WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JULIAN AJCALON, *Applicant*

vs.

RETHINK HUMAN CAPITAL MGMT, LCP, SHIFTPIXY, INC.; UNITED WISCONSIN INSURANCE COMPANY, administered by NEXT LEVEL ADMINISTRATORS; STATE NATIONAL INSURANCE COMPANY, administered by CANNON COCHRAN MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Number: ADJ14962115
Marina del Rey District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant, United Wisconsin Insurance Company (United), seeks reconsideration of the Findings and Award (F&A) issued on June 29, 2026, wherein the workers' compensation arbitrator (WCA) found, in relevant part, that applicant claimed a cumulative injury arising out of and occurring during the course of employment (AOE/COE) during the period from June 1, 2017 through May 4, 2021 to the chest, respiratory system, left lung[1], and nervous system while employed by Rethink Human Capital MGMT/LCF/Shiftpixy as a food service worker; applicant elected against State National Insurance Company (State National) for said injury; applicant and State National settled the claim via a Compromise and Release Agreement (C&R) with an Order Approving Compromise and Release (OACR) issuing on June 21, 2023; State National filed a Petition for Contribution against United[2], which was granted; and United is responsible for contribution to State National for seventy-two percent (72%) of applicable costs and benefits paid by State National in this claim. The WCA then awarded contribution by United to State National

[1] There is a clerical error in the F&A. Findings of Fact number one (1) should read lung, not long.
[2] Findings of Fact number six (6) mistakenly indicates that State National filed a Petition for Contribution against itself. The Petition for Contribution was filed against United.

"in an amount to be adjusted between the parties with the arbitrator retaining jurisdiction in case of a dispute."

United contends that the WCA erred in granting State National's Petition for Contribution and finding United responsible for contribution as the September 12, 2022 and October 2, 2025 reports of Noam Drazin, M.D. and April 27, 2026 report of internal medicine panel Qualified Medical Evaluator (PQME), Eli Hendel, M.D. were improperly excluded and the WCA applied the cases of *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009 [80 Cal.Comp.Cases 1256], *Sweeney v. Workers' Comp. Appeals Bd.* (1968) 264 Cal.App.2d 296 [33 Cal.Comp.Cases 404], and *Nunez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584 [71 Cal.Comp.Cases 161] "beyond their facts." (Petition for Reconsideration (Petition), p. 15.) United therefore requests that the September 12, 2022 and October 2, 2025 reports of Dr. Drazin and April 27, 2026 report of Dr. Hendel be admitted and United's Petition for Contribution be denied, or in the alternative, the matter returned to arbitration "for further proceedings with instructions to consider the excluded medical evidence." (*Ibid*.)

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

We have considered the contents of the Petition, the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for the limited purpose of correcting clerical errors located in Findings of Fact numbers 1, 6, seven (7), and nine (9).

FACTS

On July 28, 2021, applicant filed an Application for Adjudication of Claim (Application) claiming that while employed by defendant as a cook during the period from June 1, 2017 through May 4, 2021, he sustained injury AOE/COE to the chest, respiratory system, left lung, and nervous system. Coverage was provided by State National for the period from March 1, 2021, to May 4, 2021, and by United for the period from May 4, 2020, to February 28, 2021.

Applicant sought treatment from Ronald Zlotolow, M.D., who served as the primary treating physician. The parties obtained Dr. Hendel as the internal PQME.

Dr. Zlotolow reviewed 1,532 pages of medical records and completed a medical-legal evaluation of applicant on March 9, 2022. (Exhibit Z, p. 1-2.) In his corresponding report dated April 8, 2022, he found no industrial causation for applicant's adenocarcinoma of the tongue but noted that he would reconsider upon provision and review of Material Safety Data Sheets (MSDS). (Exhibit Z, pp. 10-11.)_

On April 8, 2022, applicant elected against State National via a written letter. (State National's Exhibit 2.)

Dr. Hendel reviewed 3,097 pages of records, including the MSDS, and evaluated applicant on April 29, 2022. In his corresponding medical-legal report, he indicated that "[g]iven the present scientific evidence and the fact that [applicant] was working for 4 years and 7 hours per day exposed to cooking oil fumes without the use of a extractor, [and] there was no history of smoking or other causes of lung cancer, there is a reasonable medical probability that [applicant's] job exposure had [a] causation effect in the development of lung cancer[;] therefore [applicant's lung] disease came during the course and out of the course of employment." (Joint Exhibit 2, p. 68.)

Subsequently, Dr. Zlotolow was provided with 873 pages of medical records, including the MSDS. In an ensuing supplement report dated August 1, 2022, he indicated that "the MSDS do show the patient was exposed to industrial solvents" and said solvents "have been shown to play a substantial factor in the development of lung cancer." (State National's Exhibit 3, p. 7.) Further, taking into consideration the MSDS and Dr. Hendel's discussion of applicant's exposure to cooking and frying oil which Dr. Hendel indicated was the cause of applicant's cancer, he agreed that applicant's "adenocarcinoma of the lung is 100% work related." (*Ibid*.)

On March 17, 2023, Dr. Zlotolow was deposed by the parties and testified as follows regarding his change in opinion:

> Q: And what about the MSDS sheets changed your opinion?
>
> A: Well, I read the report of Dr. Hendel, who was the QME, and he went through how cooking fumes can play a factor, which I agree with. Plus, it wasn't much, but there was – through the MSDSs, there was a ton of them. But there was one Medallion which contained petroleum distillates. And petroleum distillates contain benzene. Benzene is carcinogenic.

(Exhibit 2, p. 7:1-9.)

On March 8, 2023, Dr. Hendel was deposed by the parties. He continued to stand by the opinions set forth in his April 29, 2022 report.

On June 19, 2023, applicant and State National settled the claim via C&R. The OACR was issued by the WCJ on June 21, 2023. The C&R noted that State National "reserves a right for contribution/reimbursement from United Wisconsin Insurance Company as administered by Next Level Folsom for any and all amounts expended in the administration of this claim and settlement of the same."

On July 31, 2023, State National filed a Petition for Contribution against United.

United then retained Dr. Drazin to serve as a consult in oncology. Dr. Drazin issued two reports dated September 12, 2022, and October 2, 2025, but did not evaluate applicant.

On April 3, 2025, a Declaration of Readiness to Proceed to a Status Conference was filed by United. The matter proceeded to multiple hearings before the parties agreed to arbitration with WCA Mark Kahn.

On November 14, 2025, the reports of Dr. Drazin were sent by United to Dr. Hendel along with a request for a supplemental report. (United's Exhibit A.) Following this request, Dr. Hendel issued an April 27, 2026 supplemental report.

Arbitration with Mr. Kahn was set for May 1, 2026. Issues set for determination included the admissibility of the September 12, 2022 and October 2, 2025 reports of Dr. Drazin and the April 27, 2026 report of Dr. Hendel; the Labor Code[3] section 5412 injury date; the section 5500.5 liability period; and the Petition for Contribution filed by State National against United.

On June 29, 2026, the WCA issued a F&A wherein he found, in relevant part, that applicant claimed a cumulative injury AOE/COE during the period from June 1, 2017 through May 4, 2021 to the chest, respiratory system, left lung, and nervous system while employed by Rethink Human Capital MGMT/LCF/Shiftpixy as a food service worker; applicant elected against State National; applicant and State National settled the claim via C&R with an OACR issuing on June 21, 2023; State National filed a Petition for Contribution against United, which was granted; and United is responsible for contribution to State National for 72% of applicable costs and benefits paid by State National. The WCA awarded contribution by United to State National "in an amount to be adjusted between the parties with the arbitrator retaining jurisdiction in case of a dispute."

It is from this F&A that United seeks reconsideration.

[3] All further statutory references will be to the Labor Code unless otherwise indicated.

DISCUSSION

I.

Petitions for reconsideration filed on or after July 14, 2026 are subject to section 5909, which states 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 section 5909(a), the Appeals Board must act on a petition for reconsideration within sixty (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 August 12, 2026 and 60 days from the date of transmission is October 11, 2026, which is a Sunday. The next business day that is 60 days from the date of transmission is Monday, October 12, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)[4] This decision is issued by or on Monday, October 12, 2026 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

[4] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

act on a petition. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

Here, according to the proof of service for the Report by the WCA, the Report was served on August 11, 2026, and the case was transmitted to the Appeals Board on August 12, 2026. Service of the Report and transmission of the case to the Appeals Board did not occur on the same day. Thus, we conclude that service of the Report did not provide accurate notice of transmission under section 5909(b)(2) because service of the Report did not provide actual notice to the parties as to the commencement of the 60-day period on August 12, 2026.

II.

Turning now to the merits of the Petition, United contends that the WCA erred in granting State National's Petition for Contribution and finding United responsible for contribution as the September 12, 2022 and October 2, 2025 reports of Dr. Drazin and April 27, 2026 report of Dr. Hendel were improperly excluded and the WCA applied the *Batten*, *Sweeney*, and *Nunez* cases "beyond their facts." (Petition, p. 15.)

We remind the parties that section 4060 applies to "disputes over the compensability of any injury." Subdivision (c) of section 4060, provides that "[i]f a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2." Subdivision (a) of section 4062.2 provides that "[w]henever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section." Section 4062.2 goes on to say that in represented cases involving injuries on or after January 1, 2005, the parties shall either select an agreed medical examiner (AME) or select a QME from a three-member panel. Thus, subdivision (c) of section 4060 and subdivision (a) of section 4062.2, when read together, underscore the fact that medical evaluations "shall be obtained only" by the procedure specified as the Legislature's clear intent was to provide an exclusive method for obtaining medical evaluations on the issue compensability.

Further, subdivision (d) of section 4064 provides, in relevant part, that:

> … [N]o party is prohibited from obtaining any medical evaluation or consultation at the party's own expense. In no event shall an employer or employee be liable for

> an evaluation obtained in violation of subdivision (b) of Section 4060. All comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board except as provided in subdivisions (d) and (m) of Section 4061 and subdivisions (b) and (e) of Section 4062.

Prior to its amendment by Senate Bill (SB) 899, former subdivision (c) of section 4060 allowed any party to "obtain additional reports at their own expense." However, that provision was deleted by SB 899 and replaced with the current subdivision (c) noted above, which requires, in represented cases, that medical evaluations for determining compensability be obtained "only by the procedure provided in Section 4062.2." Section 4064, however, was not amended by SB 899. Thus, in cases wherein subdivision (d) of section 4064 conflicts with subdivision (c) of section 4060 and subdivision (a) of section 4062.2, the latter sections prevail as the more recent amended/enacted statutes. (*Cf. Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310; *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41 Cal.Comp.Cases 42]; *Graham v. Workers' Comp. Appeals Bd.* (1989) 210 Cal.App.3d 499, 505 [54 Cal.Comp.Cases 160].) This is consistent with Court of Appeal decisions rejecting other attempts to circumvent former AME/QME statutes. (*Nunez*, *supra*, at p. 594 (section 4050 may not be used to circumvent former section 4060 et seq.); *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596 [71 Cal.Comp.Cases 155] (neither section 4050 nor section 5701 may be used to circumvent former section 4060 et seq.); see also, *Regents of the Univ. of Cal. v. Workers' Comp. Appeals Bd.* (Ford) (1995) 60 Cal.Comp.Cases 1246 (writ den.).) Thus, for injuries occurring on or after January 1, 2005, wherein the injured worker is represented, disputes regarding compensability must be resolved pursuant to sections 4060 and 4062.2 and medical-legal evaluations may not be obtained pursuant to section 4064. Otherwise, per subdivision (i) of section 4061, "[e]valuations obtained in violation of this prohibition shall not be admissible in any proceeding before the appeals board."

The above conclusion is confirmed in the case of *Batten*, wherein the Court of Appeal specifically noted that while "[s]ection 4061, subdivision (i) does not nullify section 4064, subdivision (d)" "it does prohibit the admissibility of reports by privately retained experts. Had the Legislature intended to permit the admission of additional comprehensive medical reports, obtained at a parties' own expense for the sole purpose of rebutting the opinion of the qualified medical expert, if would have said so. The pain and unambiguous language of section 4061, subdivision (i) precludes such an interpretation. We presume the Legislature intended every phrase

and provision to have meaning and to perform a useful function. (citation omitted)" (*Batten*, *supra*, at p. 1015.)

Accordingly, taking into consideration the foregoing, including sections 4060, 4061, and 4062.2, and the case of *Batten*, we agree with the WCA that the September 12, 2022 and October 2, 2025 reports of Dr. Drazin are inadmissible.

III.

Turning now to the admissibility of the April 27, 2026 report of Dr. Hendel, we underscore that per Division of Workers' Compensation (DWC) Rule 35(e):

> In no event shall any party forward to the evaluator: (1) any medical/legal report which has been rejected by a party as untimely pursuant to Labor Code section 4062.5; (2) any evaluation or consulting report written by any physician other than a treating physician, the primary treating physician or secondary physician, or an evaluator through the medical-legal process in Labor Code sections 4060 through 4062, that addresses permanent impairment, permanent disability or apportionment under California workers' compensation laws, unless that physician's report has first been ruled admissible by a Workers' Compensation Administrative Law Judge; or (3) any medical report or record or other information or thing which has been stricken, or found inadequate or inadmissible by a Workers' Compensation Administrative Law Judge, or which otherwise has been deemed inadmissible to the evaluator as a matter of law.
>
> (Cal. Code Regs., tit. 8, § 35(e).)

Thus, pursuant to Rule 35(e), submission of reports prepared by non-treating physicians outside the medical-legal process mandated by sections 4060 and/or 4062.2, are not to be provided to an evaluator (i.e. an AME or PQME) unless the reporting is first ruled admissible by a WCJ.

Here, the reports of Dr. Drazin were not ruled admissible prior to United's provision of said reports to internal PQME, Dr. Hendel. Given that the impetus for the April 27, 2026 report was a specific request by United for Dr. Hendel's review of the September 12, 2022 and October 2, 2025 reports of Dr. Drazin (See United's Exhibit A), the report must also be deemed inadmissible. To rule otherwise would mean overturning established case law rejecting other attempts to circumvent the AME/QME statutes outlined above.

Assuming arguendo that Dr. Hendel's April 27, 2026 report was admissible, we would nonetheless continue to find that State National met their burden of proof on the issue of contribution based upon the reports of Dr. Zlotolow which we believe constitute substantial medical evidence of injury AOE/COE.

It is well established that substantial medical evidence is used to establish industrial causation. "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) Pursuant to *E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th922, 928 [71 Cal.Comp.Cases 1687], "[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. (citations.) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (citation.)" "A medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises. Such reports do not constitute substantial evidence to support a denial of benefits. (citation.)" (*Kyle v. Workers' Comp. Appeals Bd* (*City and County of San Francisco*) (1987) 195 Cal.App.3d 614, 621.)

Here, Dr. Zlotolow completed a comprehensive medical-legal evaluation of applicant on March 9, 2022, and reviewed 1,532 pages of medical records. (Exhibit Z, p. 1-2.) In his report dated April 8, 2022, he found no industrial causation for applicant's adenocarcinoma of the tongue but noted that he would reconsider his opinions upon provision and review of the MSDS. (Exhibit Z, pp. 10-11.)_Thereafter, Dr. Zlotolow was provided 873 pages of medical records, including the MSDS, and prepared a supplemental report dated August 1, 2022. In this subsequent report, he indicated that "the MSDSs do show the patient was exposed to industrial solvents" and said solvents "have been shown to play a substantial factor in the development of lung cancer." (State National's Exhibit 3, p. 7.) Further, taking into consideration Dr. Hendel's discussion of applicant's exposure to cooking and frying oil which Dr. Hendel indicated was the cause of applicant's cancer, he agreed that applicant's "adenocarcinoma of the lung is 100% work related." (*Ibid*.) He continued to stand by these findings during a deposition held on March 17, 2023.

Based upon our review of Dr. Zlotolow's reports, he completed a full assessment of applicant, reviewed extensive medical records, took a detailed history, and provided evidence and reasoning in support of his conclusions. As such, we conclude that the reports of Dr. Zlotolow constitute substantial medical evidence of injury AOE/COE during the period from June 1, 2017

through May 4, 2021 while applicant was employed by defendant. Accordingly, there is sufficient basis for United's Petition for Contribution, and we agree with the WCA's grant of said Petition for Contribution.

IV.

Lastly, we have detected several clerical errors in the F&A. Findings of Fact number 1 mistakenly lists applicant's left lung injury as left long injury. Findings of Fact six 6 reads that State National filed a Petition for Contribution against itself on July 31, 2023. It should read that State National filed a Petition for Contribution against United on August 1, 2023[5]. Findings of Fact number 7 reads that United provided coverage from May 4, 2021, through February 28, 2021. It should read that United provided coverage from May 4, 2020, through February 28, 2021. Lastly, Findings of Fact number 9 reads that the medical report of Dr. Hendel dated April 27, 2027, is inadmissible. The proper date for the report is April 27, 2022. We will amend the F&A to correct these clerical errors. (*Toccalino v. Workers' Comp. Appeals Bd*. (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145] (the Appeals Board may correct a clerical error at any time without need for further hearings.))

Accordingly, United's Petition is granted, and the F&A is affirmed, except that it will be amended to correct the clerical errors noted above.

For the foregoing reasons,

IT IS ORDERED that United Wisconsin Insurance Company's Petition for Reconsideration of the Findings and Award issued on June 29, 2026, is **GRANTED**.

[5] See the Proof of Service attached to the Petition for Contribution for the actual filing date.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued on June 29, 2026, is **AFFIRMED**, **EXCEPT** as **AMENDED** below.

FINDINGS OF FACT

1. The arbitrator finds that Julian Ajcalon filed an Application for Adjudication of Claim, Case No.: ADJ14962115, alleging a cumulative injury arising out of and occurring in the course of employment from June 1, 2017 through May 4, 2021, to the chest, respiratory system, left lung and nervous system while employed by Rethink Human Capital MGMT/LCF/Shiftpixy, Inc.

* * *

6. The arbitrator finds that on August 1, 2023, State National Insurance Company filed a Petition for Contribution against United Wisconsin Insurance Company.

7. The arbitrator finds that insurance coverage for Rethink Human Capital MGMT/LCF/Shiftpixy was provided as follows:

   State National Insurance Company provided coverage from March 1, 2021 through May 4, 2021.

   United Wisconsin Insurance Company provided coverage from May 4, 2020 through February 28, 2021.

* * *

9. The arbitrator finds that the medical report of Eli Hendel, M.D. dated April 27, 2022 is inadmissible.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 12, 2026

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

JULIAN AJCALON
DJG LAW GROUP, INC.
SHEFFIELD & RICHARDS LLP
MARK L. KAHN - ARBITRATOR

RL/*cs*

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