered and it states that the right shoulder upper extremity did not show atrophy above or below the elbow and no there was no ratable impairment in range of motion. There was however 8/10 pain with activities of forceful pushing, pulling using the hands for work over shoulder height etc. The applicant had reached maximum medical improvement at that time. With that in mind, a pain rating of 3% WPI is justified since she met the 3 criteria described on page 572 in the 5th Edition of the AMA Guidelines. These are my reasons for this change of my opinion regarding her right shoulder and, in my opinion, she does qualify for a 3% WPI impairment rating in addition to what I have given before this report.
>
> (Ex. J, QME Supplemental Report of Dr. Garland, January 21, 2022, p. 3[1].)

With respect to Dr. Garland's medical findings, in her Report, the WCJ states:

> ADJ10925935
> . . .
> Based upon Dr. Garland's reporting, the Court found that applicant did not sustain any permanent disability to her right shoulder.
> . . .
> Dr. Garland first evaluated applicant on September 20, 2017. (Exhibit A) He reviewed numerous medical records from 2008 through 2017. He opined that applicant was not yet permanent and stationary. He reevaluated applicant on July 25, 2018, finding applicant to be permanent and stationary. (Exhibit B)
> . . .
> Applicant subsequently underwent right shoulder surgery in September 2018. Dr. Garland re-evaluated applicant on March 20, 2019. (Exhibit D) He states on page 3 of the report that applicant was permanent and stationary on January 22, 2019 for the right shoulder. However on page 9, Dr. Garland contradicts himself and states that applicant has not reached maximum medical improvement for the right shoulder and thus does not assign an impairment rating.
>
> Dr. Garland was deposed on May 13, 2020. (Exhibit F) He appears to confirm the

[1] While the supplemental reports of Dr. Garland are listed as a qualified medical reports (QME), both parties, in their pleadings, state that Dr. Garland served as an AME in this matter.

January 22, 2019 permanent and stationary date. He calculates a zero percent impairment rating based upon the March 20, 2019 range of motion measurements. Thereafter on December 26, 2020, Dr. Garland reports that applicant's permanent and stationary date would be six months post-surgery which equated to March 18, 2019. (Exhibit H) The Court ordered the parties to develop the record regarding applicant's permanent and stationary date for the right shoulder as it was unclear what significance the January 22, 2019 date played in the case.(It was later learned that this was the date that applicant was found to be MMI by the PTP. (Exhibit K). In addition, the Court wanted to ensure that the range of motion measurements taken on March 20, 2019 were subsequent to the permanent and stationary status. The Court needed clarification that the measurements were taken at a time that applicant was deemed permanent and stationary. The Court made no specific findings regarding applicant's permanent and stationary date as the parties did not put it at issue for trial.

After obtaining supplemental reporting from Dr. Garland, the parties returned the issues for trial. Applicant attorney objected stating that Dr. Garland's reporting was not substantial medical evidence. Dr. Garland issued a report dated January 21, 2022. (Exhibit J) In this report he refers the reader to his December 26, 2020 report for the permanent and stationary date. (This report puts the date at six months post shoulder surgery; March 18, 2019 [fn. 1]). (Exhibit H) Thus, the court was able to confirm that applicant's range of motion measurements were valid in the March 19, 2019 report. According to the March 19, 2019 report, applicant's range of motion measurements were within normal range with the exception of internal rotation (Exhibit D), however Dr. Garland testified this did not carry any impairment rating utilizing Figure 16-46 of the AMA Guides. (Exhibit F p. 13 lines 20-23).

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1 The report appears to have a typographical error as the surgery is listed as one year before it actually happened.

When the Court ordered development of the record the undersigned discussed with the parties to confirm with Dr. Garland that applicant had 0% impairment for the right shoulder (mainly due to the issue with applicant's permanent and stationary date). Upon reconsideration, Dr. Garland opined that applicant would qualify for a 3% pain add on.

However, as applicant's condition did not carry any impairment, the pain add on was not awarded.

. . .

ADJ10925933

Defendant also filed a Petition for Reconsideration regarding applicant's level of awarded permanent disability with regards to the September 3, 2008 injury to her lumbar spine.

> The Court agrees with defendant's assessment of the level of the permanent disability. Dr. Garland opined that applicant's lumbar impairment was 13% did not include a 3% pain add on for the lumbar spine as noted in his October 19, 2018 report (Exhibit B) and in his deposition (Exhibit F p. 16 lines 18-24). This was an oversight in the Findings & Award. The permanent disability would thus rate as follows:
>
> 15.03.01.00-13-[5]17-340G-19-20%
>
> (Report, p. 2-4.)

DISCUSSION

Applicant contends that the WCJ erroneously found that she did not sustain permanent disability to her right shoulder on the grounds that Dr. Garland's supplemental reporting did not properly rate her permanent disability, leaving the medical record unclear.

Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d);[2] *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].)

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence. (§§ 5701, 5906; *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

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

en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the 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 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 for developing a deficient record pursuant to *McDuffie* is to allow supplementation of the medical record by utilizing the existing physicians to the extent possible. Thereafter, per *McDuffie*, if the existing physicians cannot cure the need for development of the record, the selection of an AME should be considered by the parties. If the parties cannot agree to an AME, the WCJ can then appoint a physician to evaluate applicant pursuant to section 5701.

As discussed in the WCJ's Report, Dr. Garland reported that applicant had 0% impairment of the right shoulder and supplemented this reporting by opining that she had 3% impairment based upon the schedule for pain add-on. (Report, pp. 3-4.) However, as the WCJ correctly determined, a pain add-on may not be applied to a 0% impairment rating, and Dr. Garland's error in applying the pain add-on left the record on permanent disability of the right shoulder undeveloped. (*Id*.; see also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 631 (Appeals Board en banc) ["Because [] pain add-on can be assessed only to 'increase' other ratable impairment [], there can be no pain add-on if there is no underlying WPI for a particular body part or system."].)

Since the record remains undeveloped after the parties obtained supplemental reporting from Dr. Garland, the question before us is whether, and, if so, how, the record as to permanent disability of the right shoulder should be developed.

The AMA Guides, Section 1.2, states:

> *A 0% whole person (WP) impairment rating is assigned* to an individual with an impairment *if* the impairment has no significant organ or body system functional consequences *and does not limit the performance of the common activities of daily living indicated* in Table 1-2.

(AMA Guides, 5th Ed., p. 5 [Emphasis added].)

Under the Guides, then, an injured worker cannot be rated at 0% unless the rater finds that the worker's activities of daily living have not been limited by the industrial injury. In this case, however, Dr. Garland observed that applicant's activities of daily living such as forceful pushing and pulling using her hands were limited but nevertheless rated her permanent disability at 0%.

(Report, p. 3; Ex. J, QME Supplemental Report of Dr. Garland, January 21, 2022, p. 3.) This erroneous application of the Guides was then compounded when Dr. Garland applied a pain add-on to the 0% rating. (Report, pp. 3-4.)

Based upon these errors, we are persuaded that Dr. Garland could not cure the need for development of the record on permanent disability of the right shoulder in the first instance and cannot do so now. In the absence of a record as to that issue, we conclude that the record requires further development.

Accordingly, we will amend the findings in ADJ10925935 to defer the issue of permanent disability of the right shoulder.

Per *McDuffie*, *supra*, we recommend that the parties consider selecting a new AME to develop the record on the issue of permanent disability of the right shoulder; and, if the parties do not agree to a new AME, we recommend that the WCJ appoint a physician other than Dr. Garland to develop the record pursuant to section 5701.

We now address defendant's contention that the WCJ erroneously found that applicant sustained permanent disability of 25% in ADJ10925933.

As discussed in the WCJ's Report, the finding was the result of the erroneous inclusion of a pain add-on and permanent disability of the lumbar spine should have been rated at 20%.

Accordingly, we will amend the findings in ADJ10925933 to find that applicant sustained permanent disability of 20%.

Accordingly, as our Decision After Reconsideration, we will affirm the F&A, except that we will amend the findings in ADJ10925935 to defer the issue of permanent disability; and we will amend the findings and award in ADJ10925933 to find that applicant sustained 20% permanent disability; 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 September 12, 2022 is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

ADJ10925933

1. Applicant sustained an industrial injury to her lumbar spine on September 3, 2008.
2. Applicant's occupational group number is 340
3. Applicant sustained 20% permanent disability
4. There is no legal apportionment
5. Applicant is entitled to future medical care
6. Applicant attorney is entitled to a fee of 15% of the awarded PD.

ADJ10925935

1. Applicant sustained an industrial injury to her right shoulder on May 8, 2015.
2. Applicant's occupational group number is 340.
3. The issue of permanent disability is deferred.
4. Applicant is entitled to future medical care.

AWARD

AWARD IS MADE in favor of GUADALUPE CASTILLO against ALAMEDA COUNTY FAIR of:

ADJ10925933

a. Permanent disability of 20% payable at the rate of $230.00 per week for 75.50 weeks totaling $17,365.00, less credit for sums paid to date and less attorney fee per Finding 6 above payable to William Carlisle.
b. Future medical care per Finding 5.
c.

ADJ10925935

a. Future medical care per Finding 4

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/ KATHERINE WILLIAMS DODD, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 23, 2026

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

GUADALUPE CASTILLO
LENAHAN, SLATER, PEARSE & MAJERNIK, LLP
WILLIAM J. CARLISLE, ESQ.

SRO/kl

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