WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RUBEN GILBERT, *Applicant*

vs.

SOUTHERN CALIFORNIA RECEPTION CENTER, legally uninsured, administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Numbers: ADJ2804586 (LBO0360225), ADJ1356968 (LBO0366795)
Long Beach District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the Joint Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on October 6, 2020, wherein the WCJ found in pertinent part that applicant's disability was rated using the 2005 permanent disability rating schedule (PDRS), not the 1997 PDRS; that the factors of disability should be combined per the Combined Values Chart (CVC); that the January 2, 2004 injury caused 56% permanent disability and the October 28, 2004 injury did not result in any further disability; and that applicant's earnings warranted a permanent disability rate of $250.00 per week.

Applicant contends that his disability should be rated using the 1997 PDRS; and that the permanent disability for the various injured body parts should be added, not combined.[2]

We received a Joint Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be granted for the limited purpose of amending the F&A to award permanent disability indemnity at the weekly rate of $200.00. We received a Response

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[1] We granted the Petition to allow further study of the factual and legal issues. Deputy Commissioner Schmitz was a member of the panel; a new panel member has been assigned in her place.

[2] The Petition has five pages of exhibits attached which is in violation of Appeals Board Rule 10945(c). (Cal. Code Regs., tit. 8, § 10945.) The exhibits will not be considered and counsel is reminded that failure to comply with the Appeals Board Rules may be deemed sanctionable conduct.

(Answer) from defendant. Defendant's Answer includes the assertion that the $250.00 permanent disability indemnity rate was a clerical error and requests that the error be corrected to the weekly rate of $200.00. As explained by the WCJ, the rate of $200.00 is specified in the schedule for 2004 dates of injury, so that despite the parties' stipulation to $250.00, we will correct the legal error in the weekly rate. (Lab. Code, §§ 4453, 4658, AD Rule 9805, Schedule for rating permanent disability Table 17D.)

We have considered the allegations in the Petition and the Answer and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will affirm the F&A except that we will amend the F&A to find that applicant's earnings warranted a permanent disability indemnity rate of $200.00 per week, (Finding of Fact #2), and we will amend the Award based thereon.

BACKGROUND

Applicant claimed injury to his left knee and right hip while employed by defendant as a security supervisor on January 2, 2004 (ADJ2804586). On April 4, 2004, applicant underwent an arthroscopic left knee surgery. He returned to work for defendant and subsequently claimed injury to his back, right hip, right knee, and left knee while employed by defendant on October 28, 2004 (ADJ1356968).

On April 16, 2009, applicant was evaluated by orthopedic qualified medical examiner (QME) Charles Schwarz, M.D. The doctor examined applicant, took a history, and reviewed the medical record. (Joint Exh. C, Dr. Schwarz, April 16, 2009.) Dr. Schwarz re-examined applicant on February 3, 2010, (see Joint Exh. A, Peter Gleiberman, M.D., October 6, 2015, p. 26 review of medical record) and again on January 26, 2017. (Joint Exh. F, Dr. Schwarz, January 26, 2017.)

The parties proceeded to trial on December 18, 2019. For both injury claims the issues identified by the parties included permanent disability/apportionment and whether applicants disability would be rated based on the 1997 PDRS or the 2005 PDRS. (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 18, 2019, pp. 3 - 4.) On January 23, 2020, the WCJ issued an Order Vacating Submission. At the August 24, 2020 trial applicant's exhibit 1 was admitted into evidence and the matter was submitted for decision. (MOH, January 23, 2020.)

DISCUSSION

Labor Code section 4660(d) states in part:

> For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted during the 2003-04 Regular and Extraordinary Sessions shall apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker.
> (Lab. Code, § 4660.)

In determining which PDRS is to be used for rating an injured worker's disability caused by an injury the occurred prior to January 1, 2005, the Appeals Board explained:

> We hold that section 4660(d) requires that the revised permanent disability rating schedule be applied to injuries arising on or after the January 1, 2005 effective date of the rating schedule, subject to the specified exceptions for "compensable claims arising before January 1, 2005 . . . " The prior rating schedule may only be used to rate permanent disabilities arising from compensable injuries that occurred prior to January 1, 2005, where one of the exceptions described in the third sentence of section 4660(d) has been established. If none of the specified exceptions is established, the revised permanent disability rating schedule applies to injuries occurring before its January 1, 2005 effective date.
> (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 790 (Appeals Board en banc).)

Otherwise stated, the 2005 PDRS is to be used for rating permanent disability caused by an injury that occurred prior to January 1, 2005, unless prior to that date there existed a medical-legal report indicating that permanent disability existed at that time; or there was a medical report from the a treating physician specifically stating that permanent disability existed prior to January 1, 2005; or the employer was required to provide notice to the injured worker pursuant to Labor Code section 4061. (See: *Costco Wholesale Corp*. v. *Workers' Comp. Appeals Bd. (Chavez)* (2007) 151 Cal. App. 4th 1101, 72 Cal.Comp.Cases 582.)

Having reviewed the trial record, we agree with the WCJ that:

> Petitioner [applicant] expects the Court to make a leap of inference without substantial medical evidence alluding to the existence or even the possibility of permanent disability simply because a surgery occurred. Not all arthroscopic surgeries result in disability. The only evidence provided appeared to be

> discharge documentation and nothing more. In the instant matter, applicant continued to earn full wages, was able to perform his duties with care and self-modification for his knee and no evidence was presented by Petitioner to suggest anything else. Petitioner makes no reference to the evidence, or to case law or statute that would support its argument based on these facts.
> (Report, p. 3.)

Regarding applicant's argument that, based on the opinion of Dr. Schwarz, his factors of disability should be added, not combined, we note that the disability values of multiple impairments may be added instead of combined using the CVC if the record contains substantial medical evidence that adding the injured worker's impairments will result in a more accurate rating of the employee's disability than use of the CVC. (*Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595]; *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34] (writ den.); *Los Angeles County Metropolitan Transportation Authority* v. *Workers' Comp. Appeals Bd. (La Count)* (2015) 80 Cal.Comp.Cases 470 [2015 Cal. Wrk. Comp. LEXIS 47] (writ den.).) However, applicant does acknowledge that, "the analysis given by Dr. Schwarz was imperfect…" (Petition, p. 4.) More importantly, as explained by the WCJ:

> Dr. Schwarz does not explain anywhere how these impairments do not overlap, especially when he attempts to give gait derangement twice (Joint Exhibit J, Deposition transcript, Dr. Schwarz, 8/19/19, 23:7-15), and the Court was unable to bend the logic in Petitioner's favor and conclude that the lumbar spine rating, lower extremity rating and right hip rating did not overlap when the very reason Dr. Schwarz adds them to begin with is because they are overlapping as it pertained to the applicant's gait mechanism.
> (Report, p. 4.)

Thus, we agree with the WCJ that the opinions of Dr. Schwarz do not constitute substantial evidence that applicant's factors of impairment should be added as opposed to combining them using the CVC.

Accordingly, we affirm the F&A except that we amend the F&A to find that applicant's earnings warranted a permanent disability indemnity rate of $200.00 per week, and we amend the Award based thereon.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 6, 2020 Joint Findings and Award, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. Applicant's earnings were then $1,391.54 per week, warranting indemnity rates of $840.00 a week for temporary disability and $200.00 a week for permanent disability.

* * *

AWARD

* * *

(a) Of permanent disability of 56%, or $66,800.00 for case number ADJ2804586 only, payable at the rate of $200.00 per week beginning April 16, 2009, less sums paid on account thereof in accordance with Findings No. 4, 5, 6, 7, 8 and 13 above. No permanent disability is attributed to case number ADJ1356968;

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 18, 2022

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

RUBEN GILBERT
LAW OFFICES OF GLOW & KREIDA
STATE COMPENSATION INSURANCE FUND

TLH/*pc*

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

JOINT REPORT AND RECOMMENDATION OF WORKER'S COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Through his attorney of record, applicant files a timely and verified Petition [for] Reconsideration on October 27, 2020, with inappropriate exhibits attached in violation of 8 Cal. Code Regs. §§ 10945(c), 10510(f), to the Court's Findings and Award of October 6, 2020, which found (1) permanent disability should be combined, as the applicant failed his burden to show the addition method for impairment under *Kite* was applicable because the medical evidence , 2) apportionment to causation was inextricably intertwined pursuant to the opinion of Dr. Schwartz, the orthopedic panel qualified medical evaluator, however, apportionment pursuant to other factors under Labor Code §4663 was adequately addressed by the agreed medical consult Dr. Glieberman, whose report constituted substantial medical evidence on this point, 3) applicant was entitled to further medical treatment based on the opinions of Dr. Schwartz, 4) attorney's fees at 15% were appropriate and 5) there was no substantial evidence to indicate these dates of injury should be rated under the 1997 PDRS, which would in effect negate 16 years of active litigation by both parties under the AMA Guides.

Petitioner argues that 1) the 1997 PDRS should apply, and, 2) permanent disability should be added rather than combined under the Combined Values Chart. Defendant has also filed a Response. The Court refers back and incorporates by reference its Opinion on Decision, dated October 6, 2020, but responds in this Report with additional points below.

II. FACTS

Applicant, Ruben Gilbert, while employed on January 2, 2004, as a security supervisor, occupational group number 490, at Norwalk, California by the California Youth Authority/Southern California Reception Center, legally uninsured and administered by SCIF State Employees (SCIF), sustained an admitted injury arising out of an in the course of employment to his left knee and his right hip. On October 28, 2004, he sustained an admitted injury to his back, bilateral knees and his right hip.

During the course of this litigation the parties selected Dr. Schwartz as Panel Qualified Medical Examiner and Dr. Glieberman as an agreed medical consult on the issue of apportionment only. At the time of the initial Trial of December 18, 2019, Petitioner raised Labor Code §4660 and the applicability of the 1997 PDRS for what appeared to be the first time after nearly 16 years of litigation under the AMA Guides, to the apparent surprise of Respondent. Though it was *not* specifically raised by Petitioner in the Pre-Trial Conference Statement of November 4, 2019, the Court permitted the parties to clarify the

issue, because the issue of permanent disability was raised in the Pre-Trial Conference Statement and the Court would need to know which schedule to apply.

After assurances from counsel for Petitioner that the evidence showed the existence of permanent disability the matter was initially submitted January 17, 2020, after the Court requested the parties brief the issues, including the applicability of the old versus new schedules. Petitioner filed no brief. Submission was vacated as the Court could find no evidence of the existence of permanent disability in a medical report or medical history by any document submitted as evidence, aside from the applicant's testimony that a surgery occurred in 2004. The Court conferred with the parties several times to develop the record and the parties eventually admitted that none of the early surgical records had ever been subpoenaed. Submission was delayed until Exhibit 1 was entered into evidence on August 24, 2020.

III. DISCUSSION

The determination that an injury has resulted or *may result* in permanent disability is a medical determination and the existence of any report by a treating physician indicating same is necessary in order to trigger the applicability of the 1997 PDRS. Petitioner expects the Court to make a leap of inference without substantial medical evidence alluding to the existence or even the possibility of permanent disability simply because a surgery occurred. Not all arthroscopic surgeries result in disability. The only evidence provided appeared to be discharge documentation and nothing more. In the instant matter, applicant continued to earn full wages, was able to perform his duties with care and self-modification for his knee and no evidence was presented by Petitioner to suggest anything else. Petitioner makes no reference to the evidence, or to case law or statute that would support its argument based on these facts. It is not the Court's burden to make arguments on Petitioner's behalf on appeal. (*Dills v. Redwoods Associates, Ltd.* (1994) 23 Cal.App.4th 888, 890, fn1).

Furthermore, the Court did not find that Dr. Schwartz' opinions constituted substantial medical evidence on the issue of adding impairments because the opinion was only an partial assessment of the analysis required and was contradictory to itself. In *Kite*, the medical evaluator noted that there was a "synergistic effect of the injury to the same body parts bilaterally versus body parts from different regions." (Athens Administrators v. Workers' Comp. Appeals Bd. (Kite), 78 Cal. Comp. Cases 213, 214), but legal precedent also dictates that the ratings *must not overlap*. Simply using the term "synergistic effect" is insufficient to rebut the schedule. Dr. Schwartz provides no analysis on how adding the bilateral knee and hip impairments would not be overlapping. Petitioner has cited no specific evidence in support thereof. The Court is unable to make this determination without substantial medical evidence.

Dr. Schwarz does not explain anywhere how these impairments do not overlap, especially when he attempts to give gait derangement twice (Joint Exhibit J, Deposition transcript, Dr. Schwarz, 8/19/19, 23:7-15), and the Court was unable to bend the logic in Petitioner's favor and conclude that the lumbar spine rating, lower extremity rating and right hip rating did not overlap when the very reason Dr. Schwarz adds them to begin with is because they are overlapping as it pertained to the applicant's gait mechanism.

Last, Dr. Schwartz continued to waffle over this point as evidenced in his deposition, which the Court ultimately determined gave it no probative value on this point. He attempted to add all the impairments Joint Exhibit J, Deposition transcript, Dr. Schwarz, 8/19/19, 23:3-15) citing synergistic effect, but also confirmed he could not definitively state if the lumbar spine (and presumably right hip) should be added or combined with the lower extremities. He concluded that he would combine the lumbar spine after all, but did not state why he changed his mind. (Joint Exhibit J, Deposition transcript, Dr. Schwarz, 8/19/19, 22:10-20). The Court did not find Dr. Schwartz' opinion particularly helpful or that it constituted substantial medical evidence.

IV. RECOMMENDATION

Upon reviewing the Response to Petition for Reconsideration, the Court agrees that there was an error in the permanent disability rate. As stated, the rate in 2004 should be $200/week not $250/week based on the finding of 56% permanent disability, and the Findings should be amended to reflect same. Based on the foregoing, and the Opinion on Decision previously submitted by this Court, the Petition for Reconsideration should be denied, with the exception of correcting the permanent disability rate.

November 10, 2020
JULIE C. FENG
WORKERS' COMPENSATION JUDGE