**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**TRACY LEE, *Applicant***

**vs.**

**XCHANGING; GRANITE STATE INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ7643460**
**Sacramento District Office**

**OPINION AND ORDER**
**DENYING PETITION FOR**
**RECONSIDERATION**

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

We adopt and incorporate the following quote from the workers' compensation administrative law judge (WCJ)'s Opinion on Decision:

**OPINION ON DECISION**

> Some preliminary legal principles guide the decision in this case. The first such principle is that a finding of fact must be based on substantial evidence that is reasonable in nature, credible, and of such value that reasonable minds will accept to support conclusions (*County of Kern v WCAB* (2011) 200 Cal.App.4th 509, 516, 76 Cal.Comp.Cases 1037; *Braewood Convalescent Hospital v WCAB* (1983) 34 Cal.3d 159, 164, 48 Cal.Comp.Cases 566). Secondly, a trier of fact (in this case the Workers' Compensation Administrative Law Judge, hereafter WCALJ) is not required to blindly accept an opinion from a particular medical expert but when the situation calls for it, may make findings within the range of the evidence (*Liberty Mutual Insurance Company v WCAB* (1948) 33 Cal.2d 89, 93-94, 13 Cal.Comp.Cases 267). That includes a finding of disability that is between all the various experts' opinions (*Liberty Mutual, supra* at p. 94).
>
> The above paragraph sets the tone for the findings in this case because there was such a wide variation in the body of evidence. The findings nonetheless are based on substantial evidence after consideration of the entire record (*LeVesque v WCAB* (1970) 1 Cal.3d 627,637, 35 Cal.Comp.Cases 316). That record includes Tracy Lee's (applicant's) own testimony, the varied opinions of the different physicians who've examined applicant, the vocational counselors' reports, the record of proceedings prior to the most recent trial, the formal disability rating, and matters subject to judicial notice.

The most relevant medical evidence begins with the March 15, 2013, report of Qualified Medical Examiner (QME) Philip Hay, M.D. In a very thorough review of applicant's medical history and exam findings he concluded that applicant had 16 different diagnoses which included comprehensive regional pain syndrome (CRPS) resulting in chronic pain and sensitization, not yet then permanent and stationary. Dr. Hay also reported that there would be apportionment of (later determined) permanent disability since applicant had documented ongoing lupus before this industrial injury ever occurred. In his follow up report of August 27, 2014, he found that applicant had reached maximal medical improvement/permanent and stationary status. He then went on to rate applicant's impairments in her neck, left shoulder and upper extremity, coming up with overall impairment of 38%. Notably, he reported at that time that the ratings (based on strength, loss of motion and diagnosis for the neck) were an accurate measurement of applicant's disability with no need for analogy to other factors. Dr. Hay also went on to outline the apportionment, noting 85% of the overall disability was due to this injury, with the remaining 15% caused by underlying processes (progression of lupus and degeneration due to aging).

In the ensuing years, Dr. Hay reported up through 2017. Most significantly he reported on June 22, 2016, that applicant's conditions worsened and he added in disabilities due to applicant's right upper extremity. By that time applicant had 22 separate diagnoses. At that point applicant's neck impairment rated 8%, her right shoulder/upper extremity rated 15%, and left shoulder/upper extremity rated 33%. In addition, Dr. Hay estimated applicant's CRPS at 65% and combined that with the other factors at 77% overall. What is notable from those findings is that the doctor gave the 65% rating based on the impact of CRPS on the neck and upper extremities, essentially providing two cumulative disabilities for the same organs. It was for this reason that the instructions to the Disability Evaluations Unit (DEU) called for rating of Dr. Hay's disability findings on applicant's neck, shoulders/extremities and right knee, but the disability rater also included the 65% rating as a factor in the formal rating.

When Dr. Hay retired and was unavailable for a deposition after his last report, Daniel D'Amico, M.D. also reported as a QME. In Dr. D'Amico's report of January 20, 2020, he very exhaustively went through all of applicant's medical records beginning with her initial lupus diagnosis in 1993 and its progression thereafter, along with all of applicant's treatment for her industrial injuries. He then concluded that he agreed for the most part with Dr. Hay on diagnoses, including applicant's fibromyalgia, but differed on the diagnosis of CRPS. He then went on to describe applicant's impairments much lower: 10% for the shoulders, 2% for the right hip, 4% for the left upper extremity, and 3% for right knee pain. Although the sum of those factors is not extremely high, Dr. D'Amico also noted applicant's work restrictions (not ratable factors) meant she could not do even sedentary work.

The medical evidence also includes reports on applicant's psychiatric injury and disability. Clifford Straehley, M.D., acted as the psychiatric QME on the case and reported initially on July 2, 2016. In that report, he delved into applicant's psychiatric reaction to her injury, as well as her developmental and mental history/status both before and after the injury. After accounting for all the information provided he concluded that applicant sustained an industrial psyche injury predominantly caused by industrial factors. That injury left the

applicant significantly distressed with an overall global assessment factor of only 51. Dr. Straehley went on to note that 90% of applicant's psychiatric disability was due to this injury, but in his deposition he changed that opinion to 80% due to this injury. He explained the additional apportionment adequately, noting the existence of a prior industrial injury claim with an 84% permanent disability rating, probably made up 10% of the cause of the present psychiatric disability with another 10% due to ongoing physical stressors before this injury.

Finally, the pertinent medical evidence must include the reports of Kenneth Wiesner, M.D., who has treated applicant for her lupus and fibromyalgia since 1993. In his deposition testimony he noted that the symptoms from the two conditions are essentially the same. He also determined that Applicant's injury aggravated her fibromyalgia condition. It also was Dr. Wiesner that referred applicant to Michael Blott, D.C., for an evaluation of her disability. Dr. Blott examined and reported on January 22, 2020, noting that applicant's condition did not fit within any table of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides). Therefore he analogized to table 13-4 for an arousal (sleep) disorder, noting applicant's condition resulted in 29% impairment. Such analogy rating is authorized by case law (*City of Sacramento v WCAB* (2013) 222 Cal.App.4th 1360, 1372, 79 Cal.Comp.Cases 1). Dr. Wiesner stated his agreement with Dr. Blott's findings on March 13, 2020. Taken together, the two physicians' opinions provide substantial evidence of the disability due to the fibromyalgia (and separate from the purely orthopedic factors described by Dr. Hay.

As referenced above there is a wide range of evidence regarding applicant's disability. Based on Dr. D'Amico, and including the findings of Drs. Straehley and Blott, the overall rating would probably come in at 78%. In contrast, the findings of Dr. Hay, along with Drs. Straehley, and Blott came up as high as 96% according to the DEU. As noted above, the DEU rating provided applicant with two disabilities for her CRPS/causalgia because it included both Dr. Blott's findings as well as Dr. Hay's 65% rating separate from the ratings for all her orthopedic disabilities. Therefore, the most accurate rating would be to take the DEU findings without the 65% taken from Dr. Hay's reports. The remaining disability ratings are 50% (Dr. Blott), 45% (Dr. Straehley), 31% (Dr. Hay, left upper extremity), 15% (Dr. Hay, right upper extremity) and 3% (Dr. Hay, right knee). The combined result is 84% permanent disability which is well within the range of the evidence in this case.

Regarding the permanent disability, Granite State Insurance (defendant) has claimed there should be much greater apportionment than what was described by the examining physicians because applicant had an earlier claim (ADJ836506) which resulted in Stipulations with Request for Award (stips) at 84% permanent disability approved on April 21, 2009, and then a later Compromise and Release settling the claim for $350,000.00. Defendant asserts that the 84% should be subtracted from the present award (which would result in no disability at all in this case) based on California

Labor Code section 4664. That statute provides as follows:

> "(a) 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.
>
> (b) 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.
>
> (c)
> (1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following:
> (A) Hearing.
> (B) Vision.
> (C) Mental and behavioral disorders.
> (D) The spine.
> (E) The upper extremities, including the shoulders.
> (F) The lower extremities, including the hip joints.
> (G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.
> (2) Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, from exceeding 100 percent."

Defendant specifically relies on the conclusive presumption language of subdivision (b) for its position on subtraction of the prior award. That position is not legally persuasive because the prior award of 84% was for disability to the spine (which could include thoracic or lumbar spine) and applicant's right knee. The rating of such disability was done in accord with the 1997 Schedule for Rating Permanent Disabilities (schedule) whereas the present case was based on the 2005 schedule. Under these circumstances the apportionment had to be done initially by the physicians, parceling out the overall disability to differing causes (*Brodie v WCAB* (2007) 40 Cal.4th 1313, 1328, 72 Cal.Comp.Cases 565) and then those opinions must be adjudged as substantial (*E.L Yeager Construction v WCAB* (2006) 145 Cal.App.4th 922,928, 71 Cal.Comp.Cases 1687). In this case, the various opinions noted above and relied upon arise to the level of substantial evidence as they are based on accurate histories (the physicians reviewed applicant's extensive medical records), the facts relied upon are still germane at this date, and the doctors explained the reasons for their conclusions (Ibid.). Further on this issue, a straight subtraction of the prior award under the 1997 schedule from the present 2005 schedule rating was already rejected by the WCAB in *Contra Costa County v WCAB* (2010) 75 Cal.Comp.Cases 896 (writ denied) because different standards for measuring disability are applied between the two schedules. Therefore the present award

is correct based on apportionment as parceled out by the examining physicians as opposed to subtracting applicant's prior award.

Some comment is required regarding the vocational evidence, submitted to rebut the diminished future earnings capacity (DFEC) in the schedule. First of all the FEC rankings (beginning at p. 2-1 of the schedule) already resulted in significant increases in impairment from that described by the physicians, most likely representing applicant's actual DFEC. Also, the report, especially that offered by applicant's selected vocational counselor Thomas Linville which found applicant incapable of return to gainful employment, ignored the very realities of this case. Applicant has shown herself extremely capable of drafting legal pleadings and presenting evidence in support of her case. As such she is very likely capable of work in the legal field (she has a law degree) as a paralegal or legal assistant. She almost certainly could work as a freelance paralegal if not as an employee in a law office. This has been made especially clear during this past year when, due to Covid-19, many paralegals have worked from home. Accordingly, the permanent disability is accurate without need for enhancement based on DFEC.

Applicant compiled a list of self-procured expenses consisting of prescription costs which were allegedly approved through utilization review. If in fact those medications were authorized then defendant should have paid for them directly. Additionally applicant claimed costs for a rental car and meals to attend her exam with Dr. D'Amico. Based on California Labor Code sections 4600 and 4621 applicant is entitled to all reasonable expenses incidental to that exam, and if defendant did not advance such costs, it must now pay applicant for her out of pocket expenses. However, there are no utilization review reports that relate to the charges claimed nor are the actual prescriptions or receipts (for medication or travel) presently in evidence so the present record is not substantial on this matter to allow for full adjudication. In such a situation the parties can attempt to informally adjust the costs or gather further evidence so that the record is substantial on the issue (*San Bernardino Comm. Hosp. v WCAB* (1999) 74 Cal.App.4th 928, 937-938, 64 Cal.Comp.Cases 986).

Applicant claimed penalties under California Labor Code section 5814 against her temporary disability benefits and against various medical expenses. She provided copies of checks sent to her for the periods September 17, 2011, through November 25, 2011. Each of those checks paid applicant $1,674.00 for two weeks or $837.00 per week. That was the correct amount due in accord with a Stipulation and Order dated March 29, 2011. Since the payments were made at the correct rate, there is no basis for a penalty based on the amount paid. However, the first check sent shows a date of October 4, 2011, but covered the period September 17, 2011, through September 30, 2011. The periodic payments are supposed to made every two weeks (Lab. Code§ 4650, subd. (c)) but that one check appears to have been paid beyond the period due. Based on subdivision (d) of the statute the check should have been increased by 10%. Given the lack of the 10% increase and the delay in issuing the check, it is deemed to have been delayed. Defendant did not offer any explanation from a medical or legal standpoint as to its liability for that period and so the delay may be considered unreasonable. The amount of the penalty assessed must strike a balance between timely compensation for the applicant and avoiding harsh or excessive penalties (*Christian*

*v WCAB* (1997) 15 Cal.4th 505, 517, 62 Cal.Comp.Cases 576). 15% of the delayed payment (including the 10% enhancement) meets that standard.

Finally, applicant objects to the resolution of the lien of the Employment Development Department (EDD) for state disability. However, the stipulation of March 29, 2011, provided that defendant would pay, adjust or litigate that lien and then on November 9, 2011, defendant and EDD resolved the lien by another Stipulation and Order settling the lien for $4,150.00 payable by defendant to EDD. As that stipulation resolved the issue it served the public policy of informally resolving that dispute and so should not be disturbed (*County of Sacramento v WCAB* (2000) 77 Cal.App.4th 1114, 1119, 65 Cal.Comp.Cases 1). Furthermore, the stipulation was between defendant and EDD (after defendant agreed it would be solely responsible for resolution) so applicant does not have standing to seek setting aside of the stipulation. Finally, the question is what remedy would apply if the stipulation were set aside. Applicant seemingly wants an order changing the effect of EDD's lien on her right to state disability. Such rights exist between applicant and EDD and a WCALJ may not order EDD to change an employee's right to such benefits. That is beyond the jurisdiction of the WCALJ.
(Opinion on Decision, 5/6/21.)

Applicant has raised several issues on reconsideration that were not raised at the time of trial. These include an allegation of ex parte communication between defendant and Dr. D'Amico and alleged entitlement to vocational rehabilitation benefits. Issues not raised at the first opportunity that they may properly be raised are waived. (Lab. Code, § 5502(e)(3), see also *Gould v. Workers' Comp. Appeals Bd*. (1992) 4 Cal.App.4th 1059 [57 Cal.Comp.Cases 157], *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260 [54 Cal.Comp.Cases 145].) The issues of self-procured medical expenses, penalties as against medical treatment expenses, and applicant's claim of benefits pursuant to section 132a for discrimination and section 4553 for serious and willful misconduct were deferred. Finally, we note that the issue of attorney fees has not been adjudicated and that 12% of the award of permanent disability indemnity is being held in trust pending resolution of applicant's former attorney's lien.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**July 26, 2021**

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

**TRACY LEE**
**JOSEPH WAXMAN**
**HAWORTH BRADSHAW STALLKNECT & BARBER**
**RAYMOND WYATT**

**PAG/oo**

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