WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

PATRICK WALSH, *Applicant*

vs.

SKYLINE STEEL ERECTORS; ZURICH, *Defendants*

Adjudication Number: ADJ9880634
Redding District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Skyline Steel Erectors, by and through its insurer, Zurich North America, seeks reconsideration of the Findings and Award, served January 12, 2021, wherein the workers' compensation administrative law judge (WCJ) found that applicant, Patrick Walsh, sustained 100% permanent disability as a result of an industrial injury to multiple body parts while employed as an ironworker on December 15, 2014.

Defendant contends the WCJ erred in awarding applicant 100% permanent disability, arguing the evidence establishes applicant is not permanently totally disabled solely due to the effects of his industrial injury. Defendant argues that the vocational evidence failed to account for the apportionment of applicant's orthopedic impairment and the sub rosa video evidence shows applicant is able to engage in activities in excess of the work restrictions placed by the Qualified Medical Evaluator in internal medicine.

We have received applicant's Answer to the Petition for Reconsideration. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations and arguments of the Petition for Reconsideration, as well as applicant's Answer thereto, and have reviewed the record in this matter and the WCJ's Report and Recommendation on Petition for Reconsideration of February 13, 2021. For the reasons discussed below, we will grant reconsideration to amend the Findings and Award to award 91%

permanent disability based upon the apportionment of applicant's permanent disability by the Agreed Medical Examiner in orthopedics.

FACTS

Applicant Patrick Walsh sustained an admitted industrial injury on December 15, 2014, to his lower back, cardiovascular system, cognitive impairment, circulatory system, right eye, DVT, and groin, while employed as an ironworker by Skyline Steel Erectors.[1] The issues to be determined included permanent disability and apportionment, with applicant claiming he is permanently totally disabled based on the vocational evidence from Daniel Sidhu that he is not amenable to participate in vocational rehabilitation and has lost his capacity to return to gainful employment.

The record includes the medical reporting of Dr. Michael Sommer, the AME in orthopedics, Dr. Scott Anderson, the AME in internal medicine, QME Dr. Philip Edington in ophthalmology and QME Dr. Robert Ansel in neurology. Defendant also offered sub rosa video taken of applicant in 2018 and 2019.

Applicant's injury was complicated by several factors, including defendant's initial determination to deny the claim on the grounds that applicant sustained his spine injury while participating in a rodeo. When his medical treatment was denied, applicant returned home and sustained a consequential injury when he burned his back while applying a heating pad. This burn led to an infection that caused severe cardiovascular and vascular injuries that required applicant to undergo substantial medical treatment. Dr. Sommer reported that in 2015, applicant had cardiac surgery, right iliac artery bypass, hypogastric artery pseudo-aneurysm coil embolization, right groin washout, CT guided fluid collection aspiration, percutaneous left internal iliac pseudo-aneurysm coil and onyx embolization, and left groin incision and drainage. (Ex. 4, 12/14/15 Dr. Sommer AME Report, p. 8.) Dr. Anderson concluded that all of applicant's internal medical conditions and disability were due to his industrial injury.

Of all of the medical evaluators, only Dr. Sommer apportioned applicant's permanent disability arising from his industrial injury. In his December 14, 2015 initial evaluation, Dr. Sommer diagnosed chronic painful lumbar degenerative disc disease, lumbosacral

[1] As noted in the July 29, 2020 Minutes of Hearing, the parties stipulated that applicant's industrial injuries includes the extensive list of injuries described in the January 18, 2017 report of Dr. Anderson, the Agreed Medical Examiner in internal medicine.

spondylolisthesis, first degree, and multiple medical, principally vascular, co-morbidities. He concluded that applicant's spondylolisthesis pre-existed his industrial injury and was responsible for 25% of his permanent disability. He explained the basis for his apportionment as follows:

> Ultimately, there are apportionment considerations regarding this matter. As to any other injury to the spine in a specific manner, I see nothing on the list to study (and for the sake of this discussion, I am assuming there was no rodeo injury). Thus we have the specific injury event of 12/15/14 (assuming the Trier of Fact determines it occurred), we have the fact that Mr. Walsh had worked as an ironworker for many years leading up to the injury and we have the fact that he has been active in rodeo over a few years, but apparently had not sustained any significant injuries as part of that. Finally, we have the fact that there is a structural anomaly in the spine, a developmental spondylolisthesis, which, as best can be told, was silent and did not , interfere either with his comfort or with his function, either in doing rodeo or as an ironworker. I conclude that there is not a basis for cumulative injury leading up to the instant event and he did not work enough afterward, if at all, to consider cumulative trauma during that timeframe. I conclude further that there was no specific injury avocationally and that, given what he did as a roper was not quite like riding bucking bulls and so forth, there was not cumulative injury from the rodeo activities. It boils down to the specific event of 12/15/14 and the anatomic condition of a spondylolisthesis (with its associated degenerative changes in the L5-S1 disc). Apportionment I conclude will be approximately 75% to the instant work injury and approximately 25% non-industrial.
> (Ex. 4, 12/14/15 Dr. Sommer AME Report, p. 11.)

Dr. Sommer placed work restrictions on applicant that precluded substantial work. He further elaborated on those restrictions, indicating applicant was able to work an 8-hour day and perform work functions on a consistent and sustained basis, provided the work is congenial to his work restrictions. He did not believe applicant would require unscheduled breaks, or lie down and rest, due to his orthopedic condition. He deferred to Dr. Anderson regarding limitations due to chronic pain and fatigue. (Ex. BB, 12/12/17 Dr. Sommer AME Report, p. 2.)

Vocational evidence was received from applicant's expert, Mr. Sidhu and defendant's vocational expert, Ms. Suhonos. Ms. Suhonos concluded applicant was capable of participating in vocational rehabilitation and was not permanently totally disabled. (Ex. A. 9/23/19 Suhonos Report.) Mr. Sidhu found applicant was unable to return to gainful employment due to his work preclusions. In his initial report, Mr. Sidhu reviewed Dr. Sommer's December 14, 2015 report and noted that Dr. Sommer found 75% causation of applicant's orthopedic disability on an industrial

basis, and 25% causation of disability on a non-industrial basis. (Ex. 8. 10/20/17 Sidhu Report, p. 3.)

Mr. Sidhu then reviewed Dr. Sommer's August 1, 2017 re-evaluation, wherein Dr. Sommer stated: "considering only Mr. Walsh's lumbosacral and lower limb pathology, he has disability which, if viewed within the work restriction system, precludes Substantial Work." Mr. Sidhu noted that Dr. Sommer did not change his 25% apportionment to non-industrial causation. (Ex. 8. 10/20/17 Sidhu Report, p. 4.) Dr. Sommer also found applicant was a QIW eligible for vocational rehabilitation.

Despite having acknowledged that Dr. Sommer had apportioned 25% of applicant's orthopedic disability to non-industrial factors, in his next report, Mr. Sidhu stated that "the various medical evaluators" found no non-industrial apportionment.

> With respect to vocational apportionment, the **various medical evaluators concluded that the applicant's disability and the factors related to the disability are 100% attributable to the industrial injury of 12/15/14**. Considering that Mr. Walsh was able to perform his usual and customary job duties as a Structural Ironworker without restriction prior to 12/15/14, and considering that the applicant is unable to return to work as an Ironworker or any related occupation due to his disability, I am of the opinion that 100% of Mr. Walsh's diminished occupational capacity is due to the industrial injury of 12/15/14.
>
> In conclusion, I maintain the opinion that Mr. Walsh does not have the ability to compete for employment in an open labor market and he is not a feasible candidate for vocational retraining that could potentially restore him to suitable gainful employment. The applicant has sustained a 100% diminished occupational capacity, which is congruent to a 100% diminished future earning capacity.
> (Ex. 9. 2/26/19 Sidhu Report, p. 15. Emphasis added.)

Relying upon Mr. Sidhu's opinion, the WCJ indicated in her Opinion on Decision that applicant was entitled to an unapportioned award, despite Dr. Sommer's apportionment determination, due to applicant's inability to compete in the open labor market.

> Orthopedic AME Michael Sommer, M.D. in his 12/14/2015 report, opined 75% industrial apportionment with 25% caused by non-industrial factors. This apportionment was included in both the formal rating instructions and resulting formal rating; however apportionment is not applied to the permanent total disability finding due to that finding due to Applicant's inability to compete in the open labor market.

In her Report and Recommendation on Petition for Reconsideration, the WCJ further explained her reasoning that Dr. Sommer's apportionment should not be applied because applicant's work restrictions were caused by his industrial injury, stating:

> On the other hand and assuming that 25% of Applicant's orthopedic permanent disability was caused by factors other than his work, Applicant was still capable of performing all of his work duties up to the 12/15/2014 date of injury. The 25% non-industrial apportionment opined by AME Sommer was due to Applicant's anatomic condition and associated degenerative changes in the L5-S1 disc. Up until the date of injury, Applicant had no work restrictions related to the anatomic condition and degenerative changes and was able to complete his job duties.
>
> Therefore, even if 25% of the permanent disability pre-existed the date of injury, Applicant's need for work restrictions was solely caused by the 12/15/2014 date of injury.

The WCJ obtained a formal rating from the Disability Evaluation Unit of 91% permanent disability, based upon the medical evidence of impairment and including Dr. Sommer's apportionment findings. The WCJ however found applicant rebutted this scheduled rating of his permanent disability based upon vocational evidence that applicant has lost 100% of his earning capacity solely due to his industrial work limitations, without reference to Dr. Sommer's apportionment of applicant's orthopedic disability.

DISCUSSION

The WCJ's finding that applicant is entitled to an award of 100% permanent disability is based upon a mis-application of the law of apportionment and reliance upon unsubstantial vocational evidence.

Labor Code section 4663(a) states, "Apportionment of permanent disability shall be based on causation." Labor Code section 4664(a) provides, "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." The defendant has the burden of proof on the issue of apportionment. (*Escobedo v Marshalls* (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc).) There is no challenge here to the substantiality of Dr. Sommer's 25% apportionment to the degenerative changes caused by applicant's pre-existing, non-industrial spondylolisthesis.

Mr. Sidhu concluded that applicant "does not have the ability to compete for employment in an open labor market and he is not a feasible candidate for vocational retraining that could potentially restore him to suitable gainful employment. The applicant has sustained a 100% diminished occupational capacity, which is congruent to a 100% diminished future earning capacity." This conclusion, if supported by substantial evidence, would support the award of permanent total disability. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624]; *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587].)

However, in reaching this determination, Mr. Sidhu did not consider and apply Dr. Sommer's apportionment determination, as mandated by *Acme Steel v. Workers' Comp. Appeals Bd.* (*Borman*) (2013) 218 Cal.App.4th 1137 [78 Cal.Comp.Cases 751]. In *Borman*, the court reversed an award of 100% permanent disability where the medical evidence established that applicant's permanent disability from hearing loss was 40% caused by non-industrial cochlear degeneration and 60% due to occupational factors. The court held that even where the vocational evidence was sufficient to establish a total loss of earning capacity, per *Ogilvie*, apportionment to the causative sources of the current disability is required.

As noted above, though he mentioned Dr. Sommer's apportionment in his initial report, Mr. Sidhu subsequently omitted it from his analysis when he noted that the medical evaluators found that "applicant's disability and the factors related to the disability are 100% attributable to the industrial injury of 12/15/14." The fact that he disregarded Dr. Sommer's apportionment to non-industrial factors rendered his reporting unsubstantial. Thus, a finding that applicant rebutted the scheduled rating of his permanent disability is not supported by substantial evidence.

Further, while the WCJ's analysis does include reference to Dr. Sommer's apportionment, she found it inapplicable based on the fact that applicant's non-industrial condition was not labor disabling at the time of his industrial injury. She noted that prior to his injury, applicant "had no work restrictions related to the anatomic condition and degenerative changes and was able to complete his job duties. Therefore, even if 25% of the permanent disability pre-existed the date of injury, Applicant's need for work restrictions was solely caused by the 12/15/2014 date of injury."

This analysis fails to address the principles of apportionment to pathology and asymptomatic conditions which is now required by Labor Code section 4663. (*City of Petaluma v. Workers' Comp. Appeals. Bd.* (*Lindh*) (2018) 29 Cal.App.5th 1175 [83 Cal.Comp.Cases 1869],

and *City of Jackson v. Workers' Comp. Appeals. Bd*. (*Rice*) (2017) 11 Cal.App.5th 109 [82 Cal.Comp.Cases 437]. In *Lindh*, the court held that apportionment to an asymptomatic underlying condition or risk factor is required, even if the condition or risk factor alone might never cause disability, provided there "is substantial medical evidence that establishes that the asymptomatic condition or pathology was a contributing cause of the disability." (*Lindh*, 83 Cal.Comp.Cases at 1882.) Similarly, in *Rice*, the court held that apportionment to a pre-existing degenerative condition which is caused in part by heredity or genetics is required where there is substantial medical evidence, as found here, to establish that the pre-existing asymptomatic condition played a role in causing the disability.

If there is substantial evidence of medical apportionment it must be applied even in cases where there is also substantial vocational evidence that the applicant has rebutted the scheduled rating and has established a total loss of earning capacity or where vocational evidence combined with substantial medical evidence reflect that an applicant is permanently totally disabled but there is also substantial medical evidence of apportionment of applicant's permanent total disability. (See *Acme Steel, supra*.) To disregard apportionment because there is no evidence that it was labor-disabling prior to an industrial injury is contrary to Section 4663. Even in cases where there is substantial vocational evidence that applicant has a 100% loss of earning capacity and is permanently totally disabled, substantial medical evidence of apportionment must be considered and applied by vocational experts and the WCJ.

Accordingly, we will grant reconsideration and amend the Findings and Award to find applicant sustained 91% permanent disability, the rating determined by the Disability Evaluation Unit based upon the medical evidence in this record.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award, served January 12, 2021, is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the Findings and Award is **AMENDED** as follows:

FINDINGS OF FACT

1. Patrick Walsh while employed on 12/15/2014 as an Ironworker at the UC Davis Expansion Project in Tulare, California, by Skyline Steel Erectors, whose workers' compensation insurance carrier was Zurich North America, sustained injury arising out of and occurring in the course of employment to the body parts previously stipulated to by the parties.

2. Applicant's earnings at the time of injury were stipulated by the parties to $1,345.93 per week producing a temporary disability rate of $897.29 per week and a permanent disability indemnity rate of $290.00 per week.

3. It is found that Applicant was temporarily disabled for the period beginning 12/15/2014 through 1/17/2017 payable at the maximum rate, less previously issued temporary disability payments.

4. Applicant's injury caused permanent disability of 91%, amounting to 769.25 weeks of disability payments at the rate of $290 per week, in the total sum of $223,082.50, and thereafter, a life pension payable at the weekly rate of $239.65.

5. Applicant will require further medical treatment to cure or relieve from the effects of this injury.

6. Applicant's attorney is entitled to a reasonable fee of 15% of the permanent disability award and life pension, in an amount to be adjusted by the parties with jurisdiction reserved at the trial level.

AWARD

AWARD IS MADE in favor of Patrick Walsh against Skyline Steel Erectors of:

a. Permanent disability of 91%, amounting to 769.25 weeks of disability payments at the rate of $290 per week, in the total sum of $223,082.50, and thereafter, a life pension payable at the weekly rate of $239.65, less attorney fees as provided in Finding number 6.

b. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 5, 2021

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

PATRICK WALSH
JONES, CLIFFORD
STOCKWELL, HARRIS, WOOLVERTON & HELPHREY

SV/*pc*

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