

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

BONNIE BENTLEY, *Applicant*

vs.

**SORA MANAGEMENT, INC.;
CALIFORNIA INSURANCE GUARANTEE ASSOCIATION
for LEGION INSURANCE, in liquidation, *Defendants***

**Adjudication Numbers: ADJ1524475 (RIV0046648)-MF
ADJ4641802 (RIV0046649)
Riverside District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Applicant, in pro per, has filed a “Petition for Reconsideration (Amended)” on January 12, 2022 and a Petition for Reconsideration on January 18, 2022. We will treat the Petition for Reconsideration as a supplemental pleading and accept it for filing pursuant to our authority. (Cal. Code Regs., tit. 8, § 10964.) We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers’ compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ’s report, which we adopt and incorporate, we will deny reconsideration.

Contrary to the WCJ, we find applicant’s petition timely filed. The WCJ issued the Joint Findings and Awards on November 16, 2021 but served it solely on defendant, designating defendant to perform service of all other parties listed on the Official Address Record pursuant to WCAB rule 10629. However, both the former version and the current version of WCAB Rule 10628 state that “The Workers’ Compensation Appeals Board shall not designate a party, or their attorney or agent of record, to serve any final order, decision or award relating to a submitted issue.”¹ (Cal. Code Regs., tit. 8, § 10628(a).) The Appeals Board’s March 18, 2020 In Re:

¹ The former version of WCAB 10628 was operative from January 1, 2020 to January 1, 2022. The new amended WCAB Rule 10628 became effective on January 1, 2022.

COVID-19 State of Emergency En Banc (Misc. No. 260) Order does not authorize the designation of service of final decisions, orders, or awards. Rather, it suspended the portion of former WCAB Rule 10628 that required service by the WCAB by regular mail. (Cal. Code Regs., tit. 8, former § 10628 (eff. from March 18, 2020 to Jan. 1, 2022).) The en banc order (misc. No. 260) states that service by the WCAB may be performed electronically with or without parties' consent. It does not state that the WCAB may designate a party to serve a final decision, order or award. The district offices should continue to serve all parties of record with all final decisions, orders or awards (whether electronically or otherwise) and not designate a party to do so. Because the service of the November 16, 2021 Joint Findings and Awards did not comply with WCAB rule 10629, we consider it defective and the Petition for Reconsideration filed on January 12, 2022 timely filed.

Nevertheless, we deny reconsideration on the merits for the reasons stated in the Report, which we adopt and incorporate herein.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 14, 2022

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

**BONNIE BENTLEY
PATRICO, HERMANSON & GUZMAN**

PAG/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION:

Applicant, in pro per, has filed a questionably timely and verified (Amended) Petition for Reconsideration (EAMS Doc ID 75066036), challenging the Joint Findings and Award dated 11/16/2021, on the following grounds:

1. The evidence does not justify the findings of fact;
2. The findings of fact do not support the Order, Decision, or Award, and;
3. By such Order, Decision or Award, the Workers' Compensation Administrative Law Judge acted without or in excess of his powers.

II

CONTENTIONS:

The (Amended) Petition further contends:

1. The applicant is entitled to an award of retroactive total temporary disability (TDD) and this matter should be remanded to the trial level to award appropriate compensation, together with penalty.
2. Attorney fees should be denied as to attorney David Lynch or that the matter should be remanded to determine appropriate fees.
3. The report of QME Dr. Kureshi dated 11/16/2010 should be "rejected".
4. The report of QME Dr. Strong dated 9/12/2012 should be "rejected".
5. The report of QME Dr. Brodie dated 2/12/2014 should be "rejected."
6. The reports of PTP Dr. Jonathan Lee and deposition of Dr. Noel Lustig should be reviewed to determine if they are substantial medical evidence upon which a award of permanent disability may be awarded, or whether, in the alternative further development of the record is indicated (McDuffie v. Los Angeles County Metropolitan Transit Authority 67 CCC 138) to include the appointment of a physician under Labor Code Section 5701.

The defendant has filed its Answer dated 12/27/2021 (EAMS Doc ID 39526635), and contends the following:

1. Applicant has not valid grounds for the Petition for Reconsideration and violates basic rules regarding such Petitions, and the reference to an “Amended” Petition for Reconsideration without a specific determination as to a prior petition(s) renders this petition invalid.
2. Applicant is not owed any temporary disability (TD) as it was not raised at the time of Trial, with applicant further having stipulated to being adequately compensated and applicant further misconstrues the payment of permanent disability (PD) as temporary disability.
3. The report of Dr. Sahib Kureshi dated 11/16/2021 is admissible and applicant waived objection on completeness.
4. The report of Dr. Barbara Strong dated 9/22/2012 is a valid qualified medical examination (QME), with the applicant having waived Labor Code Section 5502 and 8 California Code of Regulations Section 10608(b)(2), as no objection was raised at the time of Trial.
5. Applicant chose to utilize Dr. Strong as the QME and waived any objection thereto.
6. Dr. Strong complied with Labor Code Section 4062.3(d) and applicant waived the objection to identification of information.
7. The report of Dr. Ian Brodie dated 2/12/2014 is admissible.
8. There is no finding that Dr. Jonathan Lee did not incorporate the opinion of Dr. Lustig, and that as to conflicting medical opinions the trier-of-fact has discretion to choose among conflicting reports.

III

FACTS:

Bonnie Bentley, while employed at Palm Springs, California, by Sora Management, Inc., while insured by Legion Insurance Company, now in liquidation (California Insurance Guarantee Association), sustained (or claims to have sustained injury as follows:

1. ADJ1524475(MF)-age 59 at the time of injury, while employed as a reservations clerk, sustained injury of 8/30/2001 to the lumbar spine, left upper extremity, and psyche, and claims to have sustained injury in the form of post-traumatic head syndrome, cognitive disorders, left thumb and neck.
2. ADJ4641802-age 59 at the time of injury, while employed as a PBX operator, sustained injury of 10/20/2001, sustained injury to her lumbar spine, left upper extremity and psyche,

and claims to have sustained injury in the form of post-traumatic head syndrome, cognitive disorders, left thumb and neck.

In connection with these injuries, the parties stipulated the applicant had been adequately compensated for all periods of temporary disability through 11/19/2003, the employer had furnished some medical treatment, the applicant's primary treating physician was Dr. Jonathan Lee, and no attorney fees were paid and no attorney fee arrangements were made.

In connection with these cases, reporting had been received from the applicant's primary treating physician Dr. Jonathan Lee (Applicant's Exhibit's "1", "2" and "6"), and the secondary treating physician Dr. Noel Lustig (Applicant's Exhibit "4"). While their status was in dispute, the applicant had also been evaluated by Dr. Ian Brodie (Defendant's Exhibits "J" and "K"), and Dr. Barbara Strong (Defendant's Exhibits "L", "M" and "N".)

Testimony was initially taken by Judge Victor E. Jimenez (see Minutes of Hearing/Summaries of Evidence dated 10/20/2016, 3/23/2017, and 5/23/2017). With Judge Jimenez's departure, the cases were reassigned to the undersigned, with the Trial conducted on 10/4/2017, at which time the parties stipulated to the waiver of Labor Code Section 5700 and Rule 10346. The matter was continued to 12/4/2017, so that the undersigned could undertake a final review of the record with the parties, and to review each party's Trial Brief.

At the time of Trial set 12/14/2017, the parties confirmed their receipt of the Minutes of Hearing and Summaries of Evidence for the prior proceedings 10/20/2016, 3/23/2017, 5/23/2017, and 10/4/2017, and further confirmed that no corrections needed to be made.

Further, applicant's exhibits "1" through "6", and Defendant's Exhibits "A" through "CC" were taken into evidence.

The parties confirmed Dr. Brodie's status as that of panel qualified medical evaluator (PQME), but that Dr. Strong's status was in dispute, with the applicant claiming this was an impermissible agreed medical examiner, whereas the defendant claimed that she was the applicant's selected PQME.

The following represented the primary medical reporting in this file:

- Dr. Sohaib Kureshi (PQME neurosurgery)
 - Report dated 11/16/2010 (Defendant's Exhibit "P")-Initial report. Recommends orthopedic evaluation for both the left knee and left shoulder as these are outside his area of expertise. In addition, she needs to be further evaluated by a psychiatric with neuropsychological testing. As to the cervical spine, she may be a reasonable candidate for cervical spine surgery although a new MRI is required to confirm this. Otherwise defers "permanent disability rating".
 - Report dated 1/31/2011 (Defendant's Exhibit "Q")-Supplemental report directed to the applicant confirming that the orthopedic issues are outside his area of expertise.

- Report dated 11/25/2014 (Defendant's Exhibit "R")-Supplemental report following review of records. Indicates that the applicant is permanent and stationary from both a psychiatric and orthopedic standpoint (page 2). While assessing permanent disability under the AME Guides 5th edition (based on DRE cervical category III he assigns a 5% whole person impairment, and based on DRE lumbar category II he assigns a 5% whole person impairment), suggesting that these impairments should be added to those previously assigned by Drs. Brodie and Strong, he does not otherwise provide an assessment under the 1997 PDRS. Apportionment is 70% to pre-existing degenerative changes and 15% each to the industrial injuries.
- Dr. Barabara Strong (PQME psychiatry)
 - Report dated 9/22/2012 (Defendant's Exhibit "L"). Initial report. Assigns GAF score of 67, or whole person impairment of 5%. Her work injury is the sole cause of her disability (although does not otherwise distinguish between the two injuries.) She does not provide assessment of work function impairments according to the 1997 PDRS.
 - Report dated 3/26/2013 (Defendant's Exhibit "M")-In this supplemental report she provides the eight work function impairments (as set forth in the 1997 PDRS).
 - Report dated 6/27/2014. (Defendant's Exhibit "N")-Supplemental report. Assigns GAF score of 67, with apportionment of 50% to each injury.
- Dr. Ian Brodie (PQME orthopedic surgery):
 - Report dated 2/12/2014 (Defendant's Exhibit "J")-Initial report. Permanent and stationary. Confirms that treating physician Dr. Easley issued permanent and stationary report and she continued to work through 5/2/2002. As to the left shoulder, pushing, pulling and lifting activities in the use of the left arm above shoulder level, she is precluded from overhead reaching. As to the left knee, she is precluded from squatting and kneeling activities as well as climbing. All attributable to the injury of 8/30/2001.
 - Report dated 6/30/2014 (Defendant's Exhibit "K")-Supplemental report. Apportions between the two injuries 90% to the injury of 8/30/2001, and 10% to the injury of 10/20/2001
- Dr. Jonathon K. Lee (treating physician):
 - Report dated 8/22/2008 (Applicant's Exhibit "2")-MMI. Not clear, but appears to apply to left knee. Avoid lifting, pushing or pulling over 5 lbs. Avoid frequent bending or stooping. Avoid repeated climbing up and down stairs and ladders. Avoid prolonged walking and standing. Avoid running, twisting or jumping. As to the left shoulder, avoid reaching over shoulder level. Not clear but appears to apply to the low back and neck, a work preclusion to sedentary work. Noting her prior

work injury of 1997 to her low back, he finds no basis for apportionment but provides no further assessment as to the injuries of 8/30/2001 (note typo referring to “8/31/2001”) and 10/20/2001.

- Report dated 3/21/2016 (Applicant’s Exhibit “1”)-While incorporating Dr. Lustig’s opinion as his own, he recommends that Dr. Lustig’s findings be reviewed by another psychiatrist
- Report dated 6/12/2017 (Applicant’s Exhibit “6”). Review of Dr. Noel Lustig’s deposition with no state change in opinion
- Dr. Noel Lustig (examining physician.):
 - Report dated 6/23/2007 (Applicant’s Exhibit “3”)-Concludes that she is TTD noting that she is “severely disabled” and requires the assistance of her son. Finds no basis for apportionment based on current record.
 - Deposition 9/22/2011 (Applicant’s Exhibit “4”)-Confirms that he examined the applicant on only one occasion. As of that date, he confirmed that she was 100 percent permanently disabled although had no opinion on apportionment (page 10, commencing line 11). He further confirmed his understanding that he was evaluating the patient only and that no treatment relationship existed. (Page 10, commencing line 9), and that in fact that the applicant refused treatment to include medications (page 18, line 14). Parties waived the witness’ signature (page 63, line 24).

The applicant was given until 1/9/2018 for purposes of submitting a Trial Brief and supporting Points and Authorities, and the defendant given until 2/2/2018 for purposes of response, further noting that the defendant was ordering transcripts from the prior proceedings and would confirm their receipt with the applicant’s representatives.

The parties confirmed their prior receipt of the job analyses requested by the previous assigned Trial judge, and the applicant’s representative confirmed he had the police report stemming from the motor vehicle accident of 2/14/2013, and the hospitalization of 6/12/2017 as it would pertain to the costs and sanctions issue. The parties were directed to appear with this additional documentation to supplement the record at the time of the forthcoming Trial date, which was to allow the current assigned judge an opportunity to review the Trial Briefs and to complete his review of the record.

At the time of Trial on 4/25/2018, the parties were ordered to provide further documentation to complete the record, based on the court’s review of the parties’ arguments set forth in their Trial briefs, and as EAMS did not contain certain critical information, to include:

1. A copy of the Notice of Dismissal of Attorney as to when the applicant was no longer represented and was pro per.

2. A copy of the Medical Unit notice with the list of proposed qualified medical evaluators in the field of psychiatry to include the listing of Dr. Strong.
3. A copy of the Minutes of Hearing where there was a purported to utilize Dr. Strong as the agreed upon panel qualified medical evaluator.

At the time of Trial on 6/14/2018, additional exhibits were taken in, to include the agreed vocational evaluator reports from Susan Kiskis with the job analyses pertaining to the occupation issue. At that time, the court reviewed its concerns about the report of PQME Dr. Kureshi being incomplete without an assessment of permanent disability under the 1997 Permanent Disability Rating Schedule (PDRS), with the applicant's attorney's position being that this was immaterial in light of the "baseball arbitration" procedures under Labor Code Section 4065 (now repealed) and the defendant's failure to have a proposed rating at the time of the Mandatory Settlement Conference.

Further, Dr. Strong's purported position as the selected qualified medical evaluator remained in place, with the applicant's representative disputing the disposition of the case entered at the time of the Mandatory Settlement Conference of 7/23/2012. The parties agreed that testimony by the then assigned defense counsel Perry K. Countryman appeared appropriate, and the case continued to 9/6/2018.

Due to the applicant's hearing representative's illness on 9/6/2018, the matter was continued to 11/8/2018. Testimony proceeded with the defense witness Perry K. Countryman II, which included the court's examination of this witness regarding his past professional affiliation with the judge (they were previously shareholders and partners in the same defense firm of Parker & Dally, later Parker & Irwin). The witness confirmed that his own representation on this file occurred with a subsequent firm affiliation, and that he and the judge had never discussed the factual or legal issues involved in this case.

The bulk of his testimony dealt with the selection of Dr. Barbara Strong, with his acknowledging an earlier error on his part assuming that the applicant was "represented" which led him to strike Dr. Strong from the QME panel. However, after review with the applicant's hearing representative and the presiding judge Sanford-Wachtel at a subsequent conference, he withdrew his objection. His understanding was that the applicant had then selected Dr. Strong as the PQME (although it was her contention that she had actually selected Dr. Lustig in this capacity.) He reiterated his understanding that while the applicant was represented by her hearing representative Robert Bentley (also her son), that he was not an "attorney" for purposes of selecting the PQME.

At the conclusion of proceedings, the applicant's hearing representative requested time to submit a memorandum of Points and Authorities regarding this witness' testimony (he was given until 11/19/2018 for purposes of filing this brief), and the defendant given until 11/30/2018 to submit their rebuttal. The otherwise stood submitted for decision as of 11/30/2018.

After a review of the record, to include the submitted post-trial briefs, the court was persuaded that further development of the record was indicated, with the Order Vacating Submission issuing on 12/6/2018. This was the subject of a subsequent Petition for

Reconsideration/Removal, for which the Appeals Board dismissed reconsideration and denied removal.

The parties returned for a Status Conference on 10/29/2019, at which time the applicant's representative filed his Request for Final Order on L.C. 4065 (baseball arbitration (EAMS Doc ID 71471194)); the defendant was given until 11/13/2019 to respond. The case was otherwise continued to Trial for 12/18/2019.

Defendant's response to the applicant's request for a ruling on the applicability of the baseball arbitration is dated 11/11/2019 (EAM Doc ID 30852940).

At the time of Trial on 12/18/2019, and after consideration of the applicant's subsequent request to audio record the proceedings pursuant to Rule 10760, said request was granted to include limitations of recording only when the proceedings were on the record, and that a copy of said recording was to be provided to both the court and the defendant (this was to be provided digitally by e-mail, with jurisdiction reserved in that event that said recording could not be opened. Further, and after consideration of the parties' pleadings on the issue, the case stood submitted for decision on the limited issue of the applicability of Labor Code Section 4065 and Rules 10632 and 10633.

The Joint Findings and Order issued 4/20/2020, finding that Labor Code Section 4065 "baseball arbitration" was no longer operative. This was followed by the applicant's Petitions for Reconsideration/Removal which were filed 5/14/2020, and the Opinion and Order Dismissing Petition for Removal issuing 6/23/2020. The record further reflects an Order denying applicant's Petition for Writ of Review which issued 9/29/2020 (EAMS Doc ID 73367706).

After a Status Conference set for 3/23/2021, and the parties' request at that time, the matter was restored to the Trial calendar on 5/24/2021. At that time, the parties appeared (by stipulation) by way of AT&T Teleconference. The parties further stipulated as to the stipulations and issues originally framed on 10/20/2016 (see Minutes of Hearing/Summary of Evidence 10/20/2016), and jointly requested that the matter proceed to submission based on the current record (and not proceed with further development of the record as set forth in the Order Vacating Submission of 12/6/2018, which itself had been the subject of applicant's Petition for Reconsideration and subsequently the Order Dismissing Petition for Reconsideration of 3/1/2019). At that time, the disposition for both cases was that the matter would be referred to the Disability Evaluation Unit, with the parties provided 7 days (plus 5 days mailing) to object; otherwise the cases would stand submitted for decision.

Subsequently rating instructions issued, with the Recommending Ratings issuing. The Recommended Ratings issued 6/29/2021, and were served on the parties.

Subsequently, based on applicant's request, this matter was set for cross-examination of the rating specialist (over defendant's objection of 8/16/2021) for 9/27/2021.

Said ratings, based on the instructions given by this judge dated 6/22/2021, recommended permanent disability as follows:

1. ADJ1524475 (MF) (EAMS Doc ID 74363996)-Permanent disability of 28% amounting to 113.75 weeks of disability payments at the rate of \$170.00 per week, in the total amount of \$19,337.50.
2. ADJ4641802 (EAMS Doc ID 74364067)-Permanent disability of 23% amounting to 85.50 weeks of disability payments at the rate of \$160.00 per week in the total amount of \$13,680.00.

Based on applicant's Declaration of Readiness to Proceed of 8/10/2021, this matter was set over defendant's objection of 8/16/2021 to proceed with cross-examination of the DEU rating specialist Abbie Santiago. During her testimony, which was conducted by AT&T Teleconference by stipulation of the parties, the witness testified in a truthful and credible manner as to how she applied the 1997 Permanent Disability Rating Scheduled (PDRS) to the judge's instructions of 6/22/2021 for both cases, to include consideration of the Multiple Disabilities Table (MDT) and duplicating/overlapping factors of permanent disability as it would pertain to these restrictions. She further indicated that apportionment had been considered based on the judge's instructions.

The applicant's motion to submit a post-Trial Brief/Points and Authorities was granted, and he was given until 10/11/2021 to do so. The defendant was given until 10/25/2021 to respond.

The applicant's Trial Brief (in the form of an "Objection") is dated 10/9/2021, received on 10/12/2021 (EAMS Doc ID 74753245), and contends the following:

1. Rating instructions should include all Dr. Lee's reports in evidence and Dr. Lustig's report and deposition in evidence, which Dr. Lee incorporated into two of his reports.
2. No disability questionnaire was used [DWC-AD Form 100 (DEU)], and the QME's in question never gave such form to the applicant.
3. Dr. Kureshi failed to address all issues and/or failed to completely address all issues.
4. Dr. Kureshi did not review relevant tests or prior medical opinion in arriving at his conclusions.
5. Dr. Kureshi's reports are incomplete and inadmissible.
6. Dr. Kureshi's reports do not represent substantial evidence.
7. The medical history relied upon Dr. Kureshi was incomplete and/or inaccurate.
8. Dr. Kureshi failed to identify (a) all information received from the parties, and (b) all information relied upon in the formulation of his (her) opinion pursuant to Labor Code Section 4062.3(d).
9. As the result of above, Dr. Kureshi's reports should be included in the rating.

10. Dr. Brodie did not correctly state subjective complains.
11. Dr. Brodie failed to address all issues and/or completely address all issues.
12. Dr. Brodie's report do not represent substantial evidence.
13. The medical history relied upon by Dr. Brodie was inaccurate or incomplete.
14. Dr. Brodie failed to identify (a) all information received from the parties, and (b) all information relied upon in the formulation of his (her) opinion pursuant to Labor Code Section 4062.3(d).
15. Dr. Brodie's report should not be included in the rating.
16. Dr. Strong did not correctly state the subjective complaints.
17. Dr. Strong failed to identify (a) all information received from the parties, and (b) all information relied upon in the formulation of his (her) opinion pursuant to Labor Code Section 4062.3(d).
18. Dr. Strong's report are incomplete and/or inadmissible.
19. Dr. Strong's reports are not substantial evidence.
20. Dr. Strong failed to comply with 8 CCR 36.5, and failed to properly serve her reports, and further defendant violated 8 CCR 36.5 with an improper service of Dr. Strong's reports "long after" the MSC.
21. Dr. Strong was chosen by agreement in violation of Labor Code Section 4062.1.
22. Dr. Strong's report should not be included in the rating.

The defendant's response (EAMS Doc ID 38766140) was received on 10/25/2021, and contends the following:

1. The DEU rating specialist appropriately issued ratings based on the instructions as provided by the WCALJ.
2. The applicant's cross-examination of the rating specialist did not show an error on the part of the rating specialist in responding to the instructions as provided.
3. It was within the discretion of the WCALJ to omit a rating based on the opinion of Dr. Lee.

4. The occupational groups as used in the rating were consistent with the stipulations as entered into by the parties.
5. The applicant's contention that Disability Questionnaires were not utilized by the QME's is without substantial proof.
6. The applicant's contentions as against QME's Drs. Kureshi, Brodie and Strong are unsubstantiated.

At this juncture, the cases stood submitted for decision, with issuance of the Joint Findings and Award/Opinion on Decision on 11/16/2021.

IV

DISCUSSION:

Timeliness of applicant's Petition for Reconsideration:

The Joint Findings and Award with accompanying Opinion on Decisions [Labor Code Section 5313] issued 11/16/2021, with the defendant designated for service pursuant to WCAB In Re: COVID-19 State of Emergency 2020 Misc. NO 260 (En Banc). The defendant subsequently filed its proof of service dated 12/13/2021 (EAMS Doc ID 74878503).

In subsequently reviewing this matter, the undersigned noted receipt of the defendant's Answer to Petition for Reconsideration dated 12/27/2021 (EAMS Doc ID 39525635), but not having received the subject Petition for Reconsideration initiated inquiry through the Information and Assistance Office (Leticia Savalza) to determine its status.

On 1/12/2022, the undersigned Judge was advised by the I&A Officer that after contact with the applicant's son (Robert Bentley and heretofore her representative for purposes of WCAB proceedings), she was able to obtain a copy of the above referenced (Amended) Petition for Reconsideration, dated 12/11/2021 and proof of service which has since been uploaded to EAMS/File Net. Said document was received 1/11/2022 at 4:11pm. In reviewing Robert Bentley, the I&A Officer was advised that said (Amended) Petition was filed by e-mail at riv@dir.ca.gov on 12/13/2021, although this district office has no record of receiving same nor record of a hard copy for filing purposes.

Labor Code Section 5903 provides as follows:

“At any time within 20 days after the service of any final order, decision, or award made and filed by the appeals board or a workers' compensation judge granting or denying compensation, or arising out of or incidental thereto, any person aggrieved thereby may petition for reconsideration upon one or more of the following grounds and no other:

- a. *That by the order, decision, or award made and filed by the appeals board or the workers' compensation judge, the appeals board acted without or in excess of its powers.*
- b. *That the order, decision, or award was procured by fraud.*
- c. *That the evidence does not justify the findings of fact.*
- d. *That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.*
- e. *That the findings of fact do not support the order, decision, or award."*

Subsequently, hard copy original of the Amended Petition was received on 1/18/2022 (EAMS Doc ID 75084992). At this juncture, the undersigned Judge will defer to the Appeals Board as to the underlying timeliness of applicant's Petition (to include the granting of reconsideration on its own motion under Labor Code Section 5900). On the assumption that said Petition is deemed timely, the undersigned Judge will address applicant's underlying contentions as follows.

Total temporary disability:

At the time of the initial Trial of 10/20/2016 (see Minutes of Hearing/Order of Consolidation 10/20/2016; EAMS Doc ID 61801530), the parties stipulated that the applicant had been adequately compensated for all periods of (TTD) disability through 11/19/2003 (2:14; 4:2), with the issues not including that of temporary disability. A review of the subsequent Minutes of Hearing/Summary of Evidence did not show this as raised as an additional issue by the parties.

Attorney fees:

As noted in the Joint Findings and Award, the defendant was ordered to withhold and otherwise hold in trust the 15% awarded attorney fees, WCAB jurisdiction reserved. As such, no further action is warranted pending a determination of that issue at the trial level.

Report QME Dr. Kureshi:

Based on the testimony of the DEU Rating Specialist Abigail Santiago, and her ability to rate permanent disability based on the instructions issued incorporating Dr. Kureshi's findings, which the court otherwise found persuasive, and no basis to finding such reporting inadmissible, the report was deemed admissible.

Report QME Dr. Strong:

At the time of Trial on 6/14/2018, the parties provided a copy of the original DWC Medical Unit list on which Dr. Strong appeared, and the Minutes of Hearing (MOH) of 3/22/2011 issued by Judge Sanford-Wachtel noting that a new QME panel should issue as Dr. Kurland was not available. The applicant disputed the "agreement" as it appears in the MOH 7/23/2012 that Dr.

Strong was agreed upon. The testimony of witness Countryman was essentially that upon his determination that the applicant was “not represented” for purposes of the QME selection, that he withdrew his objection (or striking) of Dr. Strong, and that it was the applicant who selected Dr. Strong in this capacity. The applicant disputed this, although no Petition for Removal was filed on behalf of the applicant.

Based on the testimony of witness Countryman, which the court found persuasive, Dr. Strong’s report was deemed as admissible.

Report OME Dr. Brodie:

Based on the testimony of the DEU Rating Specialist Abigail Santiago, and her ability to rate permanent disability based on the instructions issued incorporating Dr. Brodie’s findings, which the court otherwise found persuasive, and no other basis established to exclude such reporting inadmissible, his reporting was deemed admissible.

Further development of record to include appointment of physician per Labor Code Section 5701:

As to the need to develop the record, to include consideration of the appointment of a physician under Labor Code 5701, the court is satisfied that the current record is sufficient and contains substantial medical evidence as to the issues presented, to include permanent disability and apportionment.

Upon completion of the testimony of the DEU Rating Specialist Abigail Santiago on 9/27/2021, and consideration of the rating instruction which incorporated the opinions of Drs. Brodie, Strong, Lee and Kureshi, which the court found persuasive, the court found permanent disability as follows:

1. ADJ1524475 (MF) (Court Exhibit “X”)-Permanent disability of 28% amounting to 113.75 weeks of disability payments at the rate of \$170.00 per week, in the total amount of \$19337.50.
2. ADJ4641802 (Court Exhibit “Y”)-Permanent disability of 23% amounting to 85.50 weeks of disability payments at the rate of \$160.00 per week in the total amount of \$13,680.00.

The court notes that while the Applicant contends, inter alia, that the WCALJ did not consider the opinion(s) of Dr. Lee in formulating the rating instructions, a review of the rating instructions issued 6/22/2021 incorporated such opinions as to the extent the opinion represented substantial medical evidence to the extent they provided rateable factors of permanent disability.

V

RECOMMENDATION

On the assumption that the applicant's (Amended) Petition for Reconsideration is deemed timely (to which the undersigned judge defers to the Appeals Board), it is recommended that the Petition for Reconsideration be denied as to its merits.

DATE: 1/19/2022

Respectfully submitted,

ROBERT B. HILL

Workers' Compensation Administrative Law Judge