WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GWENDOLYN SYKES, *Applicant*

vs.

LOS ANGELES COUNTY METROPOLITAN TRANSIT AUTHORITY, permissibly self-insured, *Defendants*

Adjudication Number: ADJ8599329
Marina del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

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

Defendant seeks reconsideration of the Findings of Fact and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on June 24, 2021 in ADJ8599329.[1] By the F&A, the WCJ found that applicant had sustained new and further disability for her July 16, 2012 injury. The injury was found to have caused 59% permanent disability. The WCJ found that applicant was entitled to an unapportioned award.

Defendant contends that the evidence supports apportionment of permanent disability for the lumbar spine to applicant's 2016 non-industrial motor vehicle accident pursuant to Labor Code[2] section 4663. Defendant also contends that there must be apportionment for the lumbar spine per section 4664.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that defendant's Petition be denied.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will affirm the F&A.

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[1] Applicant also sustained injury to the psyche on September 20, 2012 (ADJ8599320). A separate Findings of Fact was issued in that case on the same date. Defendant is only challenging the F&A issued in ADJ8599329. (Petition for Reconsideration, July 16, 2021, p. 1.)

[2] All further statutory references are to the Labor Code unless otherwise stated.

FACTUAL BACKGROUND

Applicant sustained two injuries while employed as a bus operator by the Los Angeles County Metropolitan Transit Authority: to the cervical spine, lumbar spine, right wrist, right ankle, left thigh and right shoulder on July 16, 2012 (ADJ8599329); and to the psyche on September 20, 2012 (ADJ8599320).

The parties agreed to use Dr. Alexander Angerman as the orthopedic agreed medical evaluator (AME). In his June 24, 2015 report, Dr. Angerman noted that applicant had a prior stipulated award from March 7, 2007 for 16% permanent disability to the neck, back and bilateral shoulders. (Report of AME Dr. Angerman, June 24, 2015, p. 4.)[3] Dr. Angerman provided 24% whole person impairment (WPI) to the lumbar spine. Apportionment for disability to the lumbar spine was: 10% to non-industrial degenerative disease, 5% to the "prior industrial injury already stipulated to" and the remaining attributable to the July 16, 2012 injury. (*Id.* at p. 5.)

Matthew Steiner, M.D. evaluated applicant in 2014 as the psychiatric qualified medical evaluator (QME). Dr. Steiner found that applicant's psychiatric condition (adjustment disorder with anxious mood) was predominantly caused by her employment. (Report of QME Dr. Steiner, November 7, 2014, p. 3.) He found that applicant does not have any permanent disability on a psychiatric basis. (*Id.* at p. 4.)

The parties entered into joint Stipulations with Request for Award for both cases in 2015. It was stipulated that the July 16, 2012 injury caused 30% permanent disability, with it noted that the "SETTLEMENT IS FOR A COMPROMISED 26% LUMBAR SPINE, 5% CERVICAL SPINE (MDT 30%) for 7/2012 DATE OF INJURY." (Stipulations with Request for Award, December 21, 2015, p. 7.) It was also noted that there is "No PD per QME Steiner as to 9/2012 date of incident." (*Id.*) The award was approved on December 21, 2015.

In March 2017, applicant filed a timely petition to reopen both claims.

The orthopedic AME Dr. Angerman reevaluated applicant in November 2017. He noted as part of applicant's interim history that she was involved in a non-industrial automobile accident in February 2016:

> She experienced increased pain in the neck, low back and left thigh, with pain in the left knee as well. Following the automobile accident, the patient saw Dr.

[3] The medical reporting filed as of the date of approval of the 2015 Stipulations with Request for Award are part of the record of proceedings per WCAB Rule 10803(b). (Cal. Code Regs., tit. 8, § 10803(b).)

> Perelman, on a private basis. Through Dr. Perelman she states the neck, low back, left thigh and left knee were treated with physical therapy from February to August of 2016, on a private basis. She states therapy was beneficial. She states the neck, low back and left thigh conditions "reverted to their previous state" by August of 2016 and the left knee pain "completely subsided" with the physical therapy rendered.
>
> The patient states she has "no residual problems" from this nonindustrial automobile accident.
>
> (Joint Exhibit CC, Agreed Medical Examination Report from Dr. Alexander Angerman, November 14, 2017, p. 5.)

Dr. Angerman requested records regarding the 2016 accident:

> I have no treatment records pertaining to the non-industrial motor vehicle accident which the patient states occurred in February of 2016 and a review of those records is mandatory before I can render further orthopaedic opinions in this case.
>
> (*Id.* at p. 14.)

Additional records were provided to Dr. Angerman and he issued a supplemental report in in 2018 in which he stated in relevant part:

> I am now provided with emergency department records dated February 12, 2016 documenting complaints of neck and back pain following a motor vehicle accident on that date. Therefore, the medical evidence does support that, prior to that non-industrial motor vehicle accident, the patient was seen by Dr. Perelman on October 7, 2015 for significant neck and back pain for which physical therapy was recommended per future medical care. However, Dr. Perelman's next report dated March 9, 2016 indicated the patient had increased neck and back pain and this was subsequent to the non-industrial motor vehicle accident of February 12, 2016.
> …
> It was noted the patient had returned to work in August of 2016 and this also correlates with her statements made to me. However, I would point out that I have none of the orthopaedic treatment records between the non-industrial motor vehicle accident on February 12, 2016 and Dr. Perelman's April 5, 2017 report. It is felt a review of those records would be highly pertinent under labor code 4663 and 4664. The limited medical evidence available to me would appear to support that the patient remained off work subsequent to that non-industrial motor vehicle accident due to orthopaedic complaints relating to that accident. Therefore, it is mandatory that I be given the opportunity to review the entire medical file between February 12, 2016 and April 5, 2017 before I am able to

render any further opinions in this case pertaining to the complex issue of causation and apportionment.

(Joint Exhibit AA, Agreed Medical Examination Report from Dr. Alexander Angerman, July 3, 2018, pp. 10-11.)

Dr. Angerman reevaluated applicant again in November 2019. He opined in pertinent part:

The patient returns today, November 5, 2019. I have now received an updated joint letter from parties instructing me that they are unable to procure any additional records. I am asked to render my opinions based on the information available to me.

With regard to the February 2016 motor vehicle accident, it is noted that the patient took six months off work. It is indicated she last worked on April 8, 2017 and officially retired on February 1, 2018.

…

With regard to the lumbosacral spine, the medical evidence supports that she had progressively worsening complaints even prior to the non-industrial motor vehicle accident in February of 2016. Therefore, it is felt the patient has increased permanent disability/impairment referable to her lumbosacral spine above and beyond the level already stipulated to.

…

With regard to the lumbosacral spine, if the subtraction method is determined to be applicable, it is then felt appropriate to state that, in all medical probability, 50% of the patient's increased level of disability/impairment would be attributable to the nonindustrial motor vehicle accident occurring in February of 2016 with the remaining portion attributable to the stipulated injury of July 16, 2012.

If the subtraction method is not determined to be applicable, it is then felt appropriate to state that, in all medical probability, 10% of the patient's lumbosacral spine disability/impairment would be attributable to underlying degenerative disease and her history of obesity on a non-industrial basis, 30% would be attributable to the industrial injury already stipulated to with the remaining portion split equally between the natural progression of the July 16, 2012 industrial injury and the non-industrial motor vehicle accident occurring in February of 2016.

(Joint Exhibit DD, Agreed Medical Examination Report from Dr. Alexander Angerman, November 5, 2019, pp. 14, 16 and 18.)

Attached to his report were impairment ratings including 28% WPI for the lumbar spine with a 3% add-on for pain. (*Id.* at pp. 21-24.) Dr. Angerman found that applicant had sustained additional impairment to the right shoulder as well, but not to her cervical spine. (*Id.* at p. 15.)

The matter proceeded to trial on February 2, 2021, at which time applicant's two cases were ordered consolidated. The issues at trial were the same for both cases and included permanent disability and apportionment. (Minutes of Hearing, Order of Consolidation and Summary of Evidence, February 2, 2021, pp. 3-4.) The matter was ordered submitted. (*Id.* at p. 1.)

On April 20, 2021, the WCJ vacated submission of the matter and sent it to the DEU for a rating. The WCJ subsequently issued the F&A finding that applicant had sustained 59% permanent disability for the July 16, 2012 injury per the DEU's rating. Applicant was found to be "entitled to an unapportioned award." The award was less credit for amounts paid.

DISCUSSION

I.

While the employee holds the burden of proof regarding the approximate percentage of permanent disability directly caused by the industrial injury, the employer holds the burden of proof to show apportionment of permanent disability. (Lab. Code, § 5705; see also *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc), *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450 [45 Cal.Comp.Cases 170].) To meet this burden, the employer "must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment." (*Gay v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 620.)

"Apportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) Physicians are required to address apportionment when evaluating permanent impairment. (Lab. Code, § 4663(b)-(c).) Section 4663(c) provides in pertinent part as follows:

> In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician

> shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.
>
> (Lab. Code, § 4663(c).)

Section 4664(a) separately states that the "employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Lab. Code, § 4664(a).)

"Apportionment is a factual matter for the appeals board to determine based upon all the evidence." (*Gay*, *supra*, 96 Cal.App.3d at p. 564.) Thus, the WCJ has the authority to determine the appropriate amount of apportionment, if any. It is also well established that decisions by the Appeals Board must be supported by substantial evidence. (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]; *Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Therefore, the WCJ must determine if the medical opinions regarding apportionment constitute substantial evidence. (See *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].)

As outlined in *Escobedo*:

> [I]n the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles.
>
> (*Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 621, citations omitted.)

The Court of Appeal has similarly held in relevant part:

> It is certain the mere fact that a report addresses the issue of causation of the permanent disability, and makes an apportionment determination by finding the approximate relative percentages of industrial and nonindustrial causation does not necessarily render the report one upon which the Board may rely.
>
> (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 927-928 [71 Cal.Comp.Cases 1687].)

Defendant contends that the WCJ erred in failing to apportion permanent disability for applicant's lumber spine to the 2016 non-industrial motor vehicle accident per section 4663 and the findings of the AME Dr. Angerman. Dr. Angerman opined that a portion of applicant's disability for this body part is attributable to the non-industrial accident. However, in his July 3, 2018 report he noted that he had "none of the orthopaedic treatment records between the non-industrial motor vehicle accident on February 12, 2016 and Dr. Perelman's April 5, 2017 report." He subsequently issued his last report in November 2019 wherein he noted that the parties "are unable to procure any additional records" and "asked [him] to render [his] opinions based on the information available."

"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].) Dr. Angerman apportioned to the 2016 non-industrial motor vehicle accident without review of the complete medical records pertaining to applicant's treatment and condition in relation to that accident. Pursuant to *Hegglin*, a medical opinion based on an inadequate history is not substantial evidence.

Furthermore, Dr. Angerman does not explain how and why the non-industrial accident contributed to applicant's current level of disability for her lumbar spine. As discussed above, a medical opinion addressing apportionment must explain the basis for the opinion and the mere fact that a report addresses apportionment does not make it substantial evidence upon which the trier of fact may rely in applying apportionment.

Defendant contends that if Dr. Angerman's report did not adequately address apportionment, the report should not have been relied upon and the WCJ should reopen the record for further discovery. The trier of fact may find a physician's opinions regarding apportionment to be deficient, but still rely on that physician's opinion to determine other issues in dispute if those opinions constitute substantial medical evidence. (See e.g., *County of El Dorado v. Workers' Comp. Appeals Bd.* (*Farrar*) (2007) 72 Cal.Comp.Cases 1149 (writ den.) [the Appeals Board made a finding of injury AOE/COE based on applicant's QME's opinion, although the QME did not adequately apportionment].) Additionally, discovery generally closes at the mandatory settlement conference. (See Lab. Code, § 5502(d)(3).) Defendant bears the burden of proving apportionment

as outlined above. The WCJ is not obligated to reopen discovery where defendant proceeds to trial on inadequate reporting on the issue of apportionment.

II.

Section 4664(b) provides:

> If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.
>
> (Lab. Code, § 4664(b).)

The employer must make the following showing in order to prove apportionment for a prior permanent disability award is warranted under section 4664:

> First, the employer must prove the existence of the prior permanent disability award. Then, having established by this proof that the permanent disability on which that award was based still exists, the employer must prove the extent of the overlap, if any, between the prior disability and the current disability. Under these circumstances, the employer is entitled to avoid liability for the claimant's current permanent disability only to the extent the employer carries its burden of proving that some or all of that disability overlaps with the prior disability and is therefore attributable to the prior industrial injury, for which the employer is not liable.
>
> (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115; see also *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223 (Appeals Board en banc).)

This matter went to trial on the issue of whether applicant had sustained new and further disability for the July 16, 2012 injury per section 5410. (Lab. Code, § 5410.) The phrase "new and further disability" is not defined in the Labor Code, but has been interpreted by case law to mean some demonstrable change in the employee's condition, including a new period of temporary disability, a change to permanent disability or a need for additional medical treatment. (*Nicky Blair's Restaurant v. Workers' Comp. Appeals Bd.* (*Macias*) (1980) 109 Cal.App.3d 941, 955 [45 Cal.Comp.Cases 876].) An award after a petition to reopen may find an increased level of permanent disability due to the industrial injury. If the WCJ awards increased permanent disability, "it is the total [permanent disability] award which is due, not the subtraction of the percent of permanent disability…On a reopening, it is as if a new award had issued." (*Sierra Vista*

Hospital v. Workers' Comp. Appeals Bd. (*Shedelbower*) (1997) 62 Cal.Comp.Cases 1465, 1466 (writ den.).)

Defendant contends that applicant's petition to reopen for new and further disability does not permit her to "re-hash" the "stipulated apportionment" from the 2015 Stipulations with Request for Award for this injury. (Petition for Reconsideration, July 16, 2021, p. 6.) The parties initially stipulated to 26% permanent disability for the lumbar spine in the 2015 award. This was presumably based on Dr. Angerman's June 24, 2015 report wherein he apportioned permanent disability for the lumbar spine as follows: 10% to non-industrial degenerative disease, 5% to the prior March 7, 2007 award and the remaining attributable to the July 16, 2012 injury.

However, in his subsequent November 5, 2019 report, Dr. Angerman provided two possible scenarios for apportionment of the lumbar spine. He initially opines that "if the subtraction method is determined to be applicable," then apportionment would be 50% to the 2016 non-industrial accident "with the remaining portion attributable to the stipulated injury of July 16, 2012." Alternatively, he then opines that "[i]f the subtraction method is not determined to be applicable" then "30% would be attributable to the industrial injury already stipulated to with the remaining portion split equally between the natural progression of the July 16, 2012 industrial injury and the non-industrial motor vehicle accident occurring in February of 2016," with 10% apportioned to non-industrial causes.

Dr. Angerman's reporting is unclear as to which "industrial injury already stipulated to" caused 30% of the permanent disability in the second scenario.[4] Assuming Dr. Angerman is apportioning to applicant's previous injury from the 2007 award, his report does not explain how and why that injury caused 30% of applicant's current disability to the lumbar spine. If Dr. Angerman is apportioning to the 2007 award per section 4664, defendant bears the burden of proving the existence of the prior award and that there is overlap between applicant's prior disability and current disability for the lumbar spine for there to be apportionment per section 4664 to the previous industrial injury. (*Kopping*, *supra*.) Dr. Angerman's June 24, 2015 report noted that this was an award for 16% permanent disability for the neck, back and shoulders, but the specific level of disability attributed to the back, if any, from this award is not discussed. The record does not contain other evidence regarding the 2007 award. Defendant has not provided

[4] As discussed above, to the extent that Dr. Angerman's opinion regarding apportionment was not substantial evidence because it was unclear, it was incumbent on defendant to develop the record to clarify murkiness in his conclusions.

substantial evidence showing overlap between applicant's prior disability from the 2007 award and her current disability from the July 16, 2012 injury.

Defendant characterizes the parties' stipulations in the 2015 award as a stipulation to Dr. Angerman's 2015 apportionment opinions. The parties to a controversy may stipulate to the facts. (Lab. Code, § 5702.) Review of the 2015 award reflects that the parties stipulated to 26% permanent disability for the lumbar spine, but there is no language in the award to indicate that the parties stipulated that Dr. Angerman's apportionment conclusions in 2015 would apply to a claim for new and further permanent disability. A stipulation by the parties to specific apportionment percentages may not be inferred when it is not contained in the 2015 award.

Defendant also argues for apportionment per section 4664 based on the 26% permanent disability for the lumbar spine due to the July 16, 2012 injury already stipulated to in the 2015 award. Determining apportionment requires looking "at the current disability and parcel[ing] out its causative sources—nonindustrial, prior industrial, current industrial—and decide the amount directly caused **by the current industrial source**." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1328 [72 Cal.Comp.Cases 565], emphasis added.) Per *Brodie* and section 4664, it is proper to apportion between *two* industrial injuries using the subtraction method where the defendant proves the existence of a prior permanent disability award and that there is overlap between the prior disability and the current disability. (See also *Kopping*, *supra*.) The 2015 award was for the same injury for which applicant has shown new and further disability. This is therefore not a "*subsequent* industrial injury" under section 4664(b). (Lab. Code, § 4664(b), emphasis added.) Applicant is entitled to a new permanent disability award reflecting the total level of disability resulting from the July 16, 2012 injury and defendant is entitled to credit for amounts previously paid as permanent disability. (*Shedelbower*, *supra*.) This is precisely what the F&A reflects.

In conclusion, defendant did not meet its burden of proving apportionment of permanent disability to the lumbar spine is warranted. Therefore, we will affirm the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Award issued by the WCJ on June 24, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 21, 2022

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

GOLDSCHMID SILVER & SPINDEL
GWENDOLYN SYKES
PURINTON LAW

AI/*pc*

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