WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

FRANKLIN OLIVER, *Applicant*

vs.

TAMPA BAY BUCCANEERS; ESIS, et al., *Defendants*

Adjudication Number: ADJ9088316
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Award (F&A) issued by the worker's compensation administrative law judge (WCJ) on March 2, 2018. The WCJ found that: (1) while employed as a professional athlete, occupational group number 590, during the period March 1, 1975 through October 1, 1981, while employed at various locations by the San Francisco 49ers, Buffalo Bills, and Tampa Bay Buccaneers, applicant sustained injury arising out of and in the course of employment to multiple body parts, including his head, neck, and back; (2) applicant elected against the Tampa Bay Buccaneers, insured by Insurance Company of North America, administered by ESIS; (3) there is California subject matter jurisdiction over applicant's claim; (4) based on the opinion of David Kim, M.D., the date of injury for purposes of the statute of limitations is December 16, 2013, through December 16, 2014; (5) the liability period is September 1, 1976, through September 1, 1977; (6) applicant's claim is not a "covered claim" for CIGA under section 1063.1; (7) based on the opinion of Dr. David Kim, applicant became permanent and stationary on December 16, 2016; (8) there is no evidence supporting lost wages or periods of

[1] Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

temporary disability; (9) applicant's earnings are maximum for permanent disability and life pension payments; (10) there is substantial medical evidence supporting a finding of apportionment of permanent disability; (11) applicant is entitled to an award of permanent disability of 98%, equivalent to 881.25 weeks of indemnity payable at the rate of $290 per week, commencing from December 16, 2016, in the total sum of $255,262.50, and thereafter a life pension at the weekly rate of $293.77; (12) there is no substantial medical evidence supporting a finding of permanent total disability (PTD) regarding applicant's brain injury; (13) applicant is in need of further medical treatment to cure or relieve him from the effects of the industrial injury; (14) applicant's attorney has performed services of a reasonable value of 15% of the permanent disability award to be commuted from the far end of the award, if necessary; and (15) pursuant to an agreement between applicant and applicant's attorney, the sum of $7,811.47 as loan for living expenses will be deducted after deduction for attorney's fees.

In his Petition, applicant contends that: (1) he is permanently and totally disabled under Labor Code section 4662 (a) (4)[2] based on his traumatic brain injury from playing football that resulted in a severe cognitive disorder, including Parkinson's disease, dementia, and other disorders; (2) he is entitled to PTD under section 4662(b) based on the combination of his neurological, psychiatric, and orthopedic disability and the disabling effects of his medication; (3) pursuant to *Gen. Foundry Serv. v. Worker's Comp. Appeals Bd. (Jackson)* (1986) 42 Cal.3d 331, [51 Cal.Comp.Cases 375], he should be awarded total temporary disability until his condition becomes permanent and stationary based on the progressive nature of his neurological disorder; (4) he is entitled to total temporary disability for the period from November 1, 2013 to December 16, 2016; and (5) applicant's attorney should receive 18% of the benefits awarded due to the complexity of the case, the work performed, and the results obtained.

We did not receive an answer to the Petition from any party. We received a Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the petition be denied.

On July 16, 2018, applicant filed a request to file and a supplemental pleading regarding attorney's fees. On January 21, 2019, applicant filed a request and a supplemental pleading, and attached a medical report from Kenneth L Nudleman, M.D., dated July 5, 2018. Without seeking

[2] All further statutory references are to the Labor Code unless otherwise stated.

permission, defendant filed an answer to applicant's request on March 15, 2019. On February 10, 2021, again without seeking permission, defendant filed a supplemental answer, and attached a report from Dr. Charles Glastein, dated February 10, 2021.

Applicant's supplemental petitions have been considered where relevant to the issues raised on reconsideration. (See Cal. Code Regs., tit. 8, § 10964.) However, we decline to admit Dr. Nudleman's July 5, 2018 report, and it will not be considered. Defendant did not seek permission to submit supplemental pleadings, and they will not be considered. (See Cal. Code Regs., tit. 8, § 10964.) We decline to admit the medical report from Dr. Glastein dated February 10, 2021, and it will not be considered. Admission of these medical reports should be considered at the trial level in the first instance.

We have reviewed the record, and considered the allegations in the Petition and applicant's supplemental pleadings and the contents of the WCJ's Report.[3] Based on our review of the record, we will affirm the F&A, except that we will amend it to reserve jurisdiction over applicant's permanent disability in accordance with *Jackson*.

I.

We begin with applicant's contention that he is permanently and totally disabled pursuant to section 4662 (a) (4), which states as follows:

> (a) Any of the following permanent disabilities shall be conclusively presumed to be total in character:
>
> (1) Loss of both eyes or the sight thereof.
>
> (2) Loss of both hands or the use thereof.
>
> (3) An injury resulting in a practically total paralysis.
>
> (4) An injury to the brain resulting in permanent mental incapacity.
>
> (b) In all other cases, permanent total disability shall be determined in accordance with the fact.

[3] Applicant testified at trial on August 16, 2017, and October 31, 2017. Applicant's wife, Charisse Oliver, testified on October 31, 2017. The record contains transcripts from each of the hearing days, and the transcripts have been reviewed and considered. However, much of applicant's testimony concerning his work history and multiple injuries is undisputed and well summarized in the Opinion and the Report, and we will not repeat it here.

Here, the WCJ rejected this contention, based on the July 17, 2017 report of Dr. Kenneth Nudleman, the Qualified Medical Evaluator (QME) in neurology. (Ex. 28; Report, p. 6.) In that report, Dr. Nudleman determined that pursuant to the AMA Guides (Guides),[4] applicant has a posttraumatic head syndrome, that is "constant slight becoming occasionally slight to moderate," posttraumatic headaches that are "intermittent and slight," a sleep disorder that is "constant and slight becoming intermittently moderate," and a panic and anxiety disorder that is "frequent and slight." Dr. Nudleman found that these disabilities resulted in applicant having a 20% Whole Person Impairment under the Guides. (Ex. 28.)

Applicant relies on the opinion of his treating physician, Leighton Reynolds, M.D., to support his contention that he has an injury to his brain "resulting in permanent mental incapacity" and is conclusively presumed to be 100% disabled. In Dr. Reynold's report of June 11, 2017, he found that applicant has the signs and symptoms of both Parkinson's disease and Chronic Traumatic Encephalopathy (CTE). He concluded that applicant "has suffered an industrial injury to his brain/mind resulting in a permanent loss of mental capacity under section 466[2] (a) (4) ('injury to the brain')." (Ex. 19.)

In *Schroeder v. Worker's Comp. Appeals Bd.* (2013) 78 Cal.Comp.Cases 506 (writ den.),[5] an Appeals Board panel held that applicant's "mild hypoxia/vascular dementia" for which the agreed medical examiner found a 12% whole person impairment did not constitute sufficient disability to trigger the conclusive presumption under [former] section 4662(d) [subsequently

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[4] The use of the Guides is required under section 4660.1, which provides in pertinent part as follows:

> This section shall apply to injuries occurring on or after January 1, 2013.
>
> (b) *For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) with the employee's whole person impairment, as provided in the Guides, multiplied by an adjustment factor of 1.4.*
>
> …
>
> (g) *Nothing in this section shall preclude a finding of permanent total disability in accordance with Section 4662.*

[5] WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language. (See *Griffith v.Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) However, panel decisions are not binding precedent on other Appeals Board panels and workers' compensation judges (see *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) The WCAB will consider these decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board En Banc Opinion).)

changed to 4662 (a) (4)]. The panel observed that the statute had been amended in 2008 to change the phrase "an injury to the brain resulting in imbecility or insanity" to "an injury to the brain resulting in permanent mental incapacity" without effecting a substantive change in the law. (*Id.*, p. 509.) The panel concluded that "given the legislative history and purpose, [former] section 4662 (d) contemplates a more severe disability." (*Id.)*

In *Winningham v. Worker's Comp. Appeals Bd.*, 2016 Cal.Wrk.Comp. P.D. LEXIS 251, an Appeals Board panel relying on *Schroeder* upheld the WCJ's finding that applicant was permanently and totally disabled "in accordance with the fact" under section 4662 (b). The panel concluded that applicant was not permanently and totally disabled under section 4662 (a) (4), despite significant psychiatric impairment, since applicant's cognitive disability did not rise to the level of severity contemplated by the statute.

Here, we are unable to conclude that Dr. Nudleman's rating of applicant's neurological disability under the Guides is of sufficient severity to invoke the conclusive presumption under 4662 (a). (Ex. 28.) Furthermore, we agree with the WCJ that Dr. Reynold's contrary opinion as expressed in his June 11, 2017 report is conclusory, based on an incomplete review of medical records, and generally less comprehensive than that of Dr. Nudleman. Thus, we find no error in the WCJ's reliance on Dr. Nudelman's opinion. (Ex. 19; see *Place v. Worker's Comp. Appeals Bd.* (1970) 35 Cal.Comp.Cases 525.)

II.

Applicant also contends that he is permanently and totally disabled "in accordance with the fact," pursuant to section 4662 (b). In this regard, applicant points out that orthopedic QME Dr. Kim noted in his report that applicant stopped working on February 28, 2014 because of multiple conditions including Parkinson's disease, hypertension, heart attack, arterial stent, hip replacement, hip provision, left knee replacement, tinnitus, torn rotator cuff, bulging discs, diabetes, and GERD. (Ex. 31, page 6.) Applicant argues that these conditions, in addition to conditions related to his brain injury and the effects of his medication, all contributed to his total disability.

In *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018), 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680], the Court of Appeal held that in cases other than those enumerated under section 4662(a), a determination of permanent

total disability shall be made on the facts of the case in accordance with "percentages of permanent disability." That is, the provisions in section 4660 for rating the percentages of permanent disability pursuant to the Guides and the Permanent Disability Rating Schedule (PDRS) must still be utilized. (*Id*., pp. 1688-1690.) The Court further concluded that there was no basis for concluding that section 4662 (b) provides a second independent path to permanent and total disability findings separate from section 4660. (*Id.*, p. 1692.) The Court noted, however, that the scheduled rating is not absolute, and it is permissible to depart from the scheduled rating on the basis of vocational expert opinion that an employee has a greater loss of future earning capacity than reflected in a scheduled rating. (*Id*., pp. 1684-1686 and 1689-1690; see *Ogilvie v. Worker's Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1266-1276 [76 Cal.Comp.Cases 624]; *Contra Costa County v. Worker's Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746, 755-761 [80 Cal.Comp.Cases 1119]; *LeBoeuf v. Worker's Comp. Appeals Bd*. (1983) 34 Cal.3rd 234 [48 Cal.Comp.Cases 587].)

In accordance with *Fitzpatrick,* we do not find a basis in the record before us to conclude that applicant is permanently and totally disability pursuant to section 4662 (b).[6] Furthermore, we note there is no vocational rehabilitation evidence in the record that rebuts the permanent disability of 98% found by the WCJ. (*Ogilvie,* s*upra,* 1266-1276.)

III.

Applicant contends that he is entitled to total temporary disability for the period from November 1, 2013, to December 6, 2016. Temporary disability connotes an inability to work and an inability to earn any income during the period when an employee is recovering from the effects of the injury. (§ 4654; *Herrera v. Worker's Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 257 [34 Cal.Comp.Cases 382].)

Here, applicant testified that following his career as a football player, he began a career in teaching, and eventually was employed as a high school vice principal and later a high school principal until his retirement in 2014. (10/31/2017 MOH, p. 6.) Applicant relies on the opinion of orthopedic QME Dr. Kim, as expressed in Dr. Kim's report of December 16, 2014. In this report, however, and in his December 16, 2016 report, Dr. Kim states under "Ability to Return To Work"

[6] We note that the *Fitzpatrick* court was interpreting section 4660 for injuries prior to 2013, and they did not address section 4660.1. However, it appears that the same rationale would apply to section 4660.1.

that: "[i]n consideration of the above-noted findings [concerning applicant's work restrictions], Mr. Oliver will be unable to return to his prior occupation as a professional football player. *The patient is currently retired from the open labor market; however, should he wish to return to the work force, he may do so within the parameters outlined above.*" (Exh 1, p. 31 and 5, p. 39 [italics added]; 10/31/2017 MOH, p. 6; see *Gonzalez v. Worker's Comp. Appeals Bd.* (1998) 68 Cal.App.4th, 843.) Although applicant testified that he left work due to his neurological disability, there is no substantial medical evidence that applicant was precluded from returning to his job as a principal or that he wished to return to the work force following his retirement. Accordingly, we find no basis in the record before us to award temporary disability for the period claimed by applicant.

IV.

Next, applicant contends that, pursuant to *Jackson, supra*, his head injuries should be considered an insidious progressive disease, and that as a result, he should be found totally and temporarily disabled until he is permanent and stationary, and the WCAB should retain jurisdiction over permanent disability. We agree that, based on the medical evidence concerning applicant's neurological disability, jurisdiction should be reserved over the issue of permanent disability, notwithstanding the jurisdictional limits of sections 5410[7] and 5804. As we explain, however, we do not find applicant is entitled to total temporary disability as claimed.

Applicant's treating doctor, neuropsychologist Dr. Reynolds and neurological QME Dr. Nudleman both found applicant's head trauma and presumed CTE to be progressive. Dr. Nudelman reported that "it is anticipated with time that this man's mental capacity, from a combination of his Parkinson's disease, dementia, and the beginning of presumed CTE (CTE actually cannot be officially diagnosed until postmortem), will lead to a progressive deterioration in his mental function over time." (Ex. 6, p. 23.) Dr. Reynolds also concluded that applicant's head trauma resulted in CTE, with continuing deterioration of applicant's symptoms. (Ex. 19, pp. 12-13.)

[7] Section 5410 provides: "Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation within 5 years after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the appeals board in these cases shall be a continuing jurisdiction within this period. This section does not extend the limitation provided in section 5407." We note that while this matter has been pending on reconsideration, applicant has filed a petition to reopen pursuant to section 5804.

In *Jackson,* the Supreme Court addressed the issue of when jurisdiction over permanent disability may be reserved in the case of an insidious and progressive disease. The applicant in *Jackson* was exposed to asbestos while working as a molder for the period from 1952 to 1981, which exposure caused the development of asbestosis. The WCJ found that Jackson's lung disease was caused at least in part by exposure to work and that the disease was progressing and not yet stationary. The WCJ found that Jackson was not entitled to temporary disability benefits but was entitled to an advance of permanent disability. Following a petition for reconsideration however, the WCJ determined that Jackson's disease was not stationary for a permanent disability rating and that Jackson should receive temporary total disability benefits from the date he left his job. The Appeals Board agreed with the WCJ, finding that applicant's condition was not yet stationary and that he incurred wage loss, since he was no longer able to work at his old job and had not been provided with alternative work. Therefore, the Appeals Board ordered total temporary disability payments to continue indefinitely. (*Id.*, p. 334.)

The Court of Appeal remanded the case to the Appeals Board holding that the Appeals Board should consider a progressive disease permanent when either: (1) "the disability is total and further deterioration would be irrelevant for rating purposes," or (2) "the prognosis of the disease is sufficiently ascertainable to make a rating determination." (*Jackson, supra,* pp. 334-335.)

The Supreme Court reversed the Court of Appeal and remanded the case to the Appeals Board. The Court noted that the Labor Code does not define the term permanent disability, although Rule 9735 (Cal. Code Regs, tit. 8, § 9735) states that "disability is considered permanent after the employee has reached maximum improvement or his condition has been stationary for a reasonable period of time." The Court observed that this definition is inadequate when it is applied to a progressive occupational disease, stating: "*The reference to 'maximum improvement' obviously refers to the classical concept of 'injury' which envisions a traumatic incident resulting in corporal injury with a period of healing to a point of greatest improvement. The term does not envision an insidious, aggressive disease process that results from a remote, undramatic work exposure and is of little or no use in determining the status of such condition…* The Board rule for permanent disability, therefore, is not very helpful… except to suggest that the condition is not permanent and stationary because of its progressive nature." (citing *Piedemonte v. Western Asbestos* (1981) 46 Cal.Comp.Cases 475, 478; italics added.) The Court found that the Appeals Board clearly has the power to continue its jurisdiction beyond the five-year period on the issue of

permanent disability in the case of insidious progressive diseases, noting that on remand, "the Board may tentatively rate Jackson's known permanent disability and order advances based on a tentative rating. The Board may then reserve its jurisdiction for a final determination of permanent disability when either: (1) [applicant]'s condition becomes permanent and stationary, or (2) his permanent disability is total and further deterioration would be irrelevant for rating purposes." (*Jackson, supra*, pp. 331-338.)

In *Ruffin v. Olson Glass Co.* (1987) 52 Cal.Comp.Cases 335, the Appeals Board en banc declined to reserve jurisdiction over permanent disability in two cases, an injury to the applicant's back in one case and to applicant's knee in the other. The Appeals Board held that the applicants' orthopedic injuries in these cases were not insidious progressive diseases within the meaning of *Jackson*. The Appeals Board concluded based on *Jackson* that the characteristics of an insidious progressive disease are: (1) that it is caused by a "remote" and "undramatic" work exposure—one that is likely to be undetected at the time, or if detected, the significance is likely to be unappreciated; (2) that the disease worsens over time, but at a rate so gradual that it is well established before becoming apparent[8]; and (3) that it has a "long latency period" between exposure to the risk and the onset of symptomatology. Noting that the *Jackson* court, citing *Piedemonte*, considered mesothelioma as an example of an insidious progressive disease, the Appeals Board held that to adopt a definition of an insidious progressive disease as argued by the applicants with respect to their orthopedic injuries would be to expand the exception to the limitations contained in sections 5410 and 5804 to a multitude of cases involving routine trauma to the spine and extremities, thus nullifying the effect of the statutory limitations. (*Id.*, pp. 341-342.)

We believe the factors set forth in *Ruffin* are generally consistent with a finding of applicant's CTE as an insidious progressive disease. Although the multiple head injuries applicant incurred over his years of playing football ultimately caused applicant's post-traumatic head syndrome and CTE, the disease was not detected until many years after applicant stopped playing. (10/31/2017 MOH, pp. 6-10; Exhibits 6 and 19.) Furthermore, although it is not clear to what extent applicant's neurological disability has worsened, Dr. Nudleman's prognosis was clear that

[8] We construe this phrase to refer generally to the nature of insidious diseases, including those insidious diseases, such as applicant's post-traumatic head syndrome and CTE, that have the potential to worsen at an indeterminate rate or time.

the applicant's head trauma "…will lead to a progressive deterioration in his mental function over time." (Ex. 6, p. 23.)

Moreover, in *Piedemonte*, *supra,* 46 Cal.Comp.Cases 475, cited by the court in *Jackson, supra,* the Appeals Board en banc determined that although applicant had sustained an industrial injury while working as an asbestos worker in the form of "pleural asbestosis," the injury was not yet permanent and stationary and had not yet caused any temporary or permanent disability. (*Id*., p. 478.) In discussing the evidence in the case, the Appeals Board noted:

> We do not disagree that there is supporting evidence of no permanent disability. There is also, however, evidence on the progressive nature of applicant's industrial condition. Dr. Levine, on whom the trier of fact relied, and Dr. Cosentino, the other reporting medical specialist herein, both agree that applicant's asbestosis condition *may progress to either a carcinoma or pleural asbestosis.* Dr. Levine, in fact, already finds pleural asbestosis. On the issue of the potential progression of the disease, the evidence is not only substantial but in concurrence, albeit to varying degrees. Based on the above, and for the reasons hereinafter discussed, the Board agrees with the applicant's position that the issue of permanent disability can and should be deferred. (*Id*.; italics added.)

Noting that there was the potential for applicant's condition to progress to disabling diseases, including mesothelioma, a form of cancer, the Appeals Board concluded that the applicant's condition was not yet permanent and stationary, and that the medical evidence "indicates the condition is potentially progressive and may yet result in significant permanent disability." The Appeals Board determined that since the issue of permanent disability remained unresolved, it may be determined at any time in the future when applicant's condition warranted, and the parties could then present evidence and move to a hearing. The Appeals Board further held that the five year limitation period in section 5804 would not preclude determination of the issue at a later time because there was no decision to be altered or amended, and under section 5410, the proceedings had been instituted within the five years from the date of injury. Therefore, the Appeals Board found that applicant's condition was not yet permanent and stationary, applicant was awarded medical treatment, and the issue of permanent disability was deferred. (*Piedemonte*, *supra,* 46 Cal.Comp.Cases 475, pp. 482-483.)

The *Jackson* doctrine has been applied to reserve jurisdiction in other cases involving insidious diseases other than asbestosis. In *Sandoval v. California Highway Patrol,* 2015 Cal. Wrk. Comp. P.D. LEXIS 404. 2015, an Appeals Board panel found that applicant's bladder cancer was

an insidious progressive disease, permitting extension of jurisdiction beyond the five-year limitation of section 5804. Applicant's bladder cancer was found to be "insidious" based on the opinion of the agreed medical examiner that the cancer could develop or recur at a distant time from the initial instigating cause, and it was progressive since applicant's condition required lifetime monitoring and invasive testing and had a high rate of recurrence, and treatment for applicant's bladder cancer would result in progressive disability. (*Id*., pp. 8-10; see also *Hazelbaker v. Cal. Highway Patrol,* 2020 Cal. Wrk. Comp. P.D. LEXIS 325 [applicant's prostate cancer constituted an insidious and progressive disease process, per *Jackson,* and the only medical evidence established that it was reasonably probable that applicant's cancer would progress, justifying a reservation of jurisdiction]; *Lockheed Martin v. WCAB (DeSoto)* (2003) 68 Cal.Comp.Cases 1878, 1879-81 (writ den.) [reserving jurisdiction over permanent disability where applicant's thyroid cancer was caused by exposure to carcinogenic chemicals at work and constituted an insidious and progressive disease similar to the lung disease caused by exposure to asbestos in *Jackson*].) The Appeals Board has also applied the *Jackson* doctrine to cases involving diseases other than cancer. (See *Travelers v. Workers' Comp. Appeals Bd. (Gonzales)* 2014 Cal.Wrk.Comp. P.D. LEXIS 497 [applicant's industrially-related Valley Fever was an insidious progressive disease]; *County of Marin v. Worker's Comp. Appeals Bd. (Carter)* (2001) 66 Cal.Comp.Cases 1533 (writ den.) [applicant's industrially-related hepatitis C was an insidious progressive disease]; *Paglialonga v. City of Irvine*, 2012 Cal. Worker's Comp. PD LEXIS 150 [applicant's industrially-related hepatitis C was an insidious progressive disease]; *Gault v. Americana Vacation Clubs* (2018) 84 Cal.Comp.Cases 112 [effects of applicant's long-term antibiotic treatment required to treat an industrially-related knee infection constituted an insidious progressive disease justifying reservation of jurisdiction].)

We find the analyses in *Jackson* and *Piedemonte* to be instructive in the present case, since reservation of jurisdiction was found justified in those cases based on medical evidence that indicated applicant's condition—asbestosis in both cases-- could potentially progress to a more serious disabling condition. In the present case, Dr. Nudleman anticipated that applicant's post-traumatic head syndrome and CTE will progress over time. (Ex. 6.) Thus, we conclude that reservation of jurisdiction over applicant's neurological permanent disability is justified in the

present case, and we will amend the award accordingly.[9] However, based on the record before us, we do not find applicant to be entitled to total temporary disability after December 16, 2016, when he was declared permanent and stationary by Dr. Kim, as claimed by applicant. (Ex. 1.)

V.

Finally, we conclude that based on the record before us, the WCJ's award of an attorney fee of 15% was appropriate. Applicant's representative, Shawn Stuckey, is not a licensed attorney in California, and although he was supervised by a California-licensed attorney, Mr. Stuckey made all of the appearances and filed the Petition for Reconsideration. (See § 4903(a); *Longval v. Workers' Comp. Appeals Bd.(Chavez)* (1996) 51 Cal.App.4th 792 [61 Cal.Comp.Cases 1396]; *Knutson v. Worker's Comp. Appeals Bd.* (1989) 64 Cal.Comp.Cases 1306 (writ den.).) We also note the record does not indicate that the required notice under WCAB Rule 10842 (Cal. Code Regs., tit. 8, § 10842) was provided to applicant. Although applicant was served with the petition for reconsideration, it does not satisfy the requirement to provide the requisite notice, particularly as proof of service does not include "notice of the attorney's adverse interest and of the applicant's right to seek independent counsel." (See *Facio v. Worker's Comp. Appeals Bd.* (1987) 52 Cal.Comp.Cases 121 (writ den.).)

Accordingly, we affirm the F&A, except that we amend it to reserve jurisdiction over applicant's permanent disability in accordance with *Jackson*.

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[9] With respect to applicant's argument concerning the application of *Jackson*, we note that while reservation of jurisdiction was not formally listed as an issue for submission, permanent disability *was* listed as an issue, and whether or not applicant can be declared permanent and stationary is central to the determination of permanent disability and to the holding in *Jackson*. (8/16/2017 MOH, pp.3-4; *Jackson, supra*, pp.331-338.) Additionally, based on the opinions of Dr. Reynolds and Dr. Nudleman, the parties were on notice that applicant had a potentially progressive disease. (Exhibits 6, 19). Since discovery may proceed at the trial level concerning applicant's permanent and stationary status and current level of permanent disability, we find no prejudice to defendant by virtue of our determination. (See *San Bernardino Community Hosp. v. Worker's Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 64 Cal.Comp.Cases 986 ["The essence of due process is simply notice and the opportunity to be heard."].)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of July 13, 2017 is **AFFIRMED**, except that the award is **AMENDED** as follows:

AWARD

AWARD IS MADE in favor of **FRANKLIN OLIVER** against **TAMPA BAY BUCANEERS AND ESIS** of:

1. Further medical treatment to cure or relieve applicant from the effects of the injury.
2. A provisional permanent disability award of 98%, equivalent to 881.25 weeks of indemnity payable at the rate of $290 per week, commencing from December 16, 2016 in the total sum of $255,262.50, less attorney's fee. Thereafter, a life pension is due at the weekly rate of $293.77.
3. An applicant's attorney fee of 15% of the permanent disability award to be commuted from the far end of the award, if necessary
4. Jurisdiction is reserved over applicant's permanent disability in accordance with *Gen. Foundry Service v. Worker's Comp. Appeals Bd. (Jackson)* (1986) 42 Cal.3d 331 [51 Cal.Comp.Cases 375].

5. Applicant's attorney fee of 15% of the permanent disability award to be commuted at the far end of the award, if necessary.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 20, 2022

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

FRANKLIN OLIVER
ALL SPORTS LAW
GUILFORD SARVAS & CARBONARA
GLENN STUCKEY LAW FIRM
LAUGHLIN, FALBO, LEVY & MORESI
LEWIS, BRISBOIS, BISGAARD & SMITH
TOBIN LUCKS

RLN/abs

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