WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SUMUDU JAYASURIYA, ***Applicant***

vs.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT (PSI) adjusted by ATHENS ADMINISTRATORS, ***Defendants***

Adjudication Numbers: ADJ9770624; ADJ10440533
Oakland District Office

OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION

Applicant in pro per seeks reconsideration of the Findings and Award (F&A) issued on March 7, 2025, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a train control electronic technician on October 13, 2014, applicant sustained injury arising out of and in the course of employment to his low back; (2) at the time of injury, defendant was permissibly self-insured; (3) at the time of injury, applicant's earnings were $1,611.96 per week, warranting temporary disability indemnity at a rate of $1,074.64 per week and permanent disability indemnity at a rate of $290.00 per week; (4) defendant has paid temporary disability indemnity of $1,074.64 per week from October 15, 2014 through October 28, 2014, and permanent disability indemnity of $11,092.50, beginning on October 29, 2014 pursuant to the parties' Stipulations with Request for Award, with applicant adequately compensated for all periods of temporary disability; (5) there is good cause to grant the petition to reopen for new and further disability; (6) applicant's injury caused permanent disability of 16%, inclusive of amounts previously awarded; (7) applicant is entitled to further medical treatment to cure or relieve the effects of injury; and (8) applicant's attorney is entitled to a fee of 15% of the new and further permanent disability indemnity awarded herein.

The WCJ awarded applicant (1) permanent disability indemnity of 16%, with all permanent total disability indemnity benefits due and payable, less credit for amounts previously paid, and less an attorney's fee of 15% of the new and further disability awarded herein; (2) further

medical treatment for the low back injury; and (3) an attorney's fee of 15% of the new and further permanent disability indemnity awarded herein.

Applicant contends that (1) Dr. Holmes's reporting fails to constitute substantial medical evidence; (2) the WCJ failed to consider his post-trial briefs; and (3) defendant's attorney engaged in misconduct.

We received an Answer from defendant.

Applicant filed papers labeled as a supplemental pleading. We do not accept, and we do not consider, applicant's supplemental pleading because applicant did not seek permission as required by WCAB Rule 10964(a) (Cal. Code Regs., tit. 8, § 10964(a)).

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will deny reconsideration.

FACTUAL BACKGROUND

In the Report, the WCJ states:

> I relied on the opinion of the Qualified Medical Examiner, Dr. Jeffrey Holmes, who reduced his assessment of Whole Person Impairment (WPI) from 13% in a pre-Maximum Medical Improvement (MMI) report down to 11% when applicant was ultimately declared at MMI.
>
> Applicant contends: (1) Dr. Holmes arbitrarily reduced the permanent impairment from 13% to 11%, without any new objective medical findings: (2) Dr. Holmes conducted an inadequate evaluation regarding range of motion (ROM) testing and failure to provide neurological tests, muscle strength tests or Waddell Signs evaluations; (3) this judge improperly failed to consider two unrequested post-trial briefs by applicant after the dismissal of his attorney; and (4) defense counsel committed procedural misconduct.
> . . .
> The factual background of this case is set forth at pages 1-3 of the March 7, 2025 Opinion on Decision as follows:
>
> This case was previously settled via Stipulations with Request for Award, with the Award approved on October 5, 2016 at 12% permanent disability for the low back. Applicant filed a petition to reopen for new and further disability August 23, 2019. In the Stipulations which was the basis for the award, the permanent disability was based upon the opinion of the Qualified

Medical Examiner (QME) at the time, Dr. Atkin, and was based on an 8% Whole Person Impairment (WPI).

At trial, applicant testified that he was injured on 10/13/14, and saw Dr. Holmes, then settled his case. He's being seen by Dr. Dioxion Rena.

His low back got worse, and then he was seen by a new QME, Dr. Holmes. He was seen 3 times by Dr. Holmes, the last time in May of 2024. This lasted 5-10 minutes. There was no range of motion (ROM) or reflex test, strength test, or use of an inclinometer or other instruments. Dr. Holmes didn't physically touch him then. He doesn't feel the report is credible because of this.

. . .

After his award, his back got worse in January or February of 2019, when he was working his regular duties. His back got worse over time. He isn't certain if he missed any time from work due solely to his back.

Dr. Holmes did sensory testing on his legs at the time of the last exam.

. . .

He's had treatment on his back since the petition to reopen – no surgery. His symptoms when he saw Dr. Holmes were the same as when he saw him in 2021 and 2022.

On re-direct examination, applicant testified that he had an epidural spinal injection in 2019. He was asked to do bending by Dr. Holmes, but not in May of 2024. (*Minutes of Hearing and Summary of Evidence* (MOH/SOE), January 9, 2025 at pp. 5-7.)

. . .

With respect to the allegation that Dr. Holmes arbitrarily reduced the level of permanent impairment from 13% WPI (report of July 3, 2023) to 11%WPI (report of June 2, 2024), applicant leaves a crucial fact out of his Petition, which is that Dr. Holmes stated in his intervening report of October 14, 2023 that applicant had not yet reached MMI status. At p. 5 of my Opinion, I noted that Dr. Holmes provided a credible rationale for his reduction of the WPI by 2%, based upon his examination of applicant at the time of his last report.

. . .

Regarding the argument over the range of motion measurements, applicant had the opportunity to cross-examine Dr. Holmes at his deposition on August 20, 2024, but curiously chose not to do so, instead asking the doctor only a few general questions about the reduction from 13% WPI to 11% WPI with no mention of range of motion measurements. Moreover, the WPI classification utilized by Dr. Holmes is pursuant to the DRE method of impairment assessment, which is used to be used to measure permanent impairment in the spine in the vast majority of cases. By contrast, the range

of motion method is only to be used only when one of six criteria exist pursuant to p. 398 of the AMA Guides, which is not alleged to be the case here. Furthermore, Dr. Holmes testified at his deposition that he reviewed all of his reports and his prior deposition, and confirmed that he had an independent recollection of evaluating the applicant on May 14, 2024. Dr. Holmes also stated that he personally took the history from applicant and personally performed the lumbar spine examination including the measurements contained at pp. 3-4 of his final report, in contrast to applicant's assertion in his Petition. Accordingly, I find no merit in applicant's lengthy argument regarding range of motion.

Similarly, with respect to alleged failure to provide neurological tests, muscle strength tests or Waddell Signs evaluations, applicant does not indicate how this would alter the assessment of WPI pursuant to the DRE method of assessment.

Regarding the two post-trial briefs filed by applicant, he is correct that I did not consider these . . . At pp. 4-5 of the MOH/SOE, I specifically only allowed defendant the opportunity to provide a post-trial brief because applicant filed his trial brief three days before trial, allegedly without serving defendant. *For this reason only*, I allowed defendant only to file on further trial brief within a specific time frame. No other trial briefs were specified, and no other briefs were considered.

Finally, I find absolutely no basis for applicant's assertion that defense counsel acted improperly at trial.
(Report, pp. 1-6.)

DISCUSSION

I.

Former Labor Code section 5909[1] provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (§ 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part:

> (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.

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

> (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 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 April 10, 2025 and 60 days from the date of transmission is June 9, 2025. This decision is issued by or on June 9, 2025, 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 act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on April 10, 2025, and the case was transmitted to the Appeals Board on April 10, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on April 10, 2025.

II.

Applicant first contends that Dr. Holmes's reporting fails to constitute substantial medical evidence. Specifically, applicant argues that Dr. Holmes reduced the permanent impairment from 13% to 11% without a medical basis for doing so and failed to conduct adequate medical evaluations in the form of range of motion, neurological, muscle strength, and psychological testing.

We observe that all decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [54 Cal.Comp.Cases 349].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].) 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 [93 Cal. Rptr. 15, 480 P.2d 967, 36 Cal.Comp.Cases 93, 97].)

Here, as stated in the Report, Dr. Homes's reporting of October 14, 2023 indicated that applicant had yet to reach maximal improvement and his subsequent reporting adequately explained his assessment of WPI at 11% in light of applicant having reached maximal medical improvement.

Furthermore, as also stated in the Report, Dr. Holmes's reporting adequately explained that he followed the DRE method of impairment assessment—and there is no evidence suggesting that he failed to follow that method or that another method utilizing range of motion, neurological, muscle strength, and psychological testing would have resulted in a more accurate assessment of applicant's impairment.

Because Dr. Holmes's reporting is based on pertinent facts, an adequate examination and history, and sets forth reasoning in support of its conclusions, we conclude that it constitutes substantial medical evidence. *(Escobedo, supra;* see also *De La Cerda v. Martin Selko & Co.* (2017) 83 Cal.Comp.Cases 567 (writ den.) (stating that a physician's opinion as to the most accurate rating method should be followed if she or he provides a reasonably articulated medical

basis for doing so).) Accordingly, we discern no error in the WCJ's reliance on Dr. Holmes's reporting.

We next address applicant's argument that the WCJ failed to consider his post-trial briefs. Specifically, applicant argues that his post-trial briefs detailed defendant's attorney's "procedural irregularities" and that the WCJ's refusal to consider them denied him a fair hearing and an opportunity to be heard. (Petition, p. 12:10-21.)

As the Court of Appeal stated in *Katzin v. Workers' Comp. Appeals Bd*. (1992) 5 Cal.App.4th 704 [57 Cal.Comp.Cases 230]:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citation.] (*Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449, 1452-1453 [56 Cal.Comp.Cases 537].) Due process requires that all parties 'must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. [Citations.]' (*Fidelity & Cas. Co. of New York v. Workers' Comp. Appeals Bd*. (*Harris*) (1980) 103 Cal.App.3d 1001, 1015 [45 Cal.Comp.Cases 381].)
> (*Katzin*, *supra*, at 711-712.)

Here, the record does not show that applicant was not denied notice and an opportunity to be heard with regard to the evidence defendant presented at trial or denied an opportunity to present rebuttal evidence. In particular, as stated in the Report, the WCJ considered one trial brief for each party and only permitted defendant to submit its brief after trial because it had not been served with applicant's brief. Accordingly, we are unable to discern error in the WCJ's failure to consider applicant's post-trial briefs.

Lastly, we address applicant's contention that defendant's attorney engaged in misconduct.

Here, as stated in the Report, the record fails to disclose grounds to conclude that defendant's attorney engaged in any misconduct. Accordingly, we are unable to discern merit to the argument that the F&A resulted from defendant's attorney's misconduct.

Accordingly, we will deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Award issued on March 7, 2025 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 9, 2025

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

SUMUDU JAYASURIYA
RATTO LAW FIRM
LAUGHLIN, FALBO, LEVY & MORESI LLP

SRO/bp

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