

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

**MARSHALL JOHNSTON, *Applicant***

**vs.**

**CALIFORNIA GOLDEN SEALS; CALIFORNIA INSURANCE  
GUARANTEE ASSOCIATION, *Defendants***

**Adjudication Number: ADJ11979009  
Santa Ana District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

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 grant reconsideration, rescind the Findings and Award, substitute it with new Findings of Fact, that defer the issues of permanent disability, apportionment, and attorney fees. Defendant does not dispute the issue of injury arising out of and occurring in the course of employment (AOE/COE) or need for medical treatment. Therefore, we will affirm the WCJ's findings in this regard and return this matter to the trial level for further proceedings, as determined appropriate by the WCJ to obtain a consultative rating from the Disability Evaluation Unit and for a new decision and reissuance of the Award.

For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the September 20, 2023 Findings and Award is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the September 20, 2023 Findings and Award is **RESCINDED** and **SUBSTITUTED** with new Findings of Fact, as provided below, and that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

### **FINDINGS OF FACT**

1. Marshall Johnston, while employed during the period October 1, 1971 through February 13, 1974, as a professional athlete, Occupational Group Number 590, at various locations, in California, by California Golden Seals sustained injury arising out of and in the course of employment to his cervical spine, lumbar spine, and left and right hand/multiple fingers and psyche.
2. At the time of injury, the employer's workers' compensation carriers were CIGA for Lumbermens Mutual, in liquidation, for the California Golden Seals; Argonaut for the California Golden Seals.
3. Pursuant to Labor Code § 5412, applicant's date of injury is January 29, 2019.
4. Pursuant to Labor Code §5500.5 the last date of injurious exposure was February 13, 1974, and the responsible employer is the California Golden Seals with coverage for worker's compensation being provided by California Insurance Guarantee Association for Lumbermens Mutual Casualty, in liquidation.
5. The issues of permanent disability and apportionment are deferred.

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

7. The issue of attorney fees is deferred.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



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

**December 12, 2023**

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

**MARSHALL JOHNSTON  
THE LAW OFFICE OF LYSETTE R. RIOS  
GUILFORD, SARVAS & CARBONARA  
ADELSON MACLEAN**

**PAG/ara**

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 OF WORKERS' COMPENSATION JUDGE ON  
DEFENDANT'S PETITION FOR RECONSIDERATION**

**I  
INTRODUCTION**

Defendant California Insurance Guarantee Association (CIGA) for Lumbermens Mutual Casualty, in Liquidation, filed a timely, verified, petition for reconsideration. Applicant's counsel has filed an Answer. The Petition for Reconsideration was filed on the standard statutory grounds, from the Findings and Award on September 19, 2023, pleading that:

1. The Findings and Award made and filed by the WCJ were in excess of her power;
2. The evidence does not justify the Findings of Fact; and,
3. The Findings of Fact do not support the Order, Decision and Award.

**II  
STATEMENT OF FACTS**

Marshall Johnston, born [], while employed during the period October 1, 1971, through February 13, 1974, as a professional athlete, Occupational Group Number 590, at various locations, in California, by California Golden Seals claimed to have sustained injury arising out of and in the course of employment to his cervical spine, lumbar spine, and left and right hand/multiple fingers and psyche. At the time of injury, the employer's workers' compensation carriers for the California Golden Seals were CIGA for Lumbermens Mutual, in liquidation followed by Argonaut Insurance. Issues presented for decision were: 1) Injury arising out of and in the course of employment; 2) Permanent disability; 3) Apportionment; 4) Need for further medical treatment; 5) Attorney fees. Petitioner focuses on the issue of permanent disability, where the WCJ found Applicant is entitled to a permanent disability award of 76% and a life pension thereafter. Petitioner claims there is no substantial evidence to support the permanent disability finding and award, and that the WCJ must rely on the permanent disability rating of 60% provided by Cecilia Mejia, the Disability Evaluator Unit rater based on the WCJ's instructions.

**III  
DISCUSSION**

The WCJ solely addresses the issue of permanent disability noting the finding regarding apportionment is not at issue per petitioner. The WCJ agrees that the DEU rater is an expert, per the en banc decision in *Blackledge v. Bank of America* (2010) 75 Cal. Comp. Cases 613 (WCAB en banc), who provides the rating at the formal request of the WCJ. The DEU rater provides a recommended rating, based on the WCJ's instruction, and the WCJ takes the expert witness conclusions, into consideration for purposes of assessing the appropriate permanent disability rating. Petitioner notes correctly that the WCJ is not bound by the petitioner's recommendation, but that in providing her own rating, she also did not provide additional reasoning in support of her alternative permanent disability rating. As discussed in the Opinion, applicant's date of injury is January 29, 2019, pursuant to Labor Code §5412. Having found that applicant's Labor Code

§5412 date of injury is January 29, 2019, the WCJ made her assessment utilizing this date with the applicable 2005 permanent disability schedule.

The formal rating request to the Disability Evaluation Unit did not provide for the §5412 date of injury and, as noted, the WCJ assessed the rating differently following the formal rating instructions and additional review of the evidentiary record. As mentioned, the WCJ is not bound to the findings of the DEU rater and the WCJ does have expertise in rating permanent disability; however, to further substantial justice in all cases, and based on the undisputed finding per §5412, the WCJ would recommend that a formal rating request be sent to the Disability Evaluation Unit reflecting the undisturbed date of injury as indicated in the Finding and Award and Opinion on Decision.

#### **IV** **RECOMMENDATION**

It is respectfully recommended that reconsideration should be granted to return the matter to the Disability Evaluation Unit with instructions to provide an impairment rating based on date of injury January 29, 2019 to then be reviewed by the WCJ.

Date: October 24, 2023

Jennifer Kaloper-Bersin  
Workers Compensation Administrative Law Judge  
SANTA ANA DISTRICT OFFICE