

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4
5 **JACOB VERVALIN,**

6 *Applicant,*

7 **vs.**

8 **MISSION UNIFORM & LINEN;**
9 **TRAVELERS INSURANCE,**

10 *Defendant(s).*
11

Case No. ADJ288083 (RDG 0128539)

**OPINION AND DECISION
AFTER RECONSIDERATION**

12
13 On November 23, 2009, we granted reconsideration of defendant's Petition for
14 Reconsideration of the September 14, 2009 Findings and Award issued by the workers'
15 compensation administrative law judge (WCJ). Therein, the WCJ found, based on the parties'
16 prior stipulations, that applicant, while employed as a sales representative on April 20, 2007,
17 sustained industrial injury to his lumbar and thoracic spine and claimed to have sustained
18 industrial injury to his cervical spine. The WCJ further found that the July 16, 2009 agreed
19 medical examination (AME) report of Donald Swartz, M.D., was admissible as Appeals Board
20 Exhibit Y and that applicant was entitled to spinal surgery on an industrial basis. We granted
21 reconsideration in order to further study the facts and issues presented. We now issue our
22 Decision After Reconsideration.

23 In its Petition for Reconsideration, defendant contended that the WCJ erred in admitting
24 the Dr. Swartz' July 16, 2009 supplemental AME report into evidence. Defendant further
25 contended that the WCJ erred in finding that applicant is entitled to spinal surgery on an industrial
26 basis.

27 ///

1 Applicant filed an Answer, and the WCJ issued a Report and Recommendation of
2 Workers' Compensation Administrative Law Judge on Petition for Reconsideration (Report)
3 recommending that we affirm his decision.

4 Based on our review of the record and for the reasons discussed below, we will rescind the
5 WCJ's decision and return this matter to the trial level for further proceedings and decision by the
6 WCJ.

7 RELEVANT FACTS

8 The relevant facts are not in dispute. Applicant underwent an AME by Dr. Swartz on
9 April 16, 2008. Dr. Swartz referred applicant to orthopedic surgeon, Brad Jones, M.D. In a report
10 dated February 11, 2009, Dr. Jones requested authorization for spinal surgery. (Applicant's
11 Exhibit 3.) Thereafter, defendant obtained a February 24, 2009 utilization review denying spinal
12 surgery. (Defendant's Exhibit B.) Defendant also obtained a March 26, 2009 report by Peter
13 Pappas, M.D., who recommended against surgery. In making his recommendation, Dr. Pappas
14 noted that he reviewed an August 21, 2007 MRI and a January 13, 2009 CT and found no clinical
15 evidence justifying surgery. (Defendant's Exhibit B, at p. 2.)

16 The July 8, 2009 Minutes of Hearing and Summary of Evidence (MOH) summarized
17 applicant's trial testimony as follows:

18 "When [applicant] went to see Dr. Pappas, Dr. Pappas looked at the first MRI
19 study that was performed in 2007, and he looked at the CT, but he would not
20 look at the MRI performed in 2009. [Applicant] took all three films with him.
21 Dr. Pappas told applicant he was overweight and that was causing his
22 problems. [Applicant] has gained 30 pounds since the injury. He was never
23 overweight before. Dr. Pappas examined him for about 20 to 25 minutes, but
24 [applicant] does not feel Dr. Pappas listened into him." (MOH 7/8/09, at p.
25 4:27-35.)

26 The trial testimony of applicant's wife was summarized as follows:

27 "She went with her husband to all of his examinations, including the
examination with Dr. Pappas. Dr. Pappas opened the 2007 MRI films, looked
at them quickly and said there was nothing wrong with her husband except he
was overweight and he needed to walk in a pool. He would not look at
anything else." (MOH 7/8/09, at p. 5:23-28.)

DISCUSSION

Labor Code¹ section 4610(g)(3)(A) states, in relevant part, that:

“If a request to perform spinal surgery is denied, disputes shall be resolved in accordance with subdivision (b) of Section 4062.” (Lab. Code, § 4610(g)(3)(A).)

In turn, section 4062(b) provides that:

“The employer may object to a report of the treating physician recommending that spinal surgery be performed within 10 days of the receipt of the report. If the employee is represented by an attorney, the parties shall seek agreement with the other party on a California licensed board-certified or board-eligible orthopedic surgeon or neurosurgeon to prepare a second opinion report resolving the disputed surgical recommendation. If no agreement is reached within 10 days, or if the employee is not represented by an attorney, an orthopedic surgeon or neurosurgeon shall be randomly selected by the administrative director to prepare a second opinion report resolving the disputed surgical recommendation. Examinations shall be scheduled on an expedited basis. The second opinion report shall be served on the parties within 45 days of receipt of the treating physician's report. If the second opinion report recommends surgery, the employer shall authorize the surgery. If the second opinion report does not recommend surgery, the employer shall file a declaration of readiness to proceed. The employer shall not be liable for medical treatment costs for the disputed surgical procedure, whether through a lien filed with the appeals board or as a self-procured medical expense, or for periods of temporary disability resulting from the surgery, if the disputed surgical procedure is performed prior to the completion of the second opinion process required by this subdivision.” (Lab. Code, §4062(b).)

In *Cervantes v. El Aguila Food Products, Inc.* (2009) 74 Cal.Comp.Cases 1336 (Appeals Board en banc), we held that:

“[T]he procedures and timelines governing objections to a treating physician's recommendation for spinal surgery are contained in Labor Code sections 4610 and 4062 and in Administrative Director (AD) Rules 9788.1, 9788.11, and 9792.6(o) and are as follows: (1) when a treating physician recommends spinal surgery, a defendant must undertake utilization review (UR); (2) if UR approves the requested spinal surgery, or if the defendant fails to timely complete UR, the defendant must authorize the surgery; (3) if UR denies the spinal surgery request, the *defendant* may object under section 4062(b), but any objection must comply with AD Rule 9788.1 and use the form required by AD Rule 9788.11; (4) the defendant must complete its UR process within 10 days of its receipt of the treating physician's report, which

¹ All further statutory references are to the Labor Code, unless otherwise noted.

1 must comply with AD Rule 9792.6(o), and, if UR denies the requested
2 surgery, any section 4062(b) objection must be made within that same 10-day
3 period; and (5) if the defendant fails to meet the 10-day timelines or comply
4 with AD Rules 9788.1 and 9788.11, the defendant loses its right to a second
opinion report and it must authorize the spinal surgery.” (*Cervantes, supra*,
74 Cal.Comp.Cases at p. 1338, (emphasis in original)(foot notes omitted).)

5 Thus, it was improper for the WCJ to rely on section 4062.3(j) and on Dr. Swartz’s July
6 16, 2009 supplemental AME report to authorize spinal surgery. The proper procedures and
7 timelines governing objections to a treating physician’s recommendation for spinal surgery are
8 contained in sections 4610 and 4062 as discussed in *Cervantes, supra*. Therefore, where as here,
9 the defendant has objected to the treating physician’s recommendation of spinal surgery; where
10 the defendant has undertaken a utilization review; where the applicant is represented; where there
11 has been no agreement on an orthopedic surgeon or neurosurgeon² to prepare a second opinion
12 report pursuant to section 4062(b); and where the defendant has obtained a second opinion report
13 from a physician randomly selected by the Administrative Director, the WCJ must rely on either
14 the treating physician’s recommendation or on the recommendation of the second opinion report
15 obtained pursuant to section 4062(b) so long as the WCJ’s decision is based on substantial
16 medical evidence. If the WCJ finds that neither of the reports is substantial medical evidence,
17 then due process requires development of the record to enable a complete adjudication. (Lab.
18 Code, §§ 5502(e)(3), 5701 & 5906; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th
19 389, 394; [62 Cal.Comp.Cases 924, 928]; *San Bernardino Community Hospital v. Workers’*
20 *Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 935 [64 Cal.Comp.Cases 986];
21 *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138,
22 142 (en banc).)

23 Based on the record before us, we are not persuaded that substantial medical evidence
24 exists to enable complete adjudication. Neither Dr. Jones’ report nor Dr. Pappas’ report contains
25 an adequate review of the medical record. A medical report and opinion is not substantial

26
27 ² Section 4062(b) requires the physician that prepares a second opinion report to be a California licensed
board-certified or board-eligible orthopedic surgeon or neurosurgeon.

1 evidence if it is based on an inadequate medical history and examination. (*Hegglin v. Worker's*
2 *Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) Although Dr. Pappas
3 reviewed a 2007 MRI, he did not review or comment on the September 18, 2008 MRI Report by
4 Stephen Hecht, M.D., finding evidence of "annular tear" at L5-S1. Therefore, it appears that Dr.
5 Pappas should be asked to provide an opinion in light of the September 18, 2008 MRI Report.
6 Thus, upon this matter's return to the trial level, the WCJ should conduct further proceedings to
7 develop the record pursuant to *Cervantes, supra*, and section 4062(b) and then issue a new
8 decision consistent with this opinion.

9 Accordingly, and based on the reasons discussed herein, we will rescind the WCJ's
10 decision and return this matter to the trial level.

11 ///

12 ///

13 ///

14 ///

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation
3 Appeals Board, that the September 14, 2009 Findings and Award be **RESCINDED** and that this
4 matter be **RETURNED** to the trial level for further proceedings and decision by the WCJ
5 consistent with this decision.

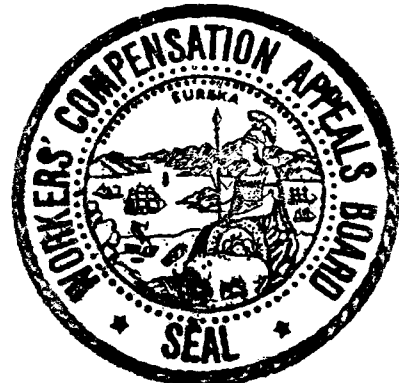
6 WORKERS' COMPENSATION APPEALS BOARD

7
8
9 I CONCUR,

Susan V. Hamilton **DEPUTY**
SUSAN V. HAMILTON

10
11 *James C. Cuneo*
JAMES C. CUNEO

12
13
14 *Ronnie G. Caplane*
RONNIE G. CAPLANE



15
16
17 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

18 **JUN 01 2010**

19 SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT
20 THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

21 JACOB VERVALIN
22 LAW OFFICES OF SHARON COHEN
HANNA, BROPHY, MacLEAN, McALEER & JENSEN, LLP

23
24
25 PAG/
26
27