WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SPENCER MALLINGER, ***Applicant***

vs.

CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION;
legally uninsured, adjusted by SCIF STATE EMPLOYEES ROHNERT PARK, ***Defendants***

Adjudication Number: ADJ7172447
Redding District Office

OPINION AND DECISION AFTER RECONSIDERATION

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

Applicant seeks reconsideration of the Findings and Award (F&A) issued on November 29, 2021, by the workers' compensation administrative law judge (WCJ). The WCJ found in pertinent part that, while employed as a paramedic and fire apparatus engineer for defendant the California Department of Forestry and Fire Protection, applicant sustained injury arising out of and in the course of his employment on June 11, 2008 to his heart, psyche, including sleep apnea, as well as burns to his head, neck, nose and hands. The WCJ also found that the injury caused 76% permanent disability.

Applicant contends that the WCJ erred in applying the combined values chart (CVC) in the Permanent Disability Rating Schedule (PDRS) to combine his physical and psychiatric impairments and instead should have used addition, based on the medical evidence that there was "a synergistic overall effect on applicant's disability," resulting in a 100% permanent disability award.

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 in applicant's Petition and defendant's Answer, and the contents of the WCJ's 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 defer the

[1] Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been appointed in her place.

issues of whether applicant's impairments should be combined or added (Finding of Fact 5) and whether applicant is entitled to additional permanent disability (Finding of Fact 6, Award 1). We will leave the finding of 76% permanent disability intact so as not to interrupt the flow of benefits to applicant.

FACTS

Applicant, while employed on June 11, 2008, as a paramedic and fire apparatus engineer, sustained an industrial injury to his heart, psyche, including sleep apnea, as well as burns to his head, neck, nose and hands. At the time of his injury applicant was extinguishing a wildfire, and the fire overran him and trapped him in a fire engine.

The parties utilized Janak Mehtani, M.D., and Brian Schindler, M.D., as agreed medical evaluators (AMEs), and each authored multiple medical reports in this case. (App. Exs. 1-3, 7; Def. Exs. G-M; P.) AME Dr. Mehtani provided deposition testimony as well. (Def. Ex. Q.) The parties also utilized Robert Harvey, M.D., Raye Bellinger, M.D., and Vinay Reddy, M.D., as qualified medical evaluators (QMEs), and each authored multiple medical reports in this case. (App. Exs. 4-6; Def. Exs. A-F, N-O.) Defendant objected to the admissibility of defendant's Exhibits N and O on the grounds of competency. (Minutes of Hearing/Summary of Evidence, 08/31/2021, 4:1-2.)

On November 29, 2021, the parties proceeded to trial. Among the issues submitted was whether applicant's permanent disability award should be calculated by applying the CVC to combine his impairments or by adding his impairments to aggregate the physical and psychiatric disabilities.

On April 11, 2022, the WCJ issued his F&A, awarding applicant 76% permanent disability based on the CVC.

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

DISCUSSION

It is axiomatic that substantial evidence must support the decisions by the Appeals Board. (Lab. Code, §§ 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].) 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].)

In *Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680], the Court of Appeal found that permanent disability impairments "are generally combined" using the CVC though the "scheduled rating [under the CVC] is not absolute" and other methodologies may be used to calculate permanent disability. (*Id.* at pp. 613-614.) Thus, while the scheduled rating is prima facie evidence of an injured employee's permanent disability, the scheduled rating is rebuttable. (*Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School Dist*. (*Almaraz-Guzman II*) (2009) 74 Cal.Comp.Cases 1084, 1106 (Appeals Board en banc); see *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 (Appeals Board en banc)*; City of Sacramento v. Workers' Comp. Appeals Bd*. (*Cannon)* (2013) 222 Cal.App.4th 1360 [79 Cal.Comp.Cases 1].) The overarching goal of rating permanent impairment is to achieve accuracy. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Almaraz-Guzman III)* (2010) 187 Cal.App.4th 808, 822 [75 Cal.Comp.Cases 837].)

For example, in *Athens Administrators v. Workers' Comp. Appeals. Bd*. (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ denied) (*Kite*), the Appeals Board concluded that impairments resulting from cumulative injury to the bilateral hips may be added where substantial medical evidence supports a physician's opinion that adding impairments will result in a more accurate rating of the level of disability than the rating that results from using the CVC. (See also *De La Cerda v. Martin Selko & Co*. (2017) 83 Cal.Comp.Cases 567 (writ denied) (requires following a physician's opinion as to the most accurate rating method if they provide a reasonably articulated medical basis for doing so and does not require use of the term "synergistic").)

In *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 (Appeals Board en banc) (*Vigil*), the Appeals Board held that an injured employee can rebut the CVC in the PDRS and add impairments where they can establish the impact of each impairment on the activities of daily living (ADLs). In addition, they must show either (a) there is no overlap between the effects on ADLs

between the body parts rated, or (b) there is overlap but the overlap increases or amplifies the impact on the overlapping ADLs. The Appeals Board explained that medical expertise is required:

> In determining whether the application of the CVC table has been rebutted in a case, an applicant must present evidence explaining what impact applicant's impairments have had upon their ADLs. Where the medical evidence demonstrates that the impact upon the ADLs overlaps, without more, an applicant has not rebutted the CVC table. Where the *medical evidence* demonstrates that there is effectively an absence of overlap, the CVC table is rebutted, and it need not be used.

(*Id.* at p. 692, italics added.)

Our en banc decision in *Vigil* issued on June 10, 2024, after our Opinion and Order Granting Petition for Reconsideration dated February 11, 2022, and is mandatory authority on all WCJs and WCAB panels. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, § 11425.60(b).)

Here, applicant was evaluated by QME Dr. Bellinger, an internist, and, in his report dated February 27, 2021 (App. Ex. 6; Def. Ex. A), he diagnosed applicant with industrially aggravated left ventricular hypertrophy and obstructive sleep apena (*Id.* at p. 19), and found 30% whole person impairment for the heart based on Class III, Table 4-2, on page 66 of the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides) due to applicant being asymptomatic and on a current anti-hypertensive medical regimen. (*Id.* at p. 21.) In addition, QME Dr. Bellinger found 5% whole person impairment for applicant's sleep apnea based on Class I, Table 13-4, on page 317 of the AMA Guides due to applicant's reduced daytime alertness, but ability to perform most activities of daily living. (*Id.* at p. 21.) Dr. Bellinger found no apportionment for the heart in accordance with Labor Code sections 3212 and 4663(e)[2] and 80% apportionment for the sleep apnea to non-industrial factors. (*Id.* at p. 20.)

This resulted in permanent disability strings as follows:

HYPERTENSIVE CARDIOVASCULAR DISEASE
100% (04.01.00.00 - 30 - [5]38 - 490I - 47 - 43%) 43%

SLEEP AND AROUSAL DISORDERS
20% (13.03.00.00 - 5 - [6]7 - 490I - 11 - 10%) 2%

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

Applicant was evaluated by AME Dr. Schindler, an otolaryngologist, and, in his report dated December 1, 2011, he diagnosed applicant with industrially caused postnasal drip with intermittent hoarseness directly related to his injury and found 2% whole person impairment based on Table 11-9, on page 265, based on a 5% impairment of speech. (App. Ex. 7; Def. Ex. P, at p. 8.)

This resulted in a permanent disability rating string as follows:

VOICE/SPEECH
100% (11.03.04.00 - 2 - [2]2 - 490I - 4 - 3%) 3%

Applicant was evaluated by QME Dr. Harvey, a plastic surgeon, and, in his report dated November 19, 2019, he diagnosed applicant with burns requiring skin grafts resulting in pigment changes. (App. Ex. 5; Def. Ex. E, at p. 3.) QME Dr. Harvey found 15% whole person impairment based on Class II, Table 8-2, on page 178, (*Id.* at p. 8), due to the skin grafts and intermittent need for moisturizers. (*Id.* at p. 3.) QME Dr. Harvey also found 20% whole person impairment due to pain, but the WCJ did not consider this impairment in his decision. QME Dr. Harvey, in his November 5, 2012 report, found no apportionment to non-industrial factors. (App. Ex. 4; Def. Ex. F, at p. 9.)

This resulted in a permanent disability rating string as follows:

SCARS & SKIN GRAFTS
100% (08.02.00.00 - 15 - [2]17 - 490J - 26 - 23%) 23%

Applicant was evaluated by AME Dr. Mehtani, a psychiatrist, and, in his report dated March 19, 2019, (App. Ex. 2; Def. Ex. H), he diagnosed applicant with post-traumatic stress disorder with recurrent moderate anxiety (*Id.* at p. 40) with global assessment functioning at 55 or 23% whole person impairment with 3% added for chronic low grade persistent pain. (*Id.* at p. 56.) AME Dr. Mehtani found no basis for apportionment. (*Id.* at pp. 52-53.)

This resulted in a permanent disability rating string as follows:

PSYCHIATRIC – MENTAL AND BEHAVIORIAL
100% (14.01.00.00 - 26 - [8]36 - 490J - 48 - 44%) 44% (with 3% add-on for pain)

With respect to aggregation of the permanent disabilities amongst the various body systems, AME Dr. Mehtani, in his report dated March 19, 2019, wrote that the 26% whole person impairment was "in addition to any degree of disability given to by the other specialists including internal medicine specialist, pulmonologist, ENT physician, and sleep specialist." (*Id.* at p. 57.) However, in his supplemental report dated August 27, 2019, (Def. Ex. G), AME Dr. Mehtani wrote as follows:

> As you recall I stated in my deposition done in my office on July 17, 2019 that ***I would like to review the QME report from plastic and reconstructive surgery, Dr. Robert***

A. Harvey, M.D. again before making the final decision about whether or not the disability of Mr. Spencer Mallinger should be based on . . . [CVC] or use the alternative way of simply adding the disabilities assigned to Mr. Mallinger by different specialties.

* * *

I reviewed the case laws in length and did my own research into this complex issue of assigning Permanent Impairments when they fall in different categories. The main point to be considered is whether or not the impairments overlap with other impairments in different body parts and different specialties or to simply add them if they do not overlap and if there is any synergistic effect of one impairment over the other impairment, across different body parts and specialties.

* * *

I spelled out in my report on [sic] number of places that [applicant's] inability to compete in the open market and his lack of progress in his career as compared to his fellow workers because of his depressed mood and inability to take the responsibility as a Fire Apparatus Operator has led him to become clinically depressed and enable [sic] to function adding on to his disabilities. Overall considering the three case laws provided to me and my research and based on the extensive review of the [AME] Reports by multiple specialists, it remains my opinion that adding on the disabilities by different specialist [sic] is more accurate way of assessing his overall disability rather than using [CVC].

* * *

I firmly believe that dealing with Psychiatric Impairments and Physical Impairments in terms of the ultimate disability here in Mr. Mallinger's case, do not overlap in a significant way. While there may be slight overlapping on this one particular issue of the skin discoloration leading to low self-esteem, there are multiple other causes of low self-esteem and lack of confidence primarily based on his overall depressed mood and having frequent panic anxiety attacks and bouts of severe depression and signs and symptoms of Posttraumatic Stress Disorder. I hope that clarifies my position of my findings on March 19, 2019.

(*Id.* at pp. 1-4, emphasis added.)

QME Dr. Harvey, in his November 19, 2019 report, (App. Ex. 5; Def. Ex. E) whose report AME Mehtani wished to review again, documented applicant's psychiatric complaints as follows:

P[ost] T[raumatic] S[tress] D[isorder], which has required a significant amount of psychiatric and psychological therapy. This has caused him to lack confidence, and he feels he's been passed over for promotions. He mentions that he has been employed on the job for 15 years and should be on the captain's promotion list by now, but he has been passed over. He states that now he is making approximately 50% of his previous wage because he has also lost additional income because of his paramedic status, which he is not practicing at this time.

* * *

> The psychological effects of the trauma of the burn have continued to be, and are even perhaps more prominent than they were during my first examination in 2008. He states that depression is a big issue. He has no feeling of enjoyment or pleasure or satisfaction or self-worth. He describes PTSD with flashbacks, poor concentration, anxiety, intrusive thoughts, nightmares, and this has become obviously the biggest issue with his disabilities following his injury.
>
> Treatment for these psychologic or psychiatric problems consisted of twice a week visits with the previous physician, Dr. Winer, D.O., over a period of 2 years. He states that Workers' Compensation no longer pays for this, and that they have directed him to go to Sacramento for these treatments, but he is unable to do this because it is an hour and a half drive in each direction.

(*Id.* at pp. 2-4.)

"[I]n order to ensure reliance on substantial evidence, and a complete adjudication of the issues consistent with due process," the WCJ and the Appeals Board both have a duty to further develop the record where there is an absence of, or insufficient evidence to determine the issues raised for trial. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see Lab. Code, §§ 5701 and 5906 and *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 139 (Appeals Board en banc).) Indeed, the Appeals Board has a constitutional mandate to "ensure substantial justice in all cases," and is therefore "clearly permitted" to admit evidence even after the discovery cut-off under section 5502(d)(3). (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-405 [65 Cal.Comp.Cases 264]; Cal. Const., art. XIV, § 4 [The system of workers' compensation "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State."].)

Pursuant to sections 5701 and 5906, a WCJ or the Appeals Board may not leave undeveloped issues that, through the exercise of its specialized knowledge, recognizes as requiring further evidentiary development. (*Kuykendall, supra*, 79 Cal.App.4th at p. 404.)

Following our independent review of the record, we believe that the medical-legal opinion of AME Dr. Mehtani mandating addition requires development to address our holdings in *Vigil*. AME Dr. Mehtani did not address how applicant's permanent disabilities affected his ADLs and, if there is any overlap, does not discuss how they amplify the effect on the overlapping ADLs.

We also observe that he did not render a final opinion until he reviewed the QME report of Dr. Harvey dated November 19, 2019. Accordingly, the evidentiary record whether to add or combine applicant's disabilities, as it currently stands, is analytically incomplete.

Upon return of this matter to the trial level, we recommend that the WCJ direct the parties to obtain supplemental reporting or deposition testimony from Dr. Mehtani, and as appropriate other physicians, that address the analysis required under *Vigil*.

Lastly, we note that the WCJ failed to rule on the admissibility of QME Dr. Reddy's reports dated January 25, 2010 and April 23, 2012 (Def. Exs. N and O) with applicant contending that the exhibits were not competent. Upon return, the WCJ should rule on the issue of admissibility of the reports.

For the reasons set forth above, as our Decision After Reconsideration, we affirm the F&A, except that we defer the issues of whether applicant's impairments should be combined or added (Finding of Fact 5) and whether applicant is entitled to additional permanent disability (Finding of Fact 6, Award 1). We have left the finding of 76% permanent disability intact so as not to interrupt the flow of benefits to applicant. If applicant is successful in meeting his burden that his impairments should be added, so as to entitle him to an award of additional permanent disability indemnity, we trust that the WCJ and the parties will adjust the indemnity owed accordingly.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings & Award dated on November 29, 2021 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

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5. The issue of whether applicant's impairments should be combined or added is deferred.

6. Applicant currently has permanent disability from this industrial injury of 76%. The issue of whether applicant's injury caused additional permanent disability is deferred.

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AWARD

1. Permanent disability of 76%, entitling the applicant to 529.24 weeks of permanent disability at 270.00 per week, for a total of 142,897.50, less any permanent disability advanced to date by defendant, and less 15% in reasonable attorney's fees. The issue of whether the applicant is entitled to an award of additional permanent disability is deferred.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 1, 2026

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

SPENCER MALLINGER
LAW OFFICES OF LARRY S. BUCKLEY
STATE COMPENSATION INSURANCE FUND

DLP/md

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