

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JOSEPH MAYOR, *Applicant*

vs.

**ROSS VALLEY SANITARY DISTRICT, PERMISSIBLY SELF-INSURED,
administered by SEDGWICK CMS, *Defendants***

**Adjudication Number: ADJ10036954
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration¹ in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant seeks reconsideration of the Findings, Award and Orders with Opinion on Decision (F&A) issued on March 2, 2023, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a maintenance worker on December 9, 2013, sustained industrial injury the cervical spine, thoracic spine, and right shoulder, and claims to have sustained injury to his right knee and in the form of cervicogenic headaches as a compensable consequence of his neck injury. The WCJ found that applicant sustained permanent and total disability based on the reporting of the evaluating physicians and applicant's vocational expert.

Defendant contends that applicant's vocational expert reached an unsubstantiated conclusion that failed to consider the entire medical record, and that the F&A does not discuss the apportionment identified by the evaluating physicians. Defendant also contends that vocational expert reporting is no longer admissible in workers' compensation proceedings pursuant to Labor Code² section 4660.1(a) and controlling case law authority.

¹ Commissioner Dodd, who was previously a member of this panel, is not currently available. Another panelist has been assigned in her place.

² All further references are to the Labor Code unless otherwise noted.

We have received an Answer from applicant. Neither the WCJ nor the Presiding WCJ have prepared a Report and Recommendation on Petition for Reconsideration (Report).

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

FACTS

Applicant sustained injury arising out of and in the course of employment (AOE/COE) to the cervical spine, thoracic spine, and right shoulder, and claims to have sustained injury to the right knee and head in the form of headaches, while employed as a maintenance worker by defendant the Ross Valley Sanitary District on December 9, 2013.

The parties have obtained reporting from Qualified Medical Evaluator (QME) Manijeh Ryan, M.D. Applicant's primary treating physician is Babak Jamasabi, M.D. Applicant has also obtained reporting from vocational expert Jeff Malmuth, while defendant has obtained reporting from vocational expert Emily Tincher.

On May 2, 2022, the parties proceeded to trial on issues including, in relevant part, the nature and extent of the injury (body parts), temporary and permanent disability, and attorney fees. (Minutes of Hearing and Summary of Evidence (Minutes), dated May 2, 2022, at p. 3:7.) The parties also placed in issue defendant's objection to the relevance of the entirety of the vocational evidence. The testimony of applicant and defense witness Steven MacKinnon was adduced over two trial settings, and the parties submitted the matter for decision on August 8, 2022.

On November 5, 2022, the WCJ issued Findings and Orders, determining in relevant part that the parties' stipulation regarding permanent disability levels needed to be clarified, as did issues concerning temporary disability and applicant's ongoing medical treatment authorization. (Findings and Order with Opinion on Decision, November 5, 2022, p. 2.)

Pursuant to the WCJ's procedural history listed in the Opinion on Decision,³ the WCJ conducted three additional hearings on November 22, 2022, December 6, 2022, and February 22,

³ The Minutes for the hearing held on February 22, 2023 are not present in the Electronic Adjudication Management System (EAMS) filenet.

2023. The record in EAMS does not reflect a date when the matter was submitted for decision, or revisions to the issues submitted for decision.

On March 2, 2023, the WCJ issued the F&A, determining in relevant part that applicant had sustained permanent and total disability. The WCJ's Opinion on Decision noted that the stipulated rating of the medical-legal report was 53 percent permanent disability, but that the reporting of applicant's vocational expert Mr. Malmuth successfully rebutted the permanent disability ratings guide by establishing applicant's non-feasibility for vocational retraining. (Opinion on Decision at pp. 20-21.)

Defendant's Petition for Reconsideration (Petition) avers that applicant's vocational expert did not adequately explain why he discounted 49 occupations into which applicant was otherwise capable of being retrained. (Petition, at 2:17.) Defendant contends the WCJ discounted the apportionment identified by the medical-legal evaluators without adequate explanation. (*Id.* at p. 2:26.) Defendant further contends that case law has eliminated the relevance of vocational reporting altogether. (*Id.* at p. 13:13.)

Applicant's Answer avers the finding of permanent and total disability is supported by the "work restrictions and functional losses identified by the (sic) Dr. Ryan and the FCE evaluator [which] were not based upon non-industrial conditions." (Answer, at p. 2:3.) Similarly, the vocational evidence demonstrates why applicant's disability was entirely caused by the industrial injury. Applicant also contends that defendant's argument for the inadmissibility of vocational reporting is contrary to the cases cited by defendant in support of its argument and ignores relevant statutory and case law authority. (*Id.* at p. 9:20.)

DISCUSSION

Section 10961 of the Workers' Compensation Appeals Board's (WCAB) Rules of Practice and Procedure provides:

Within 15 days of the timely filing of a petition for reconsideration, a workers' compensation judge shall perform one of the following actions:

- (a) Prepare a Report and Recommendation on Petition for Reconsideration in accordance with rule 10962;
- (b) Rescind the entire order, decision or award and initiate further proceedings within 30 days; or

(c) Rescind the order, decision or award and issue an amended order, decision or award. The time for filing a petition for reconsideration pursuant to Labor Code section 5903 will run from the filing date of the amended order, decision or award.

After 15 days have elapsed from the filing of a petition for reconsideration, a workers' compensation judge shall not issue any order in the case until the Appeals Board has denied or dismissed the petition for reconsideration or issued a decision after reconsideration.

(Cal. Code Regs., tit. 8, § 10961.)

WCAB Rule 10962 states:

Petitions for reconsideration, petitions for removal and petitions for disqualification shall be referred to the workers' compensation judge from whose decisions or actions relief is sought. If the workers' compensation judge prepares a report, it shall contain:

- (a) A statement of the contentions raised by the petition;
- (b) A discussion of the support in the record for the findings of fact and the conclusions of law that serve as a basis for the decision or order as to each contention raised by the petition, or, in the case of a petition for disqualification, a specific response to the allegations and, if appropriate, a discussion of any failure by the petitioner to comply with the procedures set forth in rule 10960; and
- (c) The action recommended on the petition.

The workers' compensation judge shall submit the report to the Appeals Board within 15 days after the petition is filed unless the Appeals Board grants an extension of time. The workers' compensation judge shall serve a copy of the report on the parties and any lien claimant, the validity of whose lien is specifically questioned by the petition, at the time the report is submitted to the Appeals Board.

If the workers' compensation judge assigned to the case is unavailable, the presiding workers' compensation judge shall prepare and serve the report.

(Cal. Code Regs., tit. 8, § 10962.)

Here, defendant filed its Petition on March 23, 2023. However, the record does not reflect that the WCJ prepared a Report and Recommendation on Petition for Reconsideration, or that the

WCJ rescinded the F&A and initiated further proceedings or issued an amended decision. In addition, no report has been filed by the Presiding Judge due to the WCJ's unavailability.

Section 5313 provides:

The appeals board or the workers' compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.

As required by section 5313 and explained in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Bd. en banc) (*Hamilton*), "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.)

A decision "must be based on admitted evidence in the record" (*Hamilton, supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (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. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Section 5313 thus requires the WCJ to "file finding upon *all* facts involved in the controversy" and to issue a corresponding award, order or decision that states the "reasons or grounds upon which the [court's] determination was made." (Italics added; see also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-622 [2010 Cal. Wrk. Comp. LEXIS 74] (Appeals Board en banc).)

The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision...." (*Hamilton, supra*, at p. 476.) The Court of Appeal has further observed that pursuant to Labor Code section 5908.5, decisions of the WCAB must state the evidence relied upon and specify in detail the reasons for the decision. (*Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351] (*Evans*).) The purpose of the requirement is "to assist the reviewing court to ascertain the principles relied upon by the lower tribunal, to help that tribunal avoid careless or arbitrary action, and to make the right of appeal or of seeking review more meaningful." (*Evans, supra*, at p. 755.)

Following our review of this matter occasioned by defendant's Petition, we observe that the WCJ's Opinion on Decision determines that "Dr. Ryan's opinions on apportionment involving the cervical and thoracic spine are substantial medical evidence and legally valid." (Opinion on Decision, at p. 18.) However, there is no further discussion of the identified apportionment, or its interaction with the findings of non-feasibility for vocational retraining by applicant's expert Mr. Malmuth. We also observe that pursuant to our en banc holding in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 30]), section 4663 "requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment ... [t]he Labor Code makes no statutory provision for 'vocational apportionment.'" (*Id.* at p. 743.) Moreover, although the Opinion on Decision acknowledges Mr. Malmuth's identification of 49 occupations that "might" be compatible with applicant's work restrictions, there is no discussion of why the vocational expert unilaterally deemed those occupations not feasible, and why the WCJ determined the reporting to be persuasive notwithstanding the conclusory nature of the findings. (Opinion on Decision, at p. 21.)

We also observe that the F&A appears to omit findings of fact with reference to the claimed body parts of right knee and cervicogenic headaches, noted to be "claimed" by applicant in Finding of Fact No. 1, but without a corresponding finding of fact as to their compensability. Notwithstanding a legal determination on the issue of these body parts, we also note that the WCJ's Opinion on Decision describes his determinations as to the compensability of both body parts. (See Opinion on Decision, at pp. 11-12.)

Pursuant to Section 5313 and *Hamilton, supra*, the Opinion on Decision should explain the basis for the WCJ's decision in order to assist the reviewing court in ascertaining the principles relied upon by the lower tribunal. To the extent that the Opinion on Decision does not adequately explain the basis for the WCJ's findings, the WCJ's Report and Recommendation is necessary to explicate the issues raised on petition for reconsideration, and to make the appropriate recommendations to the Appeals Board, including rescission or amendment of the decision, as may be appropriate. (Lab. Code, § 5313; Cal. Code Regs., tit. 8, § 10962; *Hamilton, supra*, at p. 476.)

In the absence of a Report addressing the contentions raised by defendant's Petition, we will rescind the F&A, and return the matter to the trial level for further proceedings as the WCJ

deems necessary, and to address the issues raised by the parties. Once the WCJ has issued a new decision, any person aggrieved thereby may thereafter seek reconsideration.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Award & Orders with Opinion on Decision, issued March 2, 2023, is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 26, 2024

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

**JOPSEH MAYOR
SHOEMAKER LAW OFFICES
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

SAR/abs

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