WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

HERMAN O'BERRY, *Applicant*

vs.

SAINT LOUIS RAMS; WORLD LEAGUE OF AMERICAN FOOTBALL, NFL EUROPE/AMSTERDAM ADMIRALS and FAIRMONT PREMIER INSURANCE COMPANY, administered by ZENITH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ10232171
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on January 5, 2022, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his head, neck, shoulders, elbows, left wrist, back, bilateral hips, bilateral knees, and left ankle, and in the form of headaches and sleep disorder; and that the injury caused 77% permanent disability.

Defendant contends that the reports from applicant's orthopedic qualified medical examiner (QME) Michael J. Einbund, M.D. are not substantial evidence regarding applicant's bi-lateral knee impairment, that apportionment of applicant's impairment should be based on the report of orthopedic QME Larry A. Danzig, M.D., and that the report from neurology QME Kenneth L. Nudleman, M.D., is not substantial evidence as to applicant's sleep disorder.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from applicant.

We have considered the allegations in the Petition for Reconsideration (Petition) and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons

discussed below, we will grant reconsideration, and we will affirm the F&A including the rating of applicant's disability caused by factors other than that caused by the right knee and left knee injury; and we will amend the F&A to defer the issue of the applicant's right and left knee disability; based thereon the issue of applicant's disability caused by the cumulative injury at issue herein will be deferred (Finding of Fact 3); and the issue of attorney fees will be deferred. (Finding of Fact 5). We will amend the Award and Order, and return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his head neck, shoulders, elbows, left wrist, back, bilateral hips, knees, and left ankle, and in the form of sleep disorder, while employed by the defendants as a professional football player during the period from April 15, 1995, through April 1, 1998.

The matter was tried on November 2, 2016, and the issue submitted for decision was whether the injury claim was barred by the statute of limitations. (Minutes of Hearing and Summary of Evidence (MOH/SOE), November 2, 2016.) In our April 10, 2017 Opinion and Order Granting Defendant's Petition for Reconsideration and Decision After Reconsideration, we affirmed the January 2017 Findings and Award (finding the injury claim was not barred by Labor Code sections 5412, 5401(a), 5405, or 3600.5(e)) except that it was amended to find the Labor Code section 5412 cumulative injury date was December 17, 2015.

QME Dr. Einbund evaluated applicant on July 19, 2016. Dr. Einbund examined applicant, took a history and reviewed various x-rays and MRI scans. The diagnoses included degeneration of the bilateral hips and bilateral knees, and "post op, left ankle." (App. Exh. 2, Dr. Einbund, July 19, 2016, p. 12.) Dr. Einbund noted:

> Examination of the right knee reveals that he lacks 15 degrees from full extension. There is full flexion. ¶ Examination of the left knee reveals that he lacks 15 degrees from full extension. There is full flexion.
> (App. Exh. 2, p. 9.)[1]

Regarding applicant's knee impairment, Dr. Einbund stated:

[1] To flex is to decrease the angel between parts. Extension is the opposite, increasing the angel between parts. For example, the elbow flexes when performing a biceps curl. The knee flexes in preparation for kicking a ball. Extension is the straightening of a joint. (See Merriam-Webster Medical Dictionary.)

> He [applicant] is noted to have joint space narrowing involving both knees as seen on the x-rays. The left knee cartilage interval is 0 mm, which carries a 50% impairment of the left lower extremity. The right knee cartilage interval is 1 mm, which carries a 25% impairment of the right lower extremity. Please refer to Chapter 17, pages 544-545, Table 17:31 [American Medical Association Guides to the Evaluation of Permanent Impairment, hereafter Guides].
> (App. Exh. 2, p. 14.)

Dr. Einbund's discussion of apportionment included:

> Taking into consideration Labor Codes 4663 and 4664, it is my opinion that with the exception of both of his knees and his left ankle, all of Mr. O'Berry's current symptoms and disability are secondary to the continuous trauma which he sustained during the course of his career as a professional football player.
> (App. Exh. 2, p. 17.)
>
> Based on the currently available information, 20% of his current knee disability can be apportioned to the specific injury in 1997.
> (App. Exh. 2, p. 17.)
>
> Therefore, with regard to one of his knees, 5% is apportioned to the injury he sustained while playing college football and 95% is apportioned to the continuous trauma of playing professional football. For the other knee, 5% is apportioned to the injury he sustained while playing college football; 20% is apportioned to the specific injury he sustained in 1997; and 75% is apportioned to the continuous trauma of playing professional football.
> (App. Exh. 2, p. 18.)
>
> Mr. O'Berry also reported that he fractured his left ankle while playing college football and underwent two surgical procedures. He did completely recover from this injury. 10% of his current left ankle disability is apportioned to the injury he sustained while in college and 90% is apportioned to the continuous trauma of playing professional football.
> (App. Exh. 2, p. 18.)
>
> [W]ith the exception of both of his knees and his left ankle as outlined above, 100 percent of Mr. O'Berry's current disability is secondary to the continuous trauma he sustained throughout the entire course of his career as a professional football player, and 0 percent is apportioned to any preexisting condition, subsequent injuries, or to any non-professional football related causation.
> (App. Exh. 2, p. 19.)

On July 20, 2016, neurology QME Dr. Nudleman evaluated applicant. Dr. Nudleman took a history, and his examination of applicant included conducting an EEG (electroencephalogram),

and an EMG/NCV (electromyography/nerve conduction study). (App. Exh. 1, Dr. Nudleman, July 20, 2016, pp. 18 – 23 and 26 – 28.) The doctor concluded that applicant sustained:

> 1. Head trauma with posttraumatic head syndrome.
> 2. No significant headaches post trauma.
> 3. Disorder of sleep and arousal secondary to nonrestorative sleep. …
> (App. Exh. 1, p. 5.)

Dr. Nudleman assigned 4% whole person impairment (WPI) for the posttraumatic head syndrome, 3% WPI for the nonrestorative sleep condition, and stated:

> As to causation and apportionment, based on the [sic] current information available, causation relative to the posttraumatic headaches and sleep disorder is 80% industry related and 20% from high school and college activities, No other factors have been identified by history or examination.
> (App. Exh. 1, p. 5)

On June 29, 2017, applicant was evaluated by orthopedic QME Dr. Danzig. (Def. Exh. BB, Dr. Danzig, July 7, 2017.) After examining applicant, taking a history, and reviewing the medical record, the diagnoses included, post right knee arthroscopic surgery, post three left knee arthroscopic surgeries, and post left ankle ligament surgery. (Def. Exh. BB, pp. 99 – 100.)

When addressing applicant's right knee WPI, Dr. Danzig stated:

> In regard to Section 17.2f Range of Motion (p 533-538) [Guides], Table 17-10 Knee Impairment was utilized. The patient had 15° knee flexion contracture. As per Table 17-10 Knee Impairment, this was 8% whole person impairment.
>
> In regard to Section 17.2h Arthritis (p 544), the patient had a 15° knee flexion contracture. Therefore, as per the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition (p 544), "impairments of individuals with knee flexion contracture should not be estimated using x-rays because measurements are unreliable."
> Therefore, this patient did not have any impairment rating for arthritis.
> (Def. Exh. BB, pp. 117.)

The doctor reached the same conclusions as to applicant's left knee WPI. (Def. Exh. BB, p. 125.)

Dr. Danzig concluded that the cumulative injury caused 34% WPI and regarding apportionment he stated:

> [I]t is medically probable that approximately ninety percent of the patient's disability for the neck, low back, right and left shoulders, right and left elbows, right and left hands and wrists, right and left hips, and right knee was caused as a direct result of the patient's cumulative trauma injury which the patient sustained during the course of his professional football career. ¶ … it is medically probable that ten percent of the patient's disability … was due to other factors, e.g. the patient's high school and college football career.
> (Def. Exh. BB, pp. 130 – 131.)

In regard to applicant's left knee and left ankle, Dr. Danzig concluded:

> In summary, fifty percent of the patient's left knee disability should be apportioned to his professional football career. Ten percent should be apportioned to his high school and college football career. Twenty percent should be apportioned to the specific injury while playing for the Amsterdam Admirals. Twenty percent should be apportioned to the patient's two specific injuries while playing in college. … ¶ … it was medically probable that approximately forty percent of the disability listed above for the patient's left ankle was caused as a direct result of the patient's specific left ankle fracture which he sustained in 1993, which required surgery; and approximately fifty percent was due to the patient's cumulative trauma injury which the patient sustained during his professional football career. ¶ … approximately ten percent of the disability listed above for the patient's left ankle was due to other factors, e.g. the patient's high school and college football career.
> (Def. Exh. BB, pp. 133 – 134.)

The parties proceeded to trial on June 3, 2020, and at the trial the WCJ appointed Dr. Gary Brazina as a regular physician (Lab. Code, § 5701) to evaluate the bilateral hip and left ankle x-rays that had been reviewed by QMEs Dr. Einbund and Dr. Danzig. (MOH, June 3, 2020.) Dr. Brazina explained that Dr. Danzig's x-rays of applicant's hips and his left ankle were clearer and more accurate than those reviewed by Dr. Einbund. He then stated that based on "a strict interpretation of the AMA Guides" there was a 3% WPI for each hip and a 2% WPI for the left ankle. (Def. Exh. CC, Dr. Brazina, September 21, 2020, pp. 2 – 3.) Based on his review of Dr. Brazina's report, Dr. Einbund submitted a supplemental report and amended his prior report to comply with Dr. Brazina's opinions regarding applicant's bilateral hip and left ankle WPI. (App. Exh. 3, Dr. Einbund, December 28, 2020.)

The parties again proceeded to trial on August 23, 2021. The issues submitted for decision included parts of body injured and permanent disability/apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 23, 2021, p. 2.)

DISCUSSION

As noted above, neurology QME Dr. Nudleman evaluated applicant and diagnosed him as having sleep disorder and arousal secondary to nonrestorative sleep. (App. Exh. 1, p. 5.) His opinions as to applicant's sleep disorder appear to be based on the Patient Sleep History, the Epworth Sleepiness Scale, and the Fatigue Severity Scale. (App. Exh. 1, pp. 8, 9, and 11.)

Pursuant to the Guides:

> Arousal and sleep disorders include disorders related to initiating and maintaining sleep or inability to sleep; excessive somnolence, including sleep-induced respiratory impairment; and sleep-wake schedules. ¶ … The clinician can evaluate sleepiness with the Epworth Sleepiness Scale …
> (Guides, p. 317.)

In her Report the WCJ stated:

> Dr. Nudleman gave the applicant a 3% rating based upon the evidence from his examination of the applicant including an Epworth study, applicant's patient sleep history, fatigue severity scale and his responses to questions regarding his activities of daily living. ¶ I considered Dr. Nudleman's reporting as a whole and its entirety, it was predicated on specific factors enumerated by Dr. Nudleman. I find this evidence relevant and adequate to support Dr. Nudleman's conclusion regarding an assignment of disability. I find Dr. Nudleman's reporting to be substantial evidence.
> (Report, p. 4.)

Defendant's argument that, "Dr. Nudleman failed to address or explain applicant's reduced daytime alertness and how applicant's sleep disorder affects his performance of activities of daily [living]" is inconsistent with the doctor's report, including the various documents and test results attached thereto. (See (App. Exh. 1, pp. 8 – 13.) We also note that the trial record contains no evidence contrary to or inconsistent with Dr. Nudleman's opinions. Therefore, we agree with the WCJ's conclusion that Dr. Nudleman's report constitutes substantial evidence.

The Guides state:

> In the case of the knee, the joint must be in neutral flexion-extension position (0 degrees) to evaluate the x-rays. Impairments of individuals with knee flexion contractures should not be estimated using x-rays because measurements are unreliable. In these individuals, the range of motion method should be used.
> (AMA Guides, p. 544.)

However, the Guides then identify Arthritis Impairment Based On Roentgenographically [x-ray] Determined Cartilage Intervals (Table 17-31).

Dr. Einbund stated that his examination of applicant showed that both knees lacked 15 degrees from full extension and that both knees had full flexion. (App. Exh. 2, p. 9.) He did not rate applicant's impairment based on the flexion contracture/range of motion (Table 17-10). Instead, having reviewed the knee x-rays Dr. Einbund rated applicant's knee impairment based on arthritis i.e., his reduced cartilage intervals (Table 17-31).

Dr. Einbund did not explain why the reduced cartilage interval was the more appropriate measure of applicant's disability, nor did he explain why it was not appropriate to rate both factors. It does not appear that these factors of disability overlap so rating both factors may constitute a strict application of the Guides, but there is no medical evidence addressing that issue. We have previously explained that the Guides provide guidelines for the exercise of professional skill and judgment which, in a given case, may result in ratings that depart from those based on the strict application of the Guides. (*Almaraz v. Environmental Recovery Services /Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) (*Almaraz/Guzman II*) affirmed by *Milpitas Unified School Dist. v. Workers' Compensation Appeals Board* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].) However, to properly rate an injured worker's disability by applying an *Almaraz/Guzman* analysis, the doctor is expected to 1) provide a strict rating per the Guides, 2) explain why the strict rating does not accurately reflect the applicant's disability, 3) provide an alternative rating using the four corners of the Guides, and 4) explain why that alternative rating more accurately reflects applicant's level of disability. (*Milpitas Unified School Dist. v. Workers' Compensation Appeals Board* (2010) 187 Cal.App.4th 808, at 828-829 [75 Cal.Comp.Cases 837].) Dr. Einbund did not provide an *Almaraz/Guzman* analysis explaining why a strict Guides rating does not accurately reflect applicant's disability, and therefore his opinion is not substantial evidence regarding applicant's disability.

We also note that Dr. Danzig rated applicant's knee disability based on the 15 degree knee flexion contracture. He then stated, because disability caused by knee flexion contracture should not be rated using x-rays, applicant had no impairment rating for arthritis. Dr. Danzig's opinion is inconsistent with Table 17-31 of the Guides which, as discussed above, identifies knee impairment based on arthritis described as reduced cartilage intervals. (Guides, p. 544.) Dr. Danzig noted that Dr. Einbund assigned impairment for both of applicant's knees due to the reduced cartilage interval

(Def. Exh. BB, p. 69, record review) but he did not diagnose or otherwise address the reduced cartilage interval in his report. Absent a discussion of that condition as it pertains to applicant's disability, Dr. Danzig's report is not substantial evidence on the issue of permanent disability.

Finally, on the issue of apportionment, the reporting physician shall determine what percentage of an injured worker's disability "was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors. . ." (Lab. Code, §4663, subd. (c).) Apportionment is the process utilized to segregate permanent disability caused by an industrial injury from the disability attributable to other industrial injuries or to nonindustrial factors, in order to properly allocate legal responsibility. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565].) As we explained, the reports from Dr. Einbund and Dr. Danzig are not substantial evidence regarding applicant's permanent disability. Clearly, in order to accurately determine the portion of disability caused by applicant's injury, as opposed to other factors, the doctors must first accurately determine applicant's level of disability. Since the doctors' reports are not substantial evidence as to the issue of permanent disability, they are, in turn, not substantial evidence on the issue of apportionment.

Any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

As discussed herein, the trial record does not contain substantial evidence addressing the threshold issues of applicant's permanent disability and apportionment of the disability. In our *en banc* decision, *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated, "Where the medical record requires further development either after trial or submission of the case for decision," the medical record should first be supplemented by physicians who have already reported in the case. "Only if the supplemental opinions of the previously reporting physicians do not or cannot cure the need for

development of the medical record, should other physicians be considered." (*Id.*, at pp. 139, 142.) Under the circumstances of this matter, we recommend upon its return to the WCJ that the parties request supplemental reports from Dr. Einbund and Dr. Danzig addressing the issue of applicant's permanent disability and the issue of apportionment, as discussed above. In the alternative, it may be in the parties' interest to have applicant evaluated by an agreed medical examiner or, to request that the WCJ appoint a regular physician. (Lab. Code § 5701.)

Accordingly, we grant reconsideration, and we affirm the F&A including the rating of applicant's disability caused by factors other than that caused by the right knee and left knee injury; and we amend the F&A to defer the issue of the applicant's right and left knee disability; based thereon the issue of applicant's disability caused by the cumulative injury at issue herein is deferred; and the issue of attorney fees is deferred. We amend the Award and Order, and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on January 5, 2022, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 5, 2022 Findings and Award, including the rating of applicant's disability caused by factors other than that caused by the right knee and left knee injury, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

*** * ***

3. The issue of applicant's disability caused by the cumulative injury at issue herein is deferred.

*** * ***

5. The issue of attorney fees is deferred.

AWARD

*** * ***

a. The award of permanent disability indemnity and attorney fees is deferred pending development of the record.

* * *

ORDER OF COMMUTATION

IT IS ORDERED that the commutation of attorney fees is deferred pending development of the record.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

MARGUERITE SWEENEY, COMMISSIONER
CONCUR NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 25, 2022

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

HERMAN O'BERRY
LAW OFFICES OF MARK A. SLIPOCK
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK
TESTAN LAW

TLH/*pc*

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